



REPUBLIC OF KENYA



**Rono v Chief Land Registrar & 5 others (Environment & Land Petition
13 of 2015) [2023] KEELC 21539 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21539 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND PETITION 13 OF 2015**

EO OBAGA, J

NOVEMBER 16, 2023

BETWEEN

MOSES KIPTOO RONO APPELLANT

AND

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

COUNTY LAND REGISTRAR, UASIN GISHU 2ND RESPONDENT

NATIONAL LAND COMMISSION 3RD RESPONDENT

DIRECTOR OF SURVEY 4TH RESPONDENT

HON. ATTORNEY GENERAL 5TH RESPONDENT

BEN MUNERIA WESONGA 6TH RESPONDENT

RULING

1. This is a ruling in respect of a notice of motion dated 16/12/2023 in which the 1st, 2nd, 4th and 5th Respondents/Applicants seek the following orders: -
 1. Spent
 2. Spent
 3. The Judgement of this Honourable court dated 20th April, 2018 (Ombwayo –J.) be and is hereby reviewed and set aside.
 4. Costs of this application be provided for.
2. The Applicants contend that there is discovery of new and important evidence which if the same was availed to the court during hearing, the court would not have reached the decision contained in the



judgement which was delivered on 20.4.2018. The new evidence according to the Applicants is an investigation report dated 7.7.2022 compiled by the Directorate of Criminal Investigations.

3. In the same supporting affidavit, the Applicant are contending that the judgement delivered on 20.4.2018 is ambiguous and not specific and implementation of the judgement has proved to be difficult as each time they try to implement the judgement, there are complaints raised.
4. The Applicants' application was opposed by the Petitioners/Respondents based on a replying affidavit sworn on 20.2.2023. The Respondents contend that the Applicants' application is a non starter, an afterthought and devoid of merit.
5. The Respondents further contend that what is being listed in the investigation report as new evidence was available during the hearing and that all parties were given opportunity to present their case. They also state that the investigations were conducted four years after delivery of judgment and after the 6th Respondent failed in his bid for leave to appeal against the judgement delivered on 20.4.2018.
6. The RespondentS further state that the Applicants are seeking to assist the 6th Respondent even after they stated that the implementation of the judgement had been completed when an application for contempt of court was filed.
7. I have carefully considered the Applicants' application and the opposition to the same by the Respondents. I have also considered the oral submissions during the hearing of the application. I notice that the Applicants' application is expressed to be brought under the provisions of order 43 Rule 1(1) and (2) of the *Civil Procedure Rules*. The order and rules cited relate to appeals from orders. The Applicants ought to have cited order 45 of the *Civil Procedure Rules* which deals with review. The omission to cite the correct provisions of the law cannot defeat an application. The most important thing is that it is clear that this is an application for review.
8. The only issue for determination in this application is whether the Applicant have met the threshold for grant of a review. Under Order 45 Rule (1) of the *Civil Procedure Rules*, an Applicant for review must bring the application without unreasonable delay. If the review is based on discovery of new and important evidence, it must be shown that the evidence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed. The Applicant must of course show that he could not with due diligence find the new evidence. An Applicant ca also move the court for review for any sufficient reason.
9. In the instant case, the judgement sought to be reviewed was delivered on 20.4.2018. This application for review was filed 16.12.2022. The application was brought after four years. There is no good explanation given why there was a delay of over four years. The counsel for the Applicants argued that order 45 Rule (1) of the Civil Procedure Rules only states that an application for review should be brought without unreasonable delay but does not fix the time.
10. The delay is unreasonable in the circumstances. As was submitted by the Respondent, this application was filed after the court of Appeal declined to extend time for appeal against the judgment of 20.4.2018. It is clear from the supporting affidavit to the application that indeed this application was brought due to the complaints by the 6th Respondent. The Applicants cannot say that they are implementing the judgment and at the same time state that there is discovery of new evidence when in their own affidavit they are saying that each time they try to implement the judgment, there are complaints raised. I therefore find that the delay has not been explained and is unreasonable.
11. On whether there is discovery of new and important evidence which could not be obtained if due diligence was exercised, I notice from the supporting affidavit that there were correspondence and



memos which were exchanged following complaints by the 6th Respondent. All these memos and letters were in the custody of the 1st, 2nd, and 4th Applicants. The petition which resulted in the judgement of 20.4.2018 was filed on 2.9.2015.

12. All what is stated to be new evidence was well known before the judgment of 20.4.2018 was delivered. A replying affidavit by the 6th Respondent filed on 5.10.2017 clearly shows that he raised the issue of fake documents being used to give title to petitioners' plots. The Applicants cannot now turn round and say that this is new evidence and that the Applicants had no capacity to carry out investigations. The Applicants were the custodians of all the documents in question and are the ones who processed them. The issue of discovery of new evidence does not arise.
13. In the case of *Rose Kaiza v Angelo Mpanju Kaiza* (2009) eKLR the Court of Appeal considered a previous decision of the Court of Appeal in the case of *D.J Lowe & Company Ltd v Banque Indosuez* Civil Application Nai 217/98 (UR) where the court stated as follows:-

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness in his part in adducing all possible evidence at the hearing.”

14. In the same case of *Rose Kanaiza* (supra) quoted from a commentary by *Mulla on similar provisions of the Indian Civil Procedure Code*, 15th Edition at page 2726 where it was stated as follows: -

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

15. It is the 6th Respondent, who made a complaint leading to the investigations whose report was dated 7.7.2022. The material which is now being said to be new evidence was known to the 6th Respondent and the Applicants who were in custody of the same. The Applicants have not demonstrated that they could not with due diligence have discovered this evidence. As was stated in the commentary by Mulla (supra), it is not open to this court to admit the said evidence on grounds of any other sufficient cause. I therefore find that the Applicants' application is devoid of merit. The application is dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 16TH DAY OF NOVEMBER, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;



M/s Odwa for Petitioners/Respondents.

Court Assistant -Laban

E. O. OBAGA

JUDGE

16TH NOVEMBER, 2023

