



Mwaura & 2 others v Cabinet Secretary for Environment and Forestry & another (Environment and Land Constitutional Petition 22 of 2018) [2023] KEELC 21132 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 22 OF 2018
JO MBOYA, J
OCTOBER 26, 2023**

BETWEEN

**JAMES KIONGI MWAURA 1ST PETITIONER
JEREMY KIONGI MWAURA 2ND PETITIONER
GODFREY KIONGI MWAURA 3RD PETITIONER**

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
CABINET SECRETARY FOR ENVIRONMENT AND FORESTRY 2ND
RESPONDENT**

RULING

1. The petitioner/applicants’ have filed and/or mounted the application dated the 28th February 2023; and in respect of which same have sought for the following reliefs;
 - i. The Honorable court be pleased and Do hereby partially Review and/or vary its Judgment and consequential orders issued on the November 15, 2018; and order and/or allow Nairobi ELC Civil Suit No. 16 of 2019 to proceed for hearing and determination without requiring the petitioners to deposit Kes 24, 500, 000/= only in court or in an interest earning account jointly held by the parties pending the hearing and determination of this application
 - ii. The Honorable court be pleased and Do hereby partially Review and/or vary its Judgment and consequential orders issued on the 15th November 2018; and order and/or allow Nairobi ELC Civil Suit No. 16 of 2019 to proceed for hearing and determination without requiring the petitioners to deposit Kes



24, 500, 000/= only in court or in an interest earning account jointly held by the parties pending the hearing and determination of this suit

- iii. Any other or further relief that this Honorable court may deem fit to grant.
 - iv. Costs of the application be provided for.
2. The instant application is premised on a plethora of grounds which have been enumerated in the body of the application. Furthermore, the application is supported by the affidavit of the 1st petitioner/ applicant sworn on even date.
 3. Upon being served with the instant application, the 1st respondent herein filed Grounds of opposition dated the 25th August 2023; and in respect of which same has contended *inter-alia* that the Honorable court is devoid and divested of Jurisdiction to entertain the subject application and by extension to grant the reliefs sought thereunder.
 4. Suffice it to point out that the instant application came up for hearing on the 27th September 2023, whereupon the advocates for the respective Parties agreed to canvass and dispose of the application by way of written submissions. Consequently and in this regard, the Honourable court proceeded to and circumscribed the timeline for the filing and exchange of the written submissions.
 5. For completeness, it is instructive to observe that thereafter the petitioners duly filed written submissions dated the 27th September 2023; whereas the 1st respondent filed written submissions dated the 3rd October 2023. Both submissions are on record.

Parties' Submissions:

applicants' Submissions:

6. The petitioners'/applicants herein have adopted the grounds on the body of the application and adopted the contents at the foot of the supporting affidavit attached thereto. Furthermore, the applicants' herein have thereafter proceeded to and highlighted three (3) issues for due consideration by the Honourable Court.
7. Firstly, Learned counsel for the applicants' have submitted that vide the Judgment rendered on the 15th November 2018, this court, (differently constituted) ordered the applicants herein to deposit the sum of Kes 24, 500, 000/- only in court or in an Escrow account within 45 days of the delivery of the said Judgment.
8. However, learned counsel for the applicants' has contended that despite best efforts by and on behalf of the applicants, same have been unable to deposit the said decretal sum in accordance with the Judgment of the court or at all.
9. Nevertheless, learned counsel for the applicants' has submitted that the inability to deposit the said monies constitutes and amount to sufficient cause to warrant the intervention by this court and in particular, to review the impugned limb of the Judgment.
10. Secondly, Learned counsel for the applicants has also submitted that the order by the court, which decreed deposit of the sum of Kes 24, 500, 000/= only, in court or in an Escrow account constitutes an impediment to the applicants Right of Access to Justice. In this respect, Learned counsel for the applicants' has thus invoked the provisions of article 48 of the *Constitution*.
11. Thirdly, Learned counsel for the applicants' has contended that by imposing the impugned conditions, which required the applicants herein to deposit the sum of Kes 24, 500, 000/- Only, in court or in an



Escrow account, the Honorable court has infringed upon the Right of the applicants to Fair Hearing as entrenched in article 50(1) of the Constitution.

12. Additionally, Learned counsel for the applicants has thus contended that the impugned condition has therefore breached and/or violated the applicants Fundamental Rights and Freedoms and thus there exists sufficient cause and/or basis to warrant review and/or variation of the named portion of the Judgment.
13. In support of the foregoing submissions, Learned counsel for the applicants' has cited and relied on various decision *inter-alia* Silvester Thenge v Johnstone Kiamba Siswili (2021)eKLR; Sbanzu Investment Ltd v Commissioner for Lands Civil Appeal No 100 f 1993 (UR); Zablon Mukua v Solomon N Choti & 3 others (2016)eKLR and Serengeti Road Services v CRBD Bank Ltd (2011) 2 EA 395, respectively.
14. Premised on the foregoing submissions, Learned counsel has therefore impressed upon the Honourable court to find and hold that the application beforehand is meritorious and thus ought to be allowed.

1st respondent's Submissions:

15. The 1st respondent filed written submissions dated the 3rd October 2023; and in respect of which same has reiterated the Grounds of opposition dated the 25th August 2023. Additionally, the 1st respondent has raised and canvassed three pertinent issues for consideration by the court.
16. First and foremost, Learned counsel for the 1st respondent has submitted that the application by and on behalf of the applicants herein has neither impleaded nor captured any of the requisite grounds upon which Review can issue and/or be granted.
17. On the other hand, Learned counsel for the 1st respondent has also submitted that to the extent that the applicants have not impleaded the requisite grounds to warrant the grant of an order for Review, then the entire application ought to be dismissed.
18. Secondly, Learned counsel for the 1st respondent has submitted that the issues which have been raised and adverted to at the foot of the current application are issues which ought to have been canvassed vide an Appeal; and not an application for Review.
19. Further and in any event, Learned counsel for the 1st respondent has contended that what the applicants herein are inviting this Honourable court to do, is to sit on appeal on the considered Judgment of the trial court which is Legally untenable.
20. Lastly, Learned counsel for the 1st respondent has also submitted that the instant application has been mounted with an undue and inordinate delay, which delay has neither been accounted for nor explained. In this regard, Learned counsel has thus invited the Honourable court to invoke and apply the Doctrine of Latches.
21. To buttress the submissions that the applicants herein have neither met nor satisfied the threshold for granting an order for Review, Learned counsel for the 1st respondent has ventured forward and cited various decisions *inter-alia* Zablon Mukua v Solomon M. Choti & 3 others (2016)eKLR; Nyamogo & Nyamogo v Kogo (2001)EA; Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya (2019)eKLR; Jaber Moshen Ali & another v Pricilla Boit & another (2014)eKLR; National Bank of Kenya Ltd v Ndungu Njau (1997)eKLR and Pankras T Swai v Kenya Breweries Ltd (2014)eKLR, respectively.



22. In a nutshell, learned counsel for the 1st respondent has thus implored the court to find and hold that the subject application is devoid of merits and otherwise constitutes an abuse of the due process of the court. Consequently and in this respect, Learned counsel has sought to have the application be dismissed with costs.

Issues For Determination:

23. Having reviewed the application beforehand and the Responses thereto; and upon consideration of the written submissions on behalf of the respective Parties, the following issues do arise/ emerge and are thus worthy of determination;
- i. Whether the applicants herein have established, demonstrated and/or proved the requisite Grounds to warrant review of the decree either in the manner sought or at all.
 - ii. Whether the instant application has been made or mounted with inordinate delay and if so; whether the application is defeated by the doctrine of laches.
 - iii. Whether the instant application constitutes an abuse of the due process of the court.

Analysis And Determination

Whether the applicants herein have established, demonstrated and/or proved the requisite Grounds to warrant Review of the Decree either in the manner sought or at all.

24. Whereas it is the right of any aggrieved person, the applicants not excepted, to apply for Review of the decree or order of a court, there is no gainsaying that such an applicant must bring him/herself within the purview of the provisions of section 80 of the [Civil Procedure Act](#); as read together with order 45 rule 1 of the [Civil Procedure Rules 2010](#).
25. Instructively, it behooves the applicant seeking for an order of review to implead and articulate in the body of the application for Review, the requisite grounds for which review is being sought.
26. On the other hand, upon articulating and impleading the relevant/requisite Ground(s) on which Review is being sought, the applicant is thereafter obligated to venture forward and avail cogent and plausible explanation to justify the necessity for granting the order of Review.
27. Furthermore, it is also imperative to underscore that whereas the court is clothed with unfettered discretion to grant an order of review, the said discretion of the court, is to be exercised albeit upon satisfaction of the circumscribed grounds which are statutorily provided for and enumerated under the provisions of order 45 rule 1 of the [Civil Procedure Rules 2010](#).
28. Premised on the foregoing position, it is now appropriate to revert to the subject matter and thereafter consider whether the applicants herein have indeed embraced, impleaded and thereafter proved either of the Grounds upon which an order of Review can issue and/or be granted.
29. To start with, the applicants herein have contended that the portion of the Judgment which decreed deposit of the sum of Kes 24, 500, 000/= only in court or in an escrow account, has impeded and/or restricted their (applicants) Right of Access to Justice.



30. Additionally, the applicants have contended that the Right of Access to Justice is Fundamental and thus ought not to be unduly impeded and/or restricted, either by putting roadblocks or obstacles on the path to Justice.
31. Secondly, the applicants herein have also contended that the impugned limb of the Judgment, which is sought to be reviewed has also infringed upon and/or violated the applicants Right to Fair Hearing in accordance with article 50(1) of the Constitution.
32. Other than the foregoing, the applicants have also contended that the restriction of the applicants' rights to justice; and right to fair hearing, by virtue of the imposition of the order for deposit, therefore constitutes a grave injustice and illegality, which ought to be remedied by way of Review.
33. To my mind, what I hear the applicants' to be saying is that the trial court, which rendered the Judgment containing the limb which imposed the condition for deposit of Kes 24, 500, 000/= only, acted in breach and violation of the applicants Constitutional Rights and Fundamental Freedoms.
34. Additionally, the other bit of the argument being raised and espoused by the applicants is that by decreeing the deposit, which is sought to be reviewed, the court acted illegally and thus committed an Error in law.
35. Arising from the foregoing, it is appropriate to state and underscore that the limb of the Judgment which decreed the deposit of the sum of Kes 24, 500, 000/- only in court or in an Escrow account was a conscious and deliberate decision by the trial court, after due consideration of all the obtaining facts and circumstances surrounding the subject dispute.
36. To the extent that the impugned decision was a conscious and deliberate decision, same therefore could only be appealed against and not otherwise. In any event, what is discernable from the arguments by the applicants is to the effect that the Learned Judge made an erroneous decision and acted without due regard to the provisions of articles 48 and 50 of the Constitution.
37. Surely, there is a dichotomy between an Erroneous decision made by a Judge or trial court; and an Error apparent on the face of record. In respect of the former, it behooves the aggrieved Party to mount and/or lodge an Appeal for purposes of intervention by the Appellate Court.
38. Nevertheless and as pertains to an error apparent on the face of record, one who is aggrieved is at liberty to mount an application for Review. However, it worth noting that what constitutes an Error apparent on record must be clear and evident; and one which is incapable of attracting two or more diverse Legal opinions.
39. To be able to distinguish between what constitutes an Erroneous decision and an Error apparent, it suffices to cite and adopt the holding of the Court of Appeal in the case of *Nyamogo & Nyamogo v Kogo* (2001) EA 174, where the court held as hereunder;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it



cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us”.

40. Furthermore, the circumstances where an application for review can be mounted was also considered and elaborated upon by the Court of Appeal in the case of *National Bank of Kenya Ltd v Ndungu Njau* (1997)eKLR, where the court held thus;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.

It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

41. Though the current application for Review has neither been premised nor anchored on the existence of an Error apparent on the face of record; however, the grounds which have been dubbed to constitute sufficient cause, actually amount to an invitation to this court to audit and thereafter superintend the Judgment of a Court of coordinate Jurisdiction, which a view to (sic) holding inter-alia that by imposing of the condition to deposit the money, the Court (differently Constituted) failed to properly appreciate and internalize the import of articles 48 and 50 of the *Constitution*, 2010.
42. In my humble view, if this court were to venture forward and to appropriate the invitation by and at the instance of the applicants’ herein, then this court will be over reaching its mandate and/or Jurisdiction; and thus the resultant outcome would not only be inimical to the Rule of Law; but would also amount to absurdity.
43. On the other hand, it is also appropriate to point out at this juncture, that if the applicants’ were convinced that the imposition of the condition to deposit the money violated and/or infringed on their Constitutional Right and Fundamental Freedoms, then same ought to have mounted the requisite appeal and not otherwise.
44. In a nutshell, my answer to issue number one is to the effect that the applicants herein have neither impleaded the requisite grounds to warrant an order of review and in any event, no plausible basis has been espoused to warrant the review sought.

Whether the instant application has been made or mounted with inordinate delay and if so; whether the application is defeated by the Doctrine of Latches.

45. Other than the disguised and thinly veiled invitation to this court to sit on appeal on the Judgment of a court of coordinate Jurisdiction, under the guise of Review (which has been discussed in the preceding paragraphs); there is also the issue of the length of delay attendant to the subject application.
46. To start with, it is not lost on this court that the Judgment and the resultant decree, which is the subject of the current application was rendered on the 15th November 2018. For good measure, the current application has been mounted more than 4 years from the date when the impugned Judgment was delivered.
47. On the other hand, it is also worthy to recall that upon the delivery of the Judgment, which is the subject of the current application, the applicants herein reverted to court and filed an application dated



- 21st February 2019; and wherein same sought for an order of stay of the Judgment and decree which was delivered on the 15th November 2018.
48. Suffice it to point out that the application dated the 21st February 2019; which sought for *inter-alia* orders of stay of the Judgment, was disposed of *vide* ruling rendered on the 29th July 2019.
 49. Arising from the foregoing position, what is evident is that the applicants herein have been privy to and knowledgeable of the terms of the Judgment/decree at all times and hence, if same were keen to mount an application for Review, then the application ought to have been filed timeously, promptly and without undue delay.
 50. Be that as it may, there is no gainsaying that the current application has been mounted with inordinate and unreasonable delay, amounting to more than 4 years from the date of delivery of the Judgment,; which is sought to be reviewed.
 51. At any rate, it is also evident that despite the length of time taken before mounting the application for delay, the applicants herein did not find it fit, just and/or mete to account the delay prior to and before mounting the current application. Clearly, one who is desirous to seek for and obtain an order of review is called upon to file the application without undue delay. See the Provisions of order 45 rule 1 of the [Civil Procedure Rules, 2010](#); and in particular, the Proviso thereof.
 52. Furthermore, whenever there is any scintilla of delay, then the applicant, the current applicants not excepted, are obligated to avail to court cogent, plausible and believable reasons to justify the delay; and by extension to warrant the exercise of judicial discretion in his/her favor.
 53. Notwithstanding the foregoing, the applicants herein did not deem it fit and/or expedient to account for the delay. Consequently and in this regard, I come to the conclusion that in the absence of any explanation for the inordinate delay, the applicants herein are not deserving of the discretionary Jurisdiction of the court.
 54. To this end, I beg to adopt and reiterate the *ratio decidendi* by the Court of Appeal in the case of [Njoroge v Kimani](#) (Civil application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling); where the court held thus;

“ 12. In order to exercise its discretion whether or not to grant condonation, the court must be apprised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant’s prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court’s indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.



55. Simply put, the instant application which essentially seeks for Review of a limb of the Judgment and Decree rendered on the 15TH November 2018; has been mounted with inordinate delay; and thus same is defeated by the Doctrine of Latches.

Whether the instant application constitutes an abuse of the Due process of the Honourable court.

56. It is imperative to underscore that the Honorable court ordered and directed that the applicants herein were to deposit the sum of Kes 24, 500, 000/- Only, in court or an Escrow account within 30 days from the date of delivery of the Judgment.
57. Furthermore, the court ventured forward and also decreed that the deposit of the named amount of money was to be made pending the filing and determination of the suit as pertains to the issue of the alleged breach of the terms of the sale agreement, which had hitherto been entered into between the applicants on one hand; and the 1st respondent on the other hand.
58. To be able to appreciate the true import and tenor of the limb of the Judgment relative to the deposit of the money in question, it is appropriate to reproduce the contents of Paragraph 19 of the Judgment.
59. Same are reproduced as hereunder;
19. The petitioners are directed to deposit the sum of Kes 24, 500, 000/= only paid by the ministry as 10% of the deposit of the purchase price in court or in an interest earning account in the joint name of the advocates for the petitioners and the respondents within 30 days of the date of this judgment, pending filing and determination of the suit on the issue of the alleged breach of the sale agreement
60. From the excerpts which have been reproduced in the preceding paragraph, it is apparent that the Deposit in question was to be made prior to and before the filing of the intended suit for breach of the Sale Agreement/ Contract.
61. However, despite the clear wording of the Judgment in question, the applicants herein went ahead and filed Milimani ELC No. 16 of 2019; prior to and before complying with the terms of the Judgment made herein.
62. In my humble view, the action and/ or act of proceeding to and filing Milimani ELC No. 16 of 2019; before complying with the terms of the Judgment herein constituted and amounted to willful disregard of lawful court orders and thus amounted to (sic) Contempt.
63. Having acted contrary to the orders of the court, the applicants herein are now brave enough to revert to court and are now seeking that the limb of the Judgment which same disregarded to be varied and/ or reviewed to enable same (applicants) to prosecute the suit which was filed in contempt of lawful court orders.
64. In the circumstances, the question that does arise is whether the instant application has been made in good faith or otherwise. Nevertheless, in my humble view, where a Party acts in contempt of court lawful orders, such a Party cannot revert to court and impress upon the court to grant favorable orders, whose import would be tantamount to aiding and fostering the disobedience by the said applicant.
65. Put differently, what the applicants' are now asking this court is to sanitize, countenance and white-wash, their contemptuous act of filing Milimani ELC No. 16 of 2019; and thereby to allow them to proceed with the hearing.



66. To my mind, the applicants' herein are playing lottery with the due process of the court. Consequently and in this regard, I come to the conclusion that the current application amounts to and constitutes an abuse of the due process of the court.

Final Disposition:

67. From the discourse in terms of the preceding paragraphs, what is evident and apparent is that the application by and on behalf of the applicants' is actually devoid of merits and would otherwise amount to an absurdity.

68. Consequently and in the premises, the application dated the February 28, 2023; be and is hereby dismissed with costs to the 1st respondent.

69. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF OCTOBER 2023.

OGUTTU MBOYA

JUDGE.

