



Safe Haven Limited v Omar & 4 others (Environment and Land Miscellaneous Application 53 of 2022) [2023] KEELC 21578 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 53 OF 2022
MAO ODENY, J
NOVEMBER 17, 2023**

BETWEEN

SAFE HAVEN LIMITED APPLICANT

AND

SHARIF MOHAMAD A OMAR 1ST RESPONDENT

BOUGANVILLAEA COTTAGES LIMITED 2ND RESPONDENT

**ORNELLA BONTEMPI LUIGI (DEFENDING IN THE CAPACITY OF
LEGAL REPRESENTATIVE OF THE ESTATE OF BONTEMPI LUIGI-
DECEASED) 3RD RESPONDENT**

KHADIJA SHARIFF MOHAMED 4TH RESPONDENT

REGISTRAR OF COAST LAND TITLES 5TH RESPONDENT

RULING

1. This ruling is in respect of a notice of motion dated November 24, 2022 by the applicant seeking the following orders:
 - a. Spent.
 - b. That the Honourable court be pleased to enlarge time to allow the Applicant to seek leave to review the judgment of Justice J.O. Olola delivered on 31st August 2021 in ELC Case No. 82 of 2014 at Malindi.
 - c. That upon enlargement of time the Honourable court be pleased to grant leave to the Applicant to review the judgment of Justice J.O Olola delivered on August 31, 2021 in ELC Case No. 82 of 2014 at Malindi.
 - d. Spent.



- e. Spent.
 - f. That the honourable court be pleased to review and/or vary and/or set aside the judgment of Justice J.O Olola delivered on August 31, 2021 in ELC Case No. 82 of 2014 at Malindi.
 - g. That an order do issue directing the registrar of Coast Land Titles to cancel the indenture dated July 5, 2022 registered in favour of the 4th Respondent over the suit property and any further dealings on the property.
 - h. That an order do issue directing the Registrar of Coast Land Titles to restore the title to the suit property in favour of the 3rd Respondent.
 - i. That this honourable court do grant any other orders it deems fit and just to grant.
 - j. That costs of this suit be provided for.
2. The application is based on the grounds listed on its face and supported by the affidavit of Radhika Muralee Thayyil dated November 24, 2022, who deponed that sometime in the year 2013, the applicant entered into an agreement to purchase land parcel identified as Subdivision No. 5650 (Original No. 24/5) (Vol. No. LT21 Folio B 20A, File 7031) Malindi being part portion of Plot No. 24 (the suit property).
 3. That upon payment of the purchase price however, the Applicant was not able to transfer the same as there was a caution registered against the title in ELC Case No. 82 of 2014. As a result, the Applicant filed ELC Case No. 79 of 2017 where judgment was entered on September 22, 2022 by Olola J. declaring the Applicant a *bona fide* purchaser for value over the suit property. The learned judge also issued an order for specific performance against the 3rd Respondent.
 4. The Applicant further deponed that her efforts to execute that judgment has been frustrated due to the existence of an earlier judgment in ELC Case No. 82 of 2014 delivered on August 31, 2021 by Olola J. According to her, the Applicant only became aware of that judgment on 10th November 2022 and that the suit property has since been transferred to the 4th Respondent.
 5. She stated that the judgment in ELC No. 82 of 2014 was ripe for review for the following reasons;
 - a. The Honourable court in error failed to consider that the statute of limitation had expired as the suit was brought by the 1st Respondent over 17 years from when the cause of action accrued thus directly offending section 7 of the [Limitation of Actions Act](#), cap 22.
 - b. The Honourable court erred in directing that a new title for the suit property be issued in favour of the 2nd Respondent herein, failing to consider that there was no valid document in the form of a sale agreement in the name of the 2nd respondent brought before the court, to establish that the 2nd Respondent had any stake in the purchase of the property from the previous registered owner, contrary to section 3 (3) of the [Law of Contract Act](#), cap 23.
 - c. The Honourable court erred in relying on inadmissible documents, failing to consider that the only sale agreement produced in court did not pass title to the 2nd Respondent nor did it create beneficial ownership and in any case it was



neither signed by all the parties thereto, nor was there attestation as required by section 3(3) of the Law of Contract Act, cap 23 and section 38 of the Land Act, 2012.

- d. The honourable court in error relied on an instrument, being sale agreement, not duly stamped for stamp duty contrary to section 19 (1) of the Stamp Duty Act, cap 480, which states that no instrument chargeable with stamp duty shall be received in any proceedings whatsoever unless it is duly stamped.
 - e. The honourable court failed to take into account that the two suits being ELC 82 of 2014 and ELC 79 of 2017 ought to have been consolidated before the determination of the former suit as both matters dealt with the same suit property before the same judge.
 - f. The honourable court failed to ensure that the provisions of order 21 rule 6 were complied with prior to delivery of the judgment in ELC 82 of 2014 being that a certified copy of the title for the suit property ought to have been produced by the Land Registrar before issuance of judgment.
 - g. The honourable court failed to consider the law of adverse possession and that the 3rd Respondent had been in exclusive possession of the property from 1991 without any protest from the 2nd respondent as the alleged true owner, being a shareholding director of the 2nd Respondent therefore having access to the financial accounts and asset register of the company.
6. The application was opposed by the 1st, 2nd and 4th Respondents who filed grounds of opposition on February 13, 2023 and stated that the application was an afterthought having been filed more than one year since delivery of judgment. That the Application did not raise any sufficient reasons for leave to be granted.
 7. The Respondents further stated that the application did not meet the threshold for review under order 45 and that the court did not have jurisdiction to determine the application having pronounced itself on 31st August 2021. The Respondents averred that the Applicant had at one point participated in ELC 82 of 2014 but later withdrew and filed ELC 79 of 2017 to the exclusion of the 1st, 2nd and 4th Respondents.
 8. The 4th Respondent also filed a replying affidavit dated February 9, 2023 where she deponed that following the impugned judgment, the suit property was transferred back to the 1st and 2nd Respondents who subsequently transferred the same to her *vide* an indenture dated 5th July 2022 which was registered on 22nd July 2022. She also stated that the 1st Respondent was her biological father.
 9. The 5th Respondent also opposed the application and stated that the application did not meet the conditions outlined under order 45 rule 1 of the Civil Procedure Rules and the threshold for grant of injunctions hence an abuse of court process.
 10. The 3rd Respondent did not participate in these proceedings.

Applicant's Submissions

11. Counsel for the Applicant identified three issues for determination namely:
 - a. Whether the Applicant has locus standi to bring this application.



- b. Whether a legal conflict arises by gist of the existence of two conflicting judgments over the same subject matter.
 - c. Whether the reliefs sought by the Applicant should be granted.
12. On the first issue whether the Applicant has locus standi to file this application, counsel submitted that the simple interpretation of the language used in section 80 of the Civil Procedure Act, and order 45 of the rules thereunder, was that the right to review extended to any aggrieved party even if they were not parties to a suit of which the Applicant is aggrieved by the Judgment in ELC No 82 of 2014.
 13. Counsel relied on the cases of Accredo Ag and 3 others v Steffano Uccelli and another [2017] eKLR; and Union of India v Nareshkumar Jagad and others v Review Petition C D. No. 40966 of 2013 cited in Civil Appeal No. 7448 of 2011, where the court held that a third party to the proceedings if he considers himself an aggrieved person, may take recourse to the remedy of review.
 14. It was counsel's further submission that the grounds highlighted in the application were sufficient to warrant a review of the impugned judgment to ensure that justice is served and that a bad precedent is not set in future proceedings.
 15. Counsel relied on the cases of Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR and Makula International Ltd v His Eminence Cardinal Nsubuga & another [1982] HCB 11.
 16. Counsel argued that this court was clothed with inherent jurisdiction under section 3A of the Civil Procedure Act to ensure ends of justice and cited the Supreme Court case of Fredrick Otieno Outa v Jared Odoyo Okello and 3 others [2017] eKLR.
 17. Mr. Wahome explained that the review application could not be filed under ELC 82 of 2014 since the Applicant was not a party in that suit, hence the present miscellaneous application. He argued that once a court delivered its judgment, it became *functus officio* and could not entertain a joinder application and that a joinder application need to be made in a pending case and cited the case in Civicon Limited v Kivuwatt Limited and 2 others [2015] eKLR.
 18. On the second issue as to whether a legal conflict arises by gist of the existence of two conflicting judgments over the same subject matter, counsel submitted that since the two judgments gave the Applicant in one, and the 1st and 2nd Respondents in another, the same property, it was imperative that the judgment in ELC 82 of 2014 be reviewed. According to counsel, the latter decision, in this case judgment in ELC No. 79 of 2017, ought to be followed and relied on the case of Govinda Naik v West Patent Press Co. Ltd – AIR 1890 Kant 92. Counsel urged the court to allow the application as prayed.

2Nd and 4Th Respondents' Submissions.

19. Counsel identified two issues namely- whether the Applicant has locus standi to seek the orders and whether costs should be awarded.
20. On the first issue, counsel submitted that the applicant was not a party in ELC No. 82 of 2014 therefore lacked the requisite locus standi to seek the orders sought in the application hence not entitled to review orders. Counsel relied on the case of Accredo Ag and 3 others v Steffano Uccelli and another (*supra*)



21. Mr. Matheka relied on the case of *Isaac Indab Muchesi v Lawrence Gichuru Njenga and 3 others* [2018] eKLR and submitted that the delay of 1 year 3 months in filing the application was inordinate as equity aids the vigilant and not those who slumber on their rights.
22. Counsel added that the grounds relied upon by the Applicant did not meet the threshold required under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* and relied on the case of *Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya* [2019] eKLR.
23. Mr. Mataheka submitted that the Applicant was not entitled to a temporary injunction since he was not the registered owner of the suit property and further that he has not established a prima facie case. Counsel relied on the case of *Nguruman Limited v Jan Bonde Nielsen and 2 others* [2014] eKLR.

5th Respondent's Submissions

24. Mr. Munga counsel for the 5th Respondent identified three issues for determination which he generated from the provisions of section 80 of the *Civil Procedure Act* and order 45 of the Rules thereunder. The issues were whether the Applicant has established the existence of an error apparent on the face of the judgment; whether the Applicant has established the existence of other sufficient reason; and whether the Applicant filed the application without unreasonable delay.
25. Regarding the first issue, counsel quoted the definition of an error apparent on the face of the record as was explained in the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [*supra*]. Counsel argued that the Applicant's allegation that the court failed to consider the law on adverse possession was misplaced since adverse possession was never pleaded in ELC No. 82 of 2014 hence there was no error apparent on the face of the record.
26. On the second issue, Mr. Munga submitted that annexure RMT 4b attached to the applicant's supporting affidavit was sufficient proof that the Applicant was at all material times aware of the existence of the suit ELC 82 of 2014 and its intended outcome. He argued that the discovery did not amount to new evidence and relied on the case of *Alpha Fine Foods Limited v Horeca Kenya Limited and 4 others* [2021] eKLR.
27. Finally, Mr. Munga submitted that the delay of 15 months to file the application was not explained therefore the application ought to be dismissed on the ground of inordinate delay. Counsel cited that case of *Afapack Enterprises Limited v Punita Jayant Acharya suing as the administrator of the Estate of the late Suchila Anatrai Raval* [2018] eKLR where a delay of 9 months from the date the decision was considered inordinate.

Analysis and Determination

28. The only issue for determination is whether the application as filed is proper before the court or an abuse of court process.
29. This is an application for review under order 45 rule 1 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*. Order 45 rule allows any party or a non-party who is aggrieved by a judgment or order of the court to file an application for review.
30. Even though the Applicant has locus standi to file an application for review of the Judgment in ELC No 82 of 2014, the right procedure has to be followed. The Applicant ought to have filed the application in ELC Case No 82 of 2014 which he seeks the court to review the judgment.
31. Assuming that the court allows the orders sought how are they going to be implemented. Courts do not give orders in vain. It should be noted that the Applicant was at one point a party in ELC 82 of



2014 but chose to withdraw and file ELC No. 79 of 2017 that he now wants the court to implement as it was in his favour.

32. The court will therefore not dwell further on the merits of the application but order that the application is hereby struck out with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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