



**Fresco Bushlands (K) Limited v Agricultural Development Corporation & another (Environment & Land Case E40 of 2022) [2023] KEELC 21843 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21843 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E40 OF 2022  
FM NJOROGE, J  
NOVEMBER 30, 2023**

**BETWEEN**

**FRESCO BUSHLANDS (K) LIMITED ..... PLAINTIFF**

**AND**

**AGRICULTURAL DEVELOPMENT CORPORATION ..... 1<sup>ST</sup> DEFENDANT**

**SWIFT AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. For determination is the 1<sup>st</sup> Defendant's Notice of Motion dated 1<sup>st</sup> August 2023 brought under Section 80 of the [Civil Procedure Act](#) and Order 45 and 51 of the [Civil Procedure Rules](#) seeking the following orders;
  - a. Spent
  - b. That the execution of this Honourable Court's ruling dated 26<sup>th</sup> June 2023 be stayed pending the hearing and determination of this application.
  - c. That the ruling issued by this Honourable Court on 26<sup>th</sup> June 2023 in Malindi ELC Case No. E040 of 2022 be reviewed on the ground that the court was misinformed as to the facts of the case.
  - d. That this honourable court be pleased to visit the alleged site where the alleged cattle are being held in order to make an independent observation.
2. The application is anchored on the grounds set out on its face and the supporting affidavit of Levy Murasi Mulupi, the Senior Complex Manager of Agricultural Development Corporation, Galana/Kulalu Ranch who deponed that the genesis of the current suit is that the 1<sup>st</sup> Defendant issued a demand notice to the Plaintiff for payment of rent arrears being the sum of Kshs. 192, 480,000 to which demand notice the Plaintiff failed to respond, resulting to the 1<sup>st</sup> Defendant levying for distress



through the 2<sup>nd</sup> Defendant. He stated that on 6<sup>th</sup> June 2022 the 2<sup>nd</sup> Defendant served the Plaintiff with two proclamation notices and on 6<sup>th</sup> July 2022 the 2<sup>nd</sup> Defendant seized 774 cows and auctioned them within 72 hours on site on 9<sup>th</sup> July 2022 in accordance with the *Distress for Rent Act*.

3. It was also stated that on 12<sup>th</sup> July 2022, the 1<sup>st</sup> Defendant herein received a Notice of Motion, a Plaint and a court Order issued by Hon. Justice Odeny on 12<sup>th</sup> July 2022 restraining the Defendants herein from dealing with seized cattle pending the hearing and determination of the matter. Further, on 22<sup>nd</sup> July 2022 the 1<sup>st</sup> Defendant received another application which sought inter alia that the managing directors of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be held in contempt for disobeying the orders issued by Justice Odeny on 12<sup>th</sup> July 2022. It was further stated that the court delivered a ruling on 26<sup>th</sup> June 2023 determining that the 1<sup>st</sup> Defendant was still in possession of some of the seized cattle and issued an order for stock taking in presence of the Plaintiff to determine the number of cattle in possession of the 1<sup>st</sup> Defendant. It was his statement that the Defendants are not in possession of any cattle at the moment and the averment by the plaintiff that the cattle were moved from Galana offices to Ganda by 3<sup>rd</sup> parties on behalf of the 1<sup>st</sup> Defendant is misguided. It was the 1<sup>st</sup> Defendant's position that the court visits the site where the Plaintiff alleges the cattle are being held to determine whether or not the cattle are actually there.
4. The Plaintiff filed a replying affidavit dated 21<sup>st</sup> November 2023 sworn by Bare Muhumed the Operations Manager of the Plaintiff stating that the instant application seeks to appeal against the decision of Hon. Lady Justice Odeny rendered on 23/06/2023 and consequently bad in law; that the 1<sup>st</sup> Defendant is now coming out to justify that there was no auction that was conducted and that the alleged sham exercise was merely up for their illegalities. Mr. Bare Muhumed also stated that he visited ADC Kulalu offices on 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> July 2022 and met Mr. Levy Murasi Mulupi who showed him the cattle were in his custody and the same had not yet been sold. He also deponed that on 07/03/2023 Mr. Mulupi appeared in court and upon questioning he was unable to account for the auction.

### **Determination**

5. On 3<sup>rd</sup> October 2023, the court issued directions that the application was to be canvassed by way of written submissions. At the time of writing this ruling, I note that only the Plaintiff's submissions dated 21<sup>st</sup> November 2023 were in the file and there is no trace of the 1<sup>st</sup> defendant's submissions. I have considered the application, the response thereto, the Plaintiff's submissions as well as the authorities relied upon. The issue for determination is whether the orders for review sought are merited.
6. Section 80 of the *Civil Procedure Act* provides that: -  
Any person who considers himself aggrieved-
  - a) By a decree or order in which an appeal allowed by this Act, but from which no appeal has
  - 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."
7. The provisions of Order 45 Rule 1 provides for the review of a decree or order 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 from whom 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 the judgment to the court which passed the decree or made the order without unreasonable delay.”
8. There are three aspects that can be deduced from Order 45 Rule 1(b) above
- a) Discovery of new and important matter or evidence.
  - b) Mistake or error apparent on the face of the record.
  - c) Any other sufficient reason.
9. From the above provisions it is clear that while Section 80 of the *Civil Procedure Act* gives the court the power to make orders for review, Order 45 sets out the conditions to be met in a review.
10. In *Republic –vs- Public Procurement Administrative Review Board & 2 Others* the court held that: -
- Section 80 gives the power of review and Order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”
11. In the present application, I am of the view that the Applicant has not demonstrated that there has been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record. Review can also be allowed for any other sufficient reason. The expression “sufficient reason” means a reason sufficiently analogous to those specified in the rule. It is my opinion that in the present application, the applicant is asking the court to sit on its appeal which jurisdiction the court does not possess. In the circumstance therefore, it is my finding that the order for review sought is not merited and the same is disallowed. The ruling dated 26<sup>th</sup> June 2023 is yet to be appealed and therefore the orders issued on even date remain in force. The consequence is that the application fails for want of merit and the same is hereby dismissed with costs.

**DATED, SIGNED AND ISSUED AT MALINDI ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI.**

