



**Sankur v Chege; Orbit Chemical Industries Limited (Aggrieved Party) (Environment & Land Case E348 of 2021) [2023] KEELC 21784 (KLR) (16 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21784 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E348 OF 2021  
JA MOGENI, J  
NOVEMBER 16, 2023**

**BETWEEN**

**ALI MOHAMED SANKUR ..... PLAINTIFF**

**AND**

**JOHN NJUGUNA CHEGE ..... DEFENDANT**

**AND**

**ORBIT CHEMICAL INDUSTRIES LIMITED ..... AGGRIEVED PARTY**

**RULING**

1. The applicant herein filed two applications, a chamber summons dated 1/08/2023 and a Notice of Motion Application dated 1/08/2023. Through the Chamber Summons the applicant sought:
  - a. To have the Notice of Motion herein dated 1<sup>st</sup> August 2023 being an urgent application to be heard at the earlier possible moment during the current vacation of this Honorable Court.
2. Given the circumstance the above chamber summons application is spent since it is overtaken by events the vacation is long gone.
3. The second application is the Notice of Motion Application dated 1/08/2023 and it is brought under the provisions of Articles 27, 40, 47, 48 and 50 of the *Constitution* and Order 45 Rule 1 and Order 22 Rule 22 of the *Civil Procedure Rules* and Sections 1A, 1B and 3 A of the *Civil Procedure Act*. It seeks the following prayers:
  - a. Spent
  - b. That this Honorable Court be pleased to stay the execution of its judgment delivered in this matter on the 10<sup>th</sup> July 2023 pending the hearing and determination of this application.



- c. That this Honorable Court be pleased to review, vary or set aside its judgment delivered in this matter on the 10<sup>th</sup> July 2023 and all the other consequential orders arising therefrom.
  - d. That the cost of this application be provided for .
4. The application is premised on 13 grounds provided on the face of the application which I need not reproduce here and the supporting affidavit of Sachin Chandaria. From the Applicant's sworn affidavit and the grounds giving rise to the said application, the Applicant's assertion is that the aggrieved party is the owner of the suit property which the court declared belongs to the plaintiff.
  5. That there are two other suits ELC Civil Suit no E048 of 2021 and ELC no 308 of 2022 which are pending in court relating to the same suit property. Further that the aggrieved party not having been given a chance to be heard violates the right their right as per Article 50 making the court's judgment delivered on 10/07/2023 liable for review because the finding constitutes an error apparent on the face of the record.
  6. That the judgment of the court declaring the plaintiff the owner of the applicant's suit property when there is a suit pending and the same plaintiff is claiming for adverse possession acknowledging the applicant as the legal owner of the suit property needs to be reviewed.
  7. The application is opposed. There is a Replying Affidavit by Ali Mohammed Sunkar, the Plaintiff/Respondent herein, sworn on 11/09/2023. The Plaintiff/Respondent argues that the applicant's application lacks merit that the applicant is a stranger to this suit. That the judgment delivered on 10/07/2023 has not bearing with the two suits mentioned above by the applicant that is ELC Civil Suit no E048 of 2021 and ELC no 308 of 2022.
  8. That the prayers sought in the two suits above are very different from what was sought in the instant sit. Further that the plaintiff/respondent has not claim against the aggrieved party/applicant who in any case has not trespassed on the plaintiff's/respondent's suit property.
  9. The plaintiff/respondent contends that the prayers sought in the plaint in any case were declaratory in nature and did not seek to cancel any title. That according to him this court is functus having pronounced itself on the issues brought before it.
  10. On 28/09/2023, counsels agreed to canvas the application by way of written submissions and parties were granted time to file written submissions to the application and the Court gave directions on the same. The parties duly submitted and I have considered them. The Applicant's written submissions are dated 18/10/2023 and the Plaintiff/Respondent's written submissions are dated 23/10/2023.

### **Issues for Determination**

11. Having considered the application and the affidavit in support thereof together with the rival submissions, the only issue for determination is whether this court should review and or set aside its judgment dated 10/07/2023 and all subsequent orders.

### **Analysis and Determination**

12. The provisions that govern orders of review are found in Section 80 of the *Civil Procedure Act* and Order 45 (1) of the *Civil Procedure Rules* which provide as follows:

Section 80. 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.

Order 45 Rule 1 of the [Civil Procure Rules](#) provides that :-

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.
13. From the above provisions of the law, the rules in my view restrict the grounds for review and lays down the jurisdiction and scope of review limiting it to the following grounds:
  - i. Discovery of new and important matter or evidence which after the exercise of the diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
  - ii. On account of some mistake or error apparent on the face of the record, or
  - iii. For any other sufficient reason and whatever the ground, there is a requirement that the application has to be made without unreasonable delay.
14. What then are the grounds which this application for review are premised on? From my reading of the grounds upon which the application is based together with the supporting affidavit, the Applicant is complaining that there was an error in the judgement because the suit property was declared to belong to the plaintiff yet he is the proprietor of the suit property and that the judgment was made without hearing him and against the spirit of Article 50 of the [Constitution](#). It is common knowledge that the Applicant was not yet a party in this suit when the judgement was delivered on 10/07/2023.
15. Since he was not a party to the suit, there is no way in which he could have been heard. I do not therefore see what error or mistake is disclosed on the face of the record. How was the Court supposed to give evidence to a stranger?
16. In the case of Stephen Wanyoike Kinuthia (suing on behalf of [John Kinuthia Marega \(deceased\) v Kariuki Marega & Another](#) (2018)eKLR stated categorically that where an applicant in an application for review sought to rely on the ground that there was discovery of new and important evidence, one had to strictly prove the same. the court of Appeal stated as follows:

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”
17. In this instant case, the Applicant argues that they are the registered proprietors of the suit property but that the plaintiff has unlawfully and illegally occupied the suit property and built illegal and unlawful structures thereon.



18. Further that there are two other cases pending before the court where the plaintiff acknowledges the applicant as the registered owner of the suit property. That the applicant is shocked that this Honorable Court in its judgment declared the plaintiff as the owner of the applicant's property.
19. The Applicant has not demonstrated what plain error or mistake there was with regard to the judgment and their argument seems to be that the decision made was wrong in light of the evidence presented to the court. If the Applicant's opinion is that the judgment was an erroneous, then their remedy is in an appeal not in review.
20. I am in this regard guided by the Court of Appeal's decision in *Muyodi v Industrial And Commercial Development Corporation And Another E.A.L.R*[2006] 1 EA 243 wherein the Court described an error or mistake apparent on face of the record as follows at pages 246-247 :-

“There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal...”

21. The applicant I note has not stated anywhere that there is new evidence that he has discovered. All he states is that he is shocked that the court declared that the plaintiff to be the owner of the suit property and that he was not given a chance to be heard contrary to Article 50 of the *Constitution*. What the applicant has not shown the court is whether he applied to be enjoined and was denied that right because how can someone be denied a right to be heard if they do not draw the court's attention to their existence and to wanting to be heard.
22. During the hearing of this suit, the defendant testified that he has obtained a copy of the certificate of Title in respect to the said property which clearly indicates that the same is registered in the name of Orbit Chemical Industries Limited and not the Plaintiff. In the court's finding this averment was not upheld and the plaintiff was declared to be the one who owns the suit property. Therefore, the applicant and the defendant seem to share a connection that saw the defendant mention the applicant at trial. The question therefore is why did the defendant not seek to have Orbit Chemicals the applicant to be enjoined if he had a certificate of title in its name as he testified.
23. The two cases referred to by the applicant, are not new and therefore do not pass for new and important facts that were not before the court at the time it entered judgment in favour of the Plaintiff.
24. The Applicant deposes that there is an error apparent on the face of the record because the Court in its judgment declared the plaintiff as the owner of the applicant's property and therefore this was sufficient reason to review the judgment.
25. In the decided case of *Ajit Kumar Rath v The State of Orisa & Others*, 9 Supreme Court Case 596: the Supreme Court of India had this to say:-
  - c. ‘the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record



or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”.

26. In my view, the matters that the applicant now seeks to raise are not new and important evidence. Going by the averments in the supporting affidavit filed by the applicant and the documents now relied on, it is quite clear that the applicant was well aware of the suit before the judgment was delivered herein on 10/07/2023. I am not satisfied therefore of the allegations by the applicant that the existence of the two cases referred to herein constitutes discovery of new and important matter or evidence. Nor does the allegation that the judgment declared the plaintiff the owner of the suit property constitute new and important evidence. The allegations clearly have no basis and have not met the requirements of Order 45.
27. In the judgment dated 10/07/2023, the court considered all the facts that had been placed before it by the parties and came to a conclusion that in its view, was fair and just in the circumstance. I find no sufficient cause that has been presented to justify a review of the judgment herein.
28. The other consideration in an application for review is whether the application was brought without an unreasonable delay.
29. The judgment in this case was delivered on 10/07/2023, while the application for review as filed on 1/08/2023, a period of less than one month. In my view, there was no inordinate delay.
30. Given the foregoing and on the limb of new and important evidence which is critical in an application of this nature I find that the instant Application did not meet the threshold set out under Order 45 Rule 1 of the *Civil Procedure Rules* and thus this is not a proper case for the court to exercise its discretion in favour of the Applicant. Accordingly, I proceed to dismiss the application dated 1/08/2023 in its entirety with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**MOGENI J.**

**JUDGE**

In the virtual presence of:-

Mr. Karwanda for the Plaintiff

Mr. Kenyatta for the Defendant/Respondent

Ms. Caroline Sagina

Court Assistant.

