Baya v Tulip Development Limited (Environment & Land Case 131 of 2020) [2023] KEELC 21911 (KLR) (29 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21911 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 131 OF 2020

NA MATHEKA, J

NOVEMBER 29, 2023

BETWEEN

REHEMA KAZUNGU BAYA ..... PLAINTIFF

AND

TULIP DEVELOPMENT LIMITED ..... DEFENDANT

RULING

1. The application is dated 26th June 2023 and is brought under Section 1A, 1B, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 45 Rule 1, Order 51 Rule I of the *Civil Procedure Rules 2010* Laws of Kenya 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 set aside and/or vary the orders issued by this Honourable Court marking the Plaintiff's suit as dismissed, and in the alternative an order do issue reinstating the Plaintiff's suit for hearing.

    3. That the Honourable Court do proceed and issue any other order(s) it may deem fit in the circumstances.

    4. That the cost of this application be provided for.

2. It is based on the grounds that the firm of M/S. Kedeki & Company Advocate had no instruction to withdraw the Plaintiff suit. That the counsel holding brief for Ms. Kedeki for the Plaintiff/Applicant had instruction to take a hearing dated for the Applicant's Notice of Motion application dated 20th June, 2023 to cease acting for the Plaintiff. That the Plaintiff could thereafter had the liberty to appoint another Advocate to act for her in future proceedings. That the withdrawal of the Plaintiff suit without her instruction was inadvertent and/or a mistake and would be a violation of the Plaintiff right as enshrine in the *Constitution*. That the Plaintiff suit be reinstated and the Notice of Motion application

dated 21st June, 2023 listed for hearing. That it is in the interest of justice that the sought herein are granted as prayed. That the Respondent will not suffer any prejudice if this Application is allowed as prayed,

3. The Defendant opposed the Plaintiffs application dated 26th June, 2023 on the following grounds that the application is a gross abuse of the process of the court. The suit was not withdrawn but dismissed on account of the determination of previous suits, namely ELC No 82 of 2017 and ELC No 120 of 2020 filed by the Plaintiff, in compliance with the order of the Court made on 11th March, 2021. The application has cited the provision of Order 45 of the *Civil Procedure Rules* yet the Plaintiff has not established the grounds for review of this Honourable court's order made on 22nd June, 2023. Accordingly, the application lacks merit and should be dismissed with costs.

4. This court has considered the application and the submissions therein. The Applicant stated that the counsel holding brief for Ms. Kedeki for the Plaintiff/Applicant had instruction to take a hearing dated for the Applicant's Notice of Motion application dated 20th June, 2023 to cease acting for the Plaintiff. That the Plaintiff could thereafter had the liberty to appoint another Advocate to act for her in future proceedings. That the withdrawal of the Plaintiff suit without her instruction was inadvertent and/or a mistake and would be a violation of the Plaintiff right as enshrine in the *Constitution*. The Respondent states that the suit was not withdrawn but dismissed on account of the determination of previous suits, namely ELC No 82 of 2017 and ELC No 120 of 2020 filed by the Plaintiff, in compliance with the order of the Court made on 11th March, 2021. The court is now asked to review and set aside the orders dismissing the suit. 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 *Mwihoko Housing Company Limited v 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 v Angelo Mpanju Kaiza* 2009, the Court was categorical that;
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> > "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-
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.
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> (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-
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> (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 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 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".

9. 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. There is no new matter and/or evidence that has come to the

knowledge of the Applicant. I have perused the court record and find that the court ruled on the 11th March 2021 that the proceedings in this case be stayed pending the determination of previous suits, namely, ELC No 82 of 2017 and ELC No 120 of 2020 filed by the Plaintiff. Subsequently, ELC No 82 of 2017 was withdrawn on the 6th April 2017 and ELC No 120 of 2020 was dismissed on 27th February 2021. On the 22nd June 2023 advocate for the Applicant Mr. Lisanza was in court, did not dispute these facts and even consented to the dismissal of this case as per the court ruling of 11th March 2021. This court is surprised that today the same Mr. Lisanza is arguing the present application stating that he had no authority to consent to the dismissal. I find this is an abuse of the court process and in any event even if he did not consent to the dismissal this was as per the court order of 11th March 2021 which has never been appealed against. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE