



**Hasgeman & Company Limited & 2 others v Mahendra G. Patel &  
3 others (Environment & Land Case 131 of 2015 & 1201 of 2016  
(Consolidated)) [2023] KEELC 22000 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22000 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 131 OF 2015 & 1201 OF 2016 (CONSOLIDATED)  
EK WABWOTO, J  
NOVEMBER 23, 2023**

**BETWEEN**

**HASGEMAN & COMPANY LIMITED ..... PLAINTIFF**

**AND**

**MAHENDRA G. PATEL ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 1201 OF 2016**

**BETWEEN**

**MARIAM AHMED ..... 1<sup>ST</sup> PLAINTIFF**

**RAJAB AHMED KARUME (SUING AS ADMINISTRATORS OF THE ESTATE  
OF AZIZ AHMED KARUME - DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ALPHA GRAIN MILLERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**FIRST COMMUNITY BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to two applications. The 1<sup>st</sup> application is dated 25<sup>th</sup> April, 2023 filed by Mahendra G. Patel seeking review of the Judgment of this Court that was delivered on 27<sup>th</sup> February,



2023 while the second application is the application dated 30<sup>th</sup> June, 2023 filed by Alpha Grain Millers Limited equally seeking for review and setting aside of the Judgment delivered by this Court. The application also sought for leave to be granted to the 2<sup>nd</sup> Defendant Alpha Grain Millers Limited to file its pleadings and defend the suit.

2. The first application was supported by an affidavit sworn by Mahendra G. Patel and Robert Simiyu on 25<sup>th</sup> and 24<sup>th</sup> April, 2023 respectively. Mahendra G. Patel contended that the Court has powers to review its judgment for the reasons that the Court totally lacked jurisdiction to enter judgment for the Plaintiff because Rajab Sheikh Karume commenced this suit on the strength of ad-litem letters of administration obtained in 2016, the said letters were issued to Mariam Ahmed, which were then confirmed by the Court on 21<sup>st</sup> day of March, 2018 and therefore the only lawful Plaintiff remained as Mariam Ahmed. It was also deposed that Rajab Sheikh Karume stated in his evidence that Mariam Ahmed passed on in the year 2018 and there being no one substituted in place of Mariam Ahmed, the suit abated and the court lacked jurisdiction to hear Aziz Ahmed Karume's (deceased) suit.
3. Robert Simiyu in support of the application deposed that there was an error on the part of the record at the court to the effect that he had stated that the Ministry of Lands do not have records of L.R. No. 20750 but it had records of title L.R. No. 20699 which were considered genuine.
4. The second application dated 30<sup>th</sup> June, 2023 was supported by an affidavit sworn by Mohamednur Ibrahim Khalif on 30<sup>th</sup> June, 2023. It was deposed that the Applicant was never served with the pleadings and summons herein by the Plaintiff despite the Plaintiffs being aware of the physical address of the Applicant. It was further deposed that the Applicant only became aware of the proceedings and judgment herein when confronted by Auctioneers who stormed into the suit property purportedly to levy distress for rent arrears. It was averred that the Applicant being the registered owner of the suit property ought to participate in these proceedings for efficient, effectual, just and fair determination of the question in dispute. It was also averred that the Plaintiffs had failed to disclose to this Court that the Applicant was in actual possession and occupation of the suit property and hence therefore, the Plaintiffs herein obtained judgment unlawfully for want of service of pleadings and through misrepresentation and non-disclosure of facts material to the case.
5. Both applications were opposed by the Plaintiffs. The Plaintiffs filed replying affidavits sworn by Rajab Ahmed Karume on 26<sup>th</sup> June, 2023 and 18<sup>th</sup> July, 2023. It was averred that the clerical error at paragraph 22 of the judgment of this Court is not sufficient reason to review the judgment for the reasons that the Court having delivered its judgment on 27<sup>th</sup> February, 2023 became functus officio, it was also averred that the Defendant's claim to title L.R. 20750 was based on a survey which Mr. Robert Simiyu confirmed at paragraph 21, 23 and 24 of the Judgment could only be answered by Director of survey.
6. It was deposed that the Judge correctly noted at paragraphs 44 and 49 that the records/evidence by Mr. Robert Simiyu did not meet the required evidentiary standard as the witness had conceded only that the Director of Survey who was not called as a witness could determine this issue. It was deposed that the confirmation that Mr. Robert Simiyu had no records for L.R. No. 20750 is not contested as the effect of lack of the records was that the 1<sup>st</sup> Defendant did not prove that the Plaintiffs' title was cancelled to reflect his name by the Director of Survey.
7. On whether or not Alpha Grain Millers Limited had been served with the necessary summons and pleadings herein, it was averred that earlier attempts to physically serve them were futile as the Court Process Server was confronted by violence and further they were not condemned unheard since they were granted an opportunity to be heard.



8. Parties filed written submissions in support and or opposition to their applications. The Plaintiffs filed written submissions dated 30<sup>th</sup> June, 2023 while the 1<sup>st</sup> Defendant, Mahendra G. Patel filed written submissions dated 15<sup>th</sup> May, 2023. The 2<sup>nd</sup> Defendant Alpha Grain Millers filed written submissions dated 7<sup>th</sup> September 2023 which the court has duly considered.
9. The Plaintiffs submitted on the following two issues: whether the 1<sup>st</sup> Defendant has met the threshold to warrant a stay of execution of the decree and whether the 1<sup>st</sup> Defendant has laid out a case for review of the judgment delivered by the Court on 27<sup>th</sup> February, 2023.
10. It was submitted that; the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, 2010 are clear that an application for review can only be sought by a party, who though has a right to challenge the Judgment by an appeal is not appealing or to whom there is no right of appeal.
11. It was submitted that the 1st Defendant having filed a Notice of Appeal on 27th February 2023 intending to challenge the Judgement of this Court in the Court of Appeal cannot exercise the right to review and that the application is from the outset incompetent having been filed after the notice of appeal.
12. Reliance was made to the case of *Kisva Investments Ltd vs. Attorney General & Another* [1996] eKLR where the Court of Appeal in dismissing an application for review held as follows:

“The crucial date for determining whether or not the term of 0.47r. I are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end..... Review application should be filed before the appeal is lodged. It if is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with..... A review application is incompetent after appeal is preferred.”
13. Similarly, in *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited*, the Court of Appeal in allowing an appeal held as follows:

“Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal.”
14. The Plaintiffs also submitted that the application for review herein does not meet the threshold set out above. There has not been any discovery of new and important evidence which after due diligence was not within the 1<sup>st</sup> Defendant's knowledge.



15. It was also submitted that the discovery of 'exhibit MP-3' as sought to be introduced by the 1<sup>st</sup> Defendant in this application is not new and important evidence. On 29th September 2022, the 1<sup>st</sup> Defendant attempted to produce the document in its supplementary list of documents. The introduction was objected to and on hearing of the parties rejected by this court.
16. It was further submitted that there has been no new evidence discovered after decree was passed. In support of the above submission, reliance was made to the case of *Alpha Fine Foods Limited vs. Horeca Kenya Limited & 4 Others*<sup>{^}</sup> [2021] where Mativo J, in dismissing an application for review held as follows on the issue of discovery of new evidence:

“ Ordinarily, the expression 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 order was made would refer only to a discovery made since the order sought to be reviewed was passed. An applicant alleging discovery of new and important evidence must demonstrate that he has discovered it since the passing of the order sought to be reviewed ...”.
17. It was further submitted that on the issue of 'exhibit MP-3', the court having passed judgment is now functus officio and that the court cannot be invited to make a finding that it lacks jurisdiction. It was contended that the application is an attempt to appeal against the decision of the court.
18. It was also argued that the application seeks a review on the basis of error apparent on record for reason that at paragraph 22 the Judge erroneously cited L.R. No 20699 instead of L.R No. 20750 and that this is a clerical error which can be corrected by the Judge suo moto under the slip rule provided under Section 99 of the *Civil Procedure Act*.
19. It was also submitted that the clerical error does not suffice as an error apparent on record to warrant a review as it is not disputed that Mr. Robert Simiyu produced records relating to L.R No. 20699. The Defendant's claim to L.R No. 20750 was based on a survey which Mr. Robert Simiyu confirmed could only be answered by the Director of Survey.
20. It was further submitted that as correctly noted in the judgment, the Plaintiffs case as the Administrators of the estate of Aziz Ahmed Karume (deceased) was that the deceased was the registered owner of L.R 20750 as delineated on land survey plan 309639, and had no interest to the 1<sup>st</sup> Defendant's claim to property L.R No. 20699 whatsoever. It was the 1<sup>st</sup> Defendant who had a claim to LR No. 20750, and failed to demonstrate by way of evidence such claim, Mr. Robert Simiyu had no records relating to L.R No. 20750.
21. The Plaintiffs further submitted that the clerical error does not affect the outcome of the judgment, neither does the decision reveal a misapprehension of the law and is therefore not a sufficient ground for review. In support of this submission, the Plaintiffs relied on the case of *Abasi Belinda vs. Frederick Kngwamu and Another*<sup>{^}</sup> [1963] E.A 557 Bennett J. held that:

“ a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal.” A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.



22. On the issue of stay of execution, it was submitted that Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 provides for stay of execution as follows:

No order for stay of execution shall be made under sub rule (1) unless-

- i. “the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay, and
- ii. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

23. It was further submitted that the provision for security is mandatory and that the 1<sup>st</sup> Defendant has not made an attempt to furnish any security as provided under Order 42 Rule 6(2) of the Civil Procedure Rules. The Plaintiffs submits that the 1<sup>st</sup> Defendant has not demonstrated in any way before the court that they would suffer substantial loss if the orders sought are not granted. The 1<sup>st</sup> Defendant is not the registered owner of the suit property and therefore the declaration made by the court on the rightful owner of the suit property L.R No. 20750 does not subject it to any loss.

24. It was also submitted that the order sought to be stayed is a negative order which is not capable of being stayed. It was argued that the Court granted declaratory orders that the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs are the registered owners of the property L.R. No. 20750 which has been at all material times been in the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's name as per the Certificate of title. The Plaintiffs relied on the following cases and urged the Court to dismiss the applications; Samvir Trustee Limited -vs- Guardian Bank Limited [2007] eKLR, Milcah Jeruto Tallan T/A Milcah Faith Enterprises -vs- Fina Bank Ltd & Another [2013] eKLR, Kanwal Sarjit Singh Dhiman -vs- Keshavji Jivraj Shah [2008] eKLR and Registered Trustees, Kenya Railways Staff Retirement Benefits Scheme -vs- Millimo, Muthomi & Co. Advocates & 2 others [2022] KFCA 491 (KLR).

25. The 1<sup>st</sup> Defendant submitted that the he has laid out a sufficient cause to warrant a stay of execution and that he has satisfied this court that he will suffer substantial loss if this prayer is not granted.

26. It was submitted that whereas Rajab is entitled to enjoy the fruits of his judgement, what this court ought to do when confronted with the present circumstances is to consider the twin overriding principles of proportionality and equality of arms, which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. In exercising its discretion, the court should, therefore, always opt for the lower rather than the higher risk of injustice as was set out in the case of Jason Ngumba Kagu & 2 Others -vs- Intra Africa Assurance Co. Limited [2014] eKLR, where it was held that:

“The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of Court in granting stay of execution pending appeal under Order 42 rule 6 of the Civil Procedure Rules. The Court arrives at a decision that substantial loss is likely to occur if stay is not made by performing a delicate balancing act between the right of the Respondent to the fruits of his Judgment and the right of the Applicant on the prospects of his appeal. Even though many say that the test in the High Court is not that of “the appeal will be rendered nugatory”, the prospects of the Appellant to his appeal invariably entails that his appeal should not be rendered nugatory. The substantial loss, therefore, will occur if there is a possibility the appeal will be rendered nugatory. Here, it is not really a question of measuring the prospects of the appeal itself, but rather, whether



by asking the Applicant to do what the Judgment requires, he will become a pious explorer in the judicial process.”

27. It was further submitted the application has been filed without undue delay. The judgment in the suit was made on 27th February, 2023. The application for stay was filed on 25<sup>th</sup> April 2023, which is approximately two (2) months after judgment.
28. The following cases were cited in support, Mumby’s Food Products Limited & 2 others -vs- Co-operative Merchant Bank Limited Civil Appeal No. 270 of 2002; National Bank of Kenya Ltd Ndungu Njau [1997] eKLR; Timber Manufacturers and Dealers –vs- Nairobi Golf Hotels (K) HCCC No. 5220 of 1992; Batuk K. Vyas -vs- Surat Municipality AIR [1953] Bom 133; The Official Receiver and Liquidator -vs- Freight Forwarders Kenya Ltd [2000] eKLR and in The Estate of the late Peter Muraya Chege (deceased) [2019] eKLR.
29. The Court has considered the two applications together with the submissions filed and is of the view that the only issue for determination is whether the two Applicants herein have made a case to warrant this Court to review and set aside its judgment delivered on 27<sup>th</sup> February, 2023.
30. The 2<sup>nd</sup> Defendant Alpha Grains Millers Limited seeks to review and set aside the judgment delivered by this Court primarily on the grounds of non-service with the pleadings and summons by the Plaintiffs while the 1<sup>st</sup> Defendant Mahendra G. Patel seeks to review the judgment of the court on the ground that there was an error on record which necessitates the setting aside of the said judgment.
31. The Court’s power to vary or set aside a judgment is exercised with a view of doing justice between parties. In the case of Patel -vs- E.A Car Handling Services Ltd [1974], the Court stated that the main concern of the Court is to do justice to the parties and will not impose conditions on itself to deter the wide discretion given to it by the Rules. Equally in the case of Shah v. Mbogo [1967] EA 116 the court stated that:

“ This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.”
32. Order 5 Rule 8 of the Civil Procedure requires that summons be personally served upon a defendant whenever it is practical, unless the Defendant has an agent empowered to accept service on his behalf in which case, service upon the agent shall be sufficient.
33. Rule 14 of Order 5, allows when the Defendant cannot be found, after exercise of reasonable and due diligence service by affixing a copy of the summons on the outer doors or some other conspicuous part of the house in which the Defendant ordinarily resides or carries on business or personally works for gain.
34. Rule 14 requires the serving officer to exercise reasonable and due diligence to find the Defendant personally. In my understanding, the serving officer must make effort to find the Defendant. The effort made should be demonstrated in the affidavit of service filed. The serving officer must indicate the number of times he attempted to find the Defendant. He should demonstrate that he laboured to search the whereabouts of the Defendant to justify service in the mode provided for under Rule 14 of Order 5.
35. In this case, there is no evidence that indeed the 2<sup>nd</sup> Defendant Alpha Grain Millers Limited was served with summons to enter appearance nor with the subsequent mention and hearing notices. In fact, the



Plaintiffs have conceded that there was no physically service of the 2<sup>nd</sup> Defendant at paragraph 4 of the affidavit sworn by Rajab Ahmed Karume on 18<sup>th</sup> July, 2023. Hence, therefore, there was no proper service.

36. In view of the foregoing, it is only fair and just that the 2<sup>nd</sup> Defendant be granted an opportunity to defend its case.
37. In the case of Mandeep Chauhan -vs- Kenyatta National Hospital & 2 others [2013] eKLR it was stated;

“It is a Cardinal Rule of Natural Justice that no one shall be condemned unheard. Natural Justice is not a Creative of humankind. It was ordained by the divine hand of the Lord God hence the rule enjoys Superiority Over all Laws made by humankind and that any law that contravenes or offends against any rules of natural justice is null and void and of no effect. The rule as captured in the Latin Phrase ‘audi alteram Partem’ literally translates into “hear the parties in turn” and has been appropriately paraphrased as ‘do not Condemn anyone unheard’. This means that a person against whom there is a complaint must be given a just and fair hearing.”

38. The 2<sup>nd</sup> Defendant is therefore entitled to be heard. Having arrived at the said decision, I need not address myself on the other issues in respect to the two applications.
39. In Conclusion, the 1<sup>st</sup> defendant’s application in ELC No. 131 of 2015 dated 25<sup>th</sup> April, 2023 and the 2<sup>nd</sup> Defendant’s Application in ELC 1201 of 2016 dated 30<sup>th</sup> June 2023 are disposed as follows:
- i. The proceedings of this court and judgment delivered on 27<sup>th</sup> February, 2023 are hereby set aside.
  - ii. The 2<sup>nd</sup> defendant in ELC No. 1201 of 2016 Alpha Grain Millers is hereby granted 30 days from today to file its defence, witness statements and documents together with its trial bundle.
  - iii. Each party to bear own costs of the applications.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2023.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:

Ms. Wanja holding brief for Ms. Maina for the Plaintiffs in ELC No. 1201 of 2016.

Mr. Karani for the 1<sup>st</sup> Defendant in ELC No. 131 of 2015.

Mr. Mwangi Kangu holding brief for Mr. Mutunga for the 2<sup>nd</sup> Defendant in ELC No. 1201 of 2016.

N/A for the other parties.

