



**Odongo & 4 others (Suing on their Own Behalf and as Members of Kiembeni Hillside Residents Association) v Njagi (Salvation Hope and Restoration Ministry) & 3 others (Environment & Land Petition E006 of 2022) [2023] KEELC 20959 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20959 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION E006 OF 2022  
NA MATHEKA, J  
OCTOBER 24, 2023**

**BETWEEN**

**JAMES LUKIRI ODONGO ..... 1<sup>ST</sup> PETITIONER  
VINCENT KIKUMU MAINGI ..... 2<sup>ND</sup> PETITIONER  
BENJAMIN SAMUEL ADIENGE MWAI ..... 3<sup>RD</sup> PETITIONER  
STEPHEN NGOTHO KAMAU ..... 4<sup>TH</sup> PETITIONER  
VICTOR ONDUONGI WANYAM ..... 5<sup>TH</sup> PETITIONER  
SUING ON THEIR OWN BEHALF AND AS MEMBERS OF KIEMBENI  
HILLSIDE RESIDENTS ASSOCIATION**

**AND**

**LUCY AKOTH NJAGI (SALVATION HOPE AND RESTORATION  
MINISTRY) ..... 1<sup>ST</sup> RESPONDENT  
COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> RESPONDENT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3<sup>RD</sup>  
RESPONDENT  
OFFICER COMMANDING POLICE DIVISION KISAUNI .... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> respondent's notice motion is dated November 25, 2022 and subsequently amended on April 24, 2023 and seeks the following orders;
  1. That this Application be certified as urgent and service be dispensed with in the first instance.



2. That this honourable court be pleased to issue an order for the stay of execution of the judgment delivered October 26, 2022 upon terms and conditions it may deem fit pending the hearing and determination of the Application herewith inter-parties.
  3. That this honourable court be pleased to review its judgment made on the October 26, 2022 following the discovery of new evidence which could not be available during the pre-trial of the matter.
  4. That this honourable court do grant any other orders it may deem fit to grant.
2. It is based on the grounds that on the February 9, 2022, the petitioners herein filed this Petition seeking various orders against the respondents. That on the October 26, 2022 this Court gave a judgment in favour of the Petitioners and against the respondents. That the applicant herein has filed this application seeking the court to review the judgment on the grounds of discovery of new evidence. That there is, in the meantime, real and imminent threat of execution of the judgment herein. That the 1<sup>st</sup> respondent/applicant fears that if the judgement will be executed this application shall be rendered nugatory. That the 1<sup>st</sup> respondent/applicant is willing to abide conditions set by this honourable court precedent to the granting of the orders sought in her application. That it is therefore within the interest of justice and equity that the orders sought are granted.
  3. Further to their statement of grounds of opposition dated January 9, 2023 and filed on even date, the petitioners oppose the 1<sup>st</sup> respondent's motion dated November 25, 2022 and subsequently amended on April 24, 2023 on further grounds that the motion is an appeal disguised as a review yet this court cannot sit on an appeal from its own decision. The motion impermissibly raises fresh, substantive, argumentative matters that were already settled by the court vide its judgment of October 26, 2022; and the motion in totality invites the Honourable Court to reverse the steadfastness and certainty demonstrated in the judgment of October 26, 2022 which invitation is contrary to the policy of the court.
  4. This court has considered the application and the submissions therein. In the case of *Kwame Kariuki & another v Mohamed Hassan Ali & 4 others* (2014) eKLR, the court observed that;
 

It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal.”
  5. In the case of *Mwiboko Housing Company Limited v Equity Building Society* (2007) 2 KLR 171 it was held, that;
 

A review could have been granted whenever the court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another court could have taken a different view of the matter nor could it have been a ground that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent



on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza v Angelo Mpanju Kaiza* 2009, the court was categorical that;

“An application for review under order 44 Rules 1 of the *Civil Procedure Rules* must be clear and specific on the basis upon which it is made...”

6. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

(1). Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed.

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

7. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, cap. 21 Laws of Kenya which states as follows:

Any person who considers himself aggrieved-

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act.

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

8. Under section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. The Applicant states that there are other sources of noise in the location, for example, the SDA church, speeding TukTuks and motorbikes ferrying residents to the estate and this noise is from the adjacent access road. That the decibel readings should have been given for each house of the five Petitioners and not just one. That this court should have ordered a fresh audit report because could be by the time the Petition was filed things might have changed on the ground. I find that the 1<sup>st</sup> Respondent has not shown that there is any discovery of new evidence in this matter.

9. In Court of Appeal, Civil Appeal No 2111 of 1996, *National Bank of Kenya v Ndungu Njau*, the Court of Appeal held that;

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



evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law”.

- 10 From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. Her recourse if dissatisfied was to file an appeal. I find the application dated November 25, 2022 and subsequently amended on April 24, 2023 is not merited and I dismissed it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER 2023.**

**N.A. MATHEKA**

**JUDGE**

