



**Kariuki v Baya (Environment and Land Appeal E009 of 2023)
[2023] KEELC 21919 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E009 OF 2023
NA MATHEKA, J
NOVEMBER 30, 2023**

BETWEEN

PETER KARUGA KARIUKI APPELLANT

AND

DANIEL BAYA RESPONDENT

RULING

1. The application is dated 19th July 2023 and is brought under Section 1B, 3, 3A and 18 of the [Civil Procedure Act](#), Cap. Laws of Kenya and under order 1 rule 10 (2) and order 51 rule 1 of the order 40 rule 7 of the [Civil Procedure Rules](#) 2010 seeking the following orders;
 1. That this Application be certified urgent and service be dispensed with in the first instance.
 2. That this Honourable Court be and is hereby pleased to review and/or vary and/or set aside the Ruling and all consequential orders issued by Honorable G. Sogomo PM on the 23rd June, 2023 and 7th July, 2023 setting the suit for pre-trial conference on the 16th August, 2023 pending hearing and determination of this application inter-parties.
 3. That this Honourable Court be and is hereby pleased to review and/or vary and/or set aside the Ruling and all consequential orders issued by Honorable G. Sogomo PM on the 23rd June, 2023 and 7th July, 2023 setting the suit for pre-trial conference on the 16th August, 2023 pending hearing and determination of this Appeal.
 4. That the Honourable Court do proceed and issue any other order(s) it may deem fit in the circumstances.
 5. That the cost of this application be provided for.
2. It is based on the following grounds that the Respondent has obtained Order(s) purporting to set aside the interlocutory judgment issued on the 31st October, 2022 and the same was obtained illegally and in



bad faith. That the Honorable Magistrate abused its discretion by hearing the Respondent application *ex parte* and allowing the Respondent to reopen the case for pre-trial conference without service upon the Applicant. That the Honourable Court set down the matter for pre-trial conference on the 16th August, 2023, and the Applicant is greatly prejudiced by those direction(s) and/or Order(s). That the application ought to have proceeded on the 13th June, 2023 as per the Order(s) of the Honourable N. Akee issued on the 6th June, 2023 whereas the matter mysteriously proceeded and/or heard on 14th June, 2023 Via Teams. That the Respondent acknowledge to have served the Applicant Counsel on the 26th June, 2023 Three (3) days after the *ex parte* ruling issued on the 23rd June, 2023. That the Applicant was never served with the said application dated 31st May, 2023 giving rise to the orders issued on the 14th June, 2023, and the ruling issued on the 23rd June, 2023.

3. That an interlocutory judgment was entered in CMCC Case No. E092 of 2021 on 25th March, 2021 and not 31st October, 2022 as alleged. That CMCC Case No. E092 of 2021 proceeded for formal proof and thereafter judgment was issued on the 16th April, 2021, and a Decree issued on the 21st April, 2021. That there is no interlocutory judgment issued on the 31st of October, 2022 as alleged by the Respondent. That the Honourable Court is *functus officio* hence bound by its own decision (Judgment) delivered on the 16th April, 2021 therefore lacks authority to deviate since the judgment has not been reviewed and/or appealed against and neither has been set aside.
4. That the Respondent was duly served with Complaint and Summons to enter appearance and failed to file his defence within the stipulated time, whereof a judgment was issued against him, and have never challenged the said judgment for the past Three (3) years until the Applicant initiated the process of execution. That there is no draft defence filed by the Respondent to warrant the orders granted by the Court to prove triable issues worth setting aside a judgment. That the Applicant is the registered owner of the suit property known as Plot No. C.R 38375 Plot N6046/II/MN situated within Mombasa County. That the Respondent was served with copy of the decree requiring him to pull down his structures standing on the Applicant's property illegally which notice he ignored whereof the Applicant filed an application dated 7th September, 2021 giving rise to the ruling issued by the Honourable D. W. Mburu on 31st October, 2022. That the Respondent has always been served with all document related to CMCC Case No. E092 of 2021 and there are records of Affidavit of service and latest being the Sixty (60) day notice to vacate served upon him on the 25th November, 2022.
5. This court has considered the application and submissions therein. The Applicant states that the Respondent has obtained Order(s) purporting to set aside the interlocutory judgment issued on the 31st October, 2022 and the same was obtained illegally and in bad faith. That the Trial Magistrate abused its discretion by hearing the Respondent application *ex parte* and allowing the Respondent to reopen the case for pre-trial conference without service upon the Applicant. The Court is therefore asked to review and/or vary and/or set aside the ruling and all consequential orders issued by Honorable G. Sogomo PM on the 23rd June, 2023 and 7th July, 2023 setting the suit for pre-trial conference on the 16th August, 2023 pending hearing and determination of this Appeal.
6. In the case of *Kwame Kariuki & Another vs. 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.”



7. In the case of *Mwiboko Housing Company Limited vs Equity Building Society* (2007) 2 KLR 171 is relevant. 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 Vs 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...”

8. 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.”

9. 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.”

10. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 211 of 1996, *National Bank of Kenya vs 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”.

11. From the above provisions of the law, authorities cited and facts of this case I find that the applicant has shown no error apparent on the face of record and/or sufficient reason to enable this court to set aside the said ruling at this interim stage. I have carefully perused the court record in the instant case and find that the record of appeal is not complete and hence the proceedings of the lower court are missing. Secondly the Applicant seems to be asking for final orders at this interim stage and the same cannot be granted. Form the record I find no sufficient reasons to review the rulings of the Trial Magistrate. I find that this application is not merited and is dismissed with costs.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

