Hirani v Walusanda & 8 others (Environment & Land Case 385 of 2010) [2023] KEELC 21929 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21929 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 385 OF 2010

NA MATHEKA, J

NOVEMBER 28, 2023

BETWEEN

HARJI KALYAN HIRANI ..... PLAINTIFF

AND

MOHAMED WALUSANDA ..... 1ST DEFENDANT

MARIAN SALEH AHMED ..... 2ND DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA ..... 3RD DEFENDANT

ABDALLA MOHAMED KASANGAMBA ..... 4TH DEFENDANT

MOHAMED HAMISI MWAPESA ..... 5TH DEFENDANT

MWINYI SALIM ZULIA ..... 6TH DEFENDANT

ALI SUDI MWASIRIMA ..... 7TH DEFENDANT

ABUBAKAR JUMA ..... 8TH DEFENDANT

MWATIME JUMA NGORODO ..... 9TH DEFENDANT

RULING

1. The application is dated 6th February 2023 and is brought pursuant to provisions Articles 25 (c), 48, 50 and 159 (l), (2) (d) of the *Constitution* of Kenya, 2010; Sections IA, 1B, 3A and 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya; Order 45 Rule I and Order 51 Rule I of the *Civil Procedure Rules*, 2010 seeking the following orders;

    1. That the Honourable Court be pleased to certify this application as urgent and the same be heard *ex-parte* in the first instance.

2. That pending hearing and determination of this application, or until further orders of the Honourable Court, the Honourable Court be pleased to order stay of execution of the Judgment of the Court delivered on 27th July 2022, the ensuing Decree and all consequential orders thereon.

3. That the Honourable Court be pleased to review, vary and/or set aside the Judgment of the Court delivered on 27th July 2022, the ensuing Decree and all consequential orders thereon.

4. That the Honourable Court be pleased to reopen the hearing of the 2nd Defendant's case commenced by way of Originating Summons dated 15th July 2009 and filed in Mombasa HCCC no 250 of 2009 (O.S); *Mariam Saleh Ahmed v Harji Kalyan Hirani* on 22nd July 2009.

5. That the Honourable Court be pleased to allocate a date on priority basis for mention to take directions on hearing of the 2nd Defendant's case filed in Mombasa HCCC no 250 of 2009 (O.S); *Mariam Saleh Ahmed v Harji Kalyan Hirani*.

6. That the Honourable Court be pleased to grant such further or better orders as it deems fit and just to serve the ends of justice.

7. That costs of this application be provided for.

2. It is based on the grounds that on 27th July 2022, the Court delivered Judgment in favour of the Plaintiff against the Defendants and thereby issued orders of injunction restraining the 2nd to the 9th Defendants from trespassing upon the property known as LR no Mombasa/Block l/Mainland South/29 and for the delivery of vacant possession of the suit property to the Plaintiff. The 2nd Defendant has never participated in the hearing of the suit herein consequently, the Plaintiff has obtained an *ex-parte* Judgment against the 2nd Defendant. Following the delivery of the Judgment of the Court, the 2nd Defendant has since discovered that there is sufficient cause for re-hearing of her case which could result in the Court reaching a different finding to that of the Judgment of the Court. The Court failed to hear *in toto* and render itself on the 2nd Defendant's Originating Summons dated 15th July 2009 despite the same being on record at the date of delivery of Judgment of the Court.

3. That in response to the 2nd Defendant's Originating Summons dated 15th July 2009, the Plaintiff herein and the Respondent in Mombasa HCCC no 250 of 2009 (O.S) filed a Replying Affidavit sworn by Harji Kalyan Hirani on 15th November 2010. By way of a Ruling of the Court dated 14th May 2012, the Court ordered the suit filed herein against the 2nd Defendant be held in abeyance pending hearing of Mombasa HCCC no 250 of 2009. On 4th November 2013, when the suit herein came up before the Court for mention for purposes of taking directions for hearing, the Court directed the suit herein proceeds as the main suit with the 2nd Defendant's Originating Summons dated 15th July 2009 and filed in Mombasa HCCC no 250 of 2009 (O.S) to become the Counterclaim to the suit herein and the Plaintiff to become the Defendant to the Counterclaim.

4. Notwithstanding the consolidation of Mombasa HCCC no 250 of 2009 (O.S) and the suit herein, the 2nd Defendant unknowingly continued participating in the proceedings in the suit herein with the mistaken belief that the Ruling of the Court dated 14th May 2012 stayed the suit herein against the 2nd Defendant pending the hearing and determination of the Originating Summons filed in Mombasa HCCC no 250 of 2009 (O.S). The 2nd Defendant should not be condemned unheard for the inadvertent error of her Counsel who mistakenly failed to point out to the Court the material evidence already on Record and in favour of the 2nd Defendant. Had the material already on Record, being the

2nd Defendant's Originating Summons dated 15th July 2009 and the Plaintiffs Replying Affidavit dated 15th November 2010 filed in response thereto, been pointed out to the Court, then the Court would have reached a different finding to the one determined in the Judgment of the Court on 27th July 2022.

5. The Plaintiff/Respondent submitted that the suit was properly heard and determined and the 2nd Defendant participated in the proceedings. That there is no appeal that has been considered by the 2nd Defendant to warrant a stay of execution.

6. This court has considered the application and the submissions therein. The 2nd Defendant submitted that they unknowingly continued participating in the proceedings in the suit herein with the mistaken belief that the Ruling of the Court dated 14th May 2012 stayed the suit herein against the 2nd Defendant pending the hearing and determination of the Originating Summons filed in Mombasa HCCC no 250 of 2009 (O.S). That the 2nd Defendant should not be condemned unheard for the inadvertent error of her Counsel who mistakenly failed to point out to the Court the material evidence already on record and in favour of the 2nd Defendant. The court is now asked to review and set aside it's judgment. 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."

7. 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;
>
> "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 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".

11. 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 2nd Defendant. The court in its judgement is clear that it considered all the evidence and the counterclaim before coming to the determination. The only option left for the 2nd Defendant if dissatisfied was to file an appeal. Judgement was entered on the 27th July 2023 and this application for review filed on the 13th February 2023. The 2nd Defendant is also guilty of inordinate delay which is inexcusable. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE