



Pardiyo & 3 others (Suing in their Capacity as the Administrators of the Estate of Pardiyo Ole Leisanka Shungea - Deceased) v Kanyoro & 3 others (Being Sued in their Capacity as Administrators of the Estate of Peter Kanyoro Wainaina - Deceased)); The Land Registrar, Kajiado County Land Registry & 2 others (Interested Parties) (Environment & Land Case 107 of 2017) [2023] KEELC 20882 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20882 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 107 OF 2017
LC KOMINGOI, J
OCTOBER 19, 2023
(FORMELY MACHAKOS HCC NO. 71 OF 2011)**

BETWEEN

**NICHOLAS MAYIANI PARDIYO 1ST PLAINTIFF
JACKSON PARDIYO 2ND PLAINTIFF
KARONCHO PARDIYO 3RD PLAINTIFF
SOPILAL ENE PARDIYO 4TH PLAINTIFF
SUING IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE ESTATE
OF PARDIYO OLE LEISANKA SHUNGEEA - DECEASED**

AND

**ANDREW KAPAU KANYORO 1ST DEFENDANT
ISSAC NAISANKAU KANYORO 2ND DEFENDANT
NOVENA KANTITO NAISANKAU 3RD DEFENDANT
NAMONYAK OLE KANYORO 4TH DEFENDANT
BEING SUED IN THEIR CAPACITY AS ADMINISTRATORS OF THE ESTATE
OF PETER KANYORO WAINAINA - DECEASED)**

AND

**THE LAND REGISTRAR, KAJIADO COUNTY LAND
REGISTRY INTERESTED PARTY
DAVID MUKUA KARUNGU INTERESTED PARTY**



RULING

1. This is the Notice of Motion dated 8th November 2021 brought under;

Order 45 Rule 1 and Order 51 Rules 1 and 3 *Civil Procedure Rules* And Sections 1A, 1B and 3A *Civil Procedure Act*.
2. It seeks orders:
 1. Spent.
 2. That the Judgment delivered herein 19th February 2019 and the decree and orders consequent thereupon be reviewed, varied or set aside on terms the Honourable Court may order.
 3. The Honourable court be pleased to make any other orders deemed just and expedient within its inherent jurisdiction.
 4. The Plaintiffs be awarded costs of the suit as well those occasioned by this application.
3. The grounds are on the face of the application and are set out in paragraphs a-e.
4. The application is supported by the affidavit of Sopilal Ene Pardiyo, the 4th Plaintiff/Applicant sworn on the 8th November 2021.
5. The Application is opposed. There's is a Replying Affidavit sworn by Isaac Nasankau Kanyoro, the 1st Defendant/Respondent, sworn on the 6th February 2023.
6. On the 27th March 2023, the court with the consent of parties, directed that the Notice of Motion be canvassed by written submissions.
7. The Plaintiff/Applicants submissions are dated 24th March 2023 while the Defendant/Respondents are dated 19th June 2023. In their submissions counsel have substantiated, the clients' respective positions stated in their respective affidavits.
8. Order 45 rule 1 of the *Civil Procedure Rule* provides that;
 - (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 119 CAP. 21 *Civil Procedure* [Subsidiary] 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.”



9. It is the 4th Plaintiff/Applicant's case that there was an error or mistake of facts by Peter Kanyoro Wainaina (Deceased) in collusion with the 1st Interested Party on the acreage of the property Kajiado/Mailua/57 thereby rendering the contract between Pardiyo Ole Leisanka Shungea(Deceased) and Peter Kanyoro Wainaina *void ab initio*.
10. It is the 1st - 4th Defendant's/Respondents case that the 4th Plaintiff/Applicant has not demonstrated any discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by her at the time the decree was passed.
11. I have considered the Notice of Motion and the affidavit in support. I have also considered the response thereto, the written submissions and the authorities cited. The issue for determination is whether this application is merited.
12. Under Order 45 rule 1 of the Civil Procedure Rule, the Applicant could only rely on one of the three grounds for review and not all of them.
13. I am of the view that no new facts and or evidence have been adduced herein. All the arguments raised herein were raised and considered by the Honourable Learned Judge in her judgement dated 19th February 2019.

In the case of D.J. Lowe & Company Ltd v Banque Indosuez Civil Appel No. Nairobi No.217 of 1998, the Court of Appeal stated as follows;

“Where an application for review is based on discovery of fresh evidence, the court must exercise greatest care as it is easy for a party who has lost, to see weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing. “.....Before a review is allowed on the ground of discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge;....and if found that the Petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause.....”

14. I also find that the 4th Plaintiff/Applicant has not demonstrated any error or mistake made by the Honourable Learned Judge that ought be rectified.

In the case of Murican Transport Limited v. Hunkar Trading Co. Limited Milimani (HCCC) 531 of 2006 the Honourable Learned Judge made reference to the ruling in National Bank of Kenya Ltd. v Ndungu Njau where the court stated;

“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 any elaborate arguments 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 if review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law miscontinuing a statute or other provision of law cannot be a ground for review”.

15. The provisions of Order 45 rule 1 envisage a situation where the application for review is to be made timelessly. In the instant scenario judgement was delivered on 19th February 2019. This application is



dated 8th November 2021 more than two years after the delivery of the judgement. No explanation has been given for the delay.

In the case of *Afapack Enterprises Limited v Punita Jayant Acharya (Sued as the Administrator of the Estate of the late Suchila Anatrai Aval* (2018) eKLR the Court of Appeal stated thus;

“It is also an important requirement that the application for review should be without unreasonable delay. Although the appellant attributed his predicament to mistake of his counsel, what militated, against the exercise of discretion by the Judge in the appellant’s favour was clearly the appellant’s own conduct. The Judge found that the appellant “has not been diligent enough in pursuing its rights” and that the appellant was guilty of inordinate delay in making the application for review. In the words of the Judge:

“ An application for review ought to be made without unreasonable delay. Here the delay is spanning a period of nine months. Ordinarily nine months delay in an application for review, if no reasonable explanation is offered is inordinate”.

16. In conclusion I find no merit in this application and the same is dismissed with costs to the Defendants/ Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 19TH DAY OF OCTOBER 2023.

L. KOMINGOI
JUDGE

