



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 817 OF 2014

HAMIDA ALI.....PLAINTIFF/RESPONDENT

-VERSUS-

PATRICK KINGONDO1ST RESPONDENT/RESPONDENT

LIVINGSTONE OOKO.....2ND RESPONDENT/RESPONDENT

JOHN KYALO.....3RD DEFENDANT/RESPONDENT

STEPHEN MBITHI.....4TH DEFENDANT/RESPONDENT

PETER KARANI.....5TH DEFENDANT/RESPONDENT

BERNARD MWANGI.....6TH DEFENDANT/RESPONDENT

CHARLSE WAWERU.....7TH DEFENDANT/RESPONDENT

CITY COUNCIL OF NAIROBI.....8TH DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the **16th September 2021**, the 8th Defendant/Applicant herein sought for the following Orders:

- a.Spent
- b. *The Honourable Court be pleased to grant leave to the firm of M/s Brian Khaemba, Kamau Kamau & Company Advocates to come on record for the 8th Defendant/Applicant in place of M/s Ogetto, Otachi & Company Advocates.*
- c. *Pending the hearing and determination of this Application Inter-parties, this Honorable court be pleased to issue Temporary Injunction restraining the Plaintiff/Respondent from Demolishing buildings erected on Parcels of Land L.R No's 209/4401/408 and 209/4401/409, otherwise referred to as the Suit Properties, commonly known as Madaraka Housing Estate.*
- d. *Pending the hearing of this Application Inter Parties, this Honorable court be pleased to issue a Temporary order of stay of Execution of the Judgment delivered on the 9th June 2018, together with all the consequential orders.*
- e. *Upon Inter-Parties hearing of this Application, this Honorable Court be pleased to Set aside and/or Review and/or vary the Judgment delivered on the 9th October 2018, together with all consequential orders.*
- f. *The OCS and OCPD Embakasi Police Station be ordered to enforce the orders issued in respect of c and d herein before.*
- g. *The costs of this application be provided for*

2. The subject Application is premised on the ground that are contained on the face thereof and same is further supported by an affidavit sworn by one Abwao Erick Odhiambo, who describes himself as a female adult of sound mind, but who however from the name, appears to be a Male Adult of Sound Mind.

3. Upon being served with the subject Application, the Plaintiff/Respondent filed a response vide Replying affidavit sworn on the 18th October 2021, to which the Plaintiff/Respondent attached the 8th Defendants/Applicants written submissions which were filed before this Honourable court and which raised very pertinent issues including the issues of alienation, allocation and acquisition of the suit properties by the Plaintiff/Respondent herein.

DEPOSITIONS BY THE PARTIES:

DEPOSITION BY THE 8TH DEFENDANT/APPLICANT:

4. On behalf of the 8th Defendant/Applicant, the supporting affidavit has been sworn by one Abwao Erick Odhiambo, who describes himself as the County Solicitor General and same has averred that the subject suit was heard inter-parties, with the participation of the 8th Defendant/Applicant and thereafter a judgment was rendered on the 9th October 2018.

5. On the other hand, the deponent has further averred that on or about the 14th June 2021, the Plaintiff/Respondent herein proceeded to and took out a notice to show cause against the 8th Defendant/Applicant culminating into the issuance of Eviction orders, which orders were ultimately executed against the 1st to 7th Defendant/Respondent.

6. Further, the deponent has pointed out that pursuant to the execution of the Eviction orders, the Building and/or structures that were constructed on the suit property were destroyed and/or demolished, by and or at the instance of the Plaintiff/Respondent herein on the 10th September 2021.

7. Be that as it may, the deponent has averred that the 8th Defendant has since discovered that the suit property was unlawfully and un-procedurally allocated and/or alienated to and in favor of the Plaintiff/Respondent and that the facts relating to the illegality into the allocation and/or alienation on the suit property, were hitherto unknown to the 8th Defendant/Applicant.

8. At any rate, the deponent has averred that during the hearing of the suit, the 8th Defendant/Applicant was not a primary party, to the extent that same was merely joined vide a counter claim by the 7th Defendant/Respondent and in this regard, same therefore played a passive role in the litigation.

9. Based on the foregoing, the deponent on behalf of the 8th Defendant/Applicant, now contend that same has discovered new and important evidence, sufficient to warrant review of the judgment of the court which was rendered on the 9th October 2018.

RESPONSE BY THE PLAINTIFF/RESPONDENT:

10. Vide Replying affidavit sworn on the 18th October 2021, the Plaintiff/Respondent herein has responded to the Application and has averred that the 8th Defendant/Applicant herein, was duly and substantively represented by able advocates during the proceedings culminating into the judgment and decree, which are now the subject of the current Application.

11. Secondly, it is averred that during the proceedings, the 8th Defendant/Applicant herein who was a Defendant to the counter claim presented by the 7th Defendant/Respondent, was a Principal Party to the proceedings, not only to the counterclaim, which same was defending, but also to the primary claim.

12. It is further averred that in the course of the proceedings, the 8th Defendant/Applicant herein cross examined the Plaintiff/Respondent and the Plaintiffs witnesses, as well as the witnesses called by the Defendants/respondents and similarly tendered own evidence and thereafter filed written submissions.

13. For clarity, it is averred that during all these occasions, the 8th Defendant/Applicant had in her custody all the documents relating to the allocation, alienation, transfer and registration of the Suit Property in the name of the Plaintiff/Respondent.

14. Based on the foregoing, the deponent has averred that it is therefore not true that the 8th Defendant/Applicant has just discovered the existence of New and important evidence, either in the manner alleged or at all. For clarity, it has been pointed out that the said documents, (*which are alluded to were directly*) in the possession of the 8th Defendant/Applicant from the onset and/or commencement of the suit.

15. Further, the deponent has averred that the subject Application has been made and/or mounted with unreasonable and inordinate delay and in this regard, the orders of review which are sought are therefore not available. In a nutshell, the Plaintiff/Respondent has therefore impleaded the doctrine of Latches.

16. In the premises, the Plaintiff/Respondent has invited the court to dismiss the Application.

RESPONSE BY THE 1ST TO 7TH DEFENDANTS/RESPONDENTS:

17. Though served with the subject Application, the 1st to 7th Defendants/ Respondents herein did not file any response, either in terms of ground of opposition or Replying Affidavit. For clarity, it appears that the subject Application, is a contest between the 8th Defendant/Applicant and the Plaintiff/Respondent.

SUBMISSIONS:

18. The Application dated the 16th September 2021, came up for hearing on the 19th October 2021, whereupon the Parties agreed and/or proposed to canvas same by way of written submissions. Consequently, directions were given that the subject Application be disposed of by way of written submissions within set timelines.

19. Pursuant to the directions of the court, the 8th Defendant/Applicant herein finally filed her written submissions on the 20th December 2021 whereas the Plaintiff/Respondent filed his written submissions on the 12 January 2022. For clarity, the two sets of written submissions herein are on record and have been duly considered.

20. On her part, the 8th Defendant/Applicant has contended that same has since discovered that the process of allocation, alienation and ultimate transfer of the suit properties to and in favor of the Plaintiff/Respondent was fraudulent, unlawful and un-procedural and that this is New and Important evidence, whose discovery is essential, should enable the court to impeach and/or impugn the Judgment that was rendered on the 9th October 2018.

21. On the other hand, the 8th Defendant/Applicant has further submitted that even though same was joined in the subject proceeding and thereafter participated in same, she was joined as a Defendant to the Counterclaim and therefore same played a passive role, which denied her an opportunity to address several and/or pertinent issues.

22. Based on the foregoing, the 8th Defendant/Applicant, has therefore implored the court to set aside and/or review the subject Judgment.

23. On his part, the Plaintiff/Respondent has raised three pertinent issues. Firstly, the Plaintiff/Respondent has submitted that the 8th Defendant/Applicant was a substantive Party in the subject matter and same participated in the proceedings, including cross examination of the Plaintiff/Respondent and the Plaintiffs'/Respondents' witnesses, as well as the other Parties' witnesses. Besides, the 8th Defendant/Applicant also called evidence and thereafter tendered submissions.

24. In the premises, the Plaintiff/Respondent has submitted that the 8th Defendant/Applicant therefore had the opportunity to place before the court all the relevant materials that were within her custody and/or possession.

25. Secondly, the Plaintiff/Respondent has further submitted that by virtue of being the Rating Authority over and in respect of the suit Properties, the 8th Defendant/Applicant by law has custody and or possession of the documents relating to the suit properties and same therefore would have used those documents to raise and/or ventilate any Defense from the onset.

26. Consequently, it is the Plaintiff's/Respondent's submissions that the documents relating to the allocation, alienation, transfer and ultimate registration of the suit properties in favor of the Plaintiff/Respondent, were well within the custody of the 8th Defendant/Applicant and not otherwise.

27. On the other hand, it has also been submitted that the said Documents, that is, the Documents relating to the alienation, allocation transfer and registration of the suit properties in favor of the Plaintiff/Respondent herein are also Public Documents, obtained at the Land Registry and therefore the 8th Defendant/Applicant, could have procured and obtained same, albeit with the exercise of due diligence.

28. Finally, the Plaintiff/Respondent has submitted that the Application has been made with unreasonable and inordinate delay, which delay has not been explained or at all. In this regard, the Plaintiff/Respondent has therefore contended that the Application is barred by the doctrine of Latches.

ISSUES FOR DETERMINATION:

29. Having reviewed the Notice of Motion Application dated the 16th September 2021, the Supporting Affidavit thereto, the Replying affidavit by the Plaintiff/Respondent in opposition thereto and having similarly considered the written submissions filed by and/or on behalf of the Parties, the following issues Do arise and are germane for Determination;

- a. Whether the 8th Defendant/Applicant herein is in existence and capable of mounting the subject Application.***
- b. Whether the 8th Defendant/Applicant has met the threshold for Review on the basis of the discovery of new and important evidence as envisaged under the provisions of Order 45 Rule 1 of the Civil Procedure Rules.***
- c. Whether the subject Application has been made without unreasonable and/or undue delay.***

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the 8th Defendant/Applicant herein is in existence and capable of mounting the subject Application.

30. Though the subject suit was initially filed without the 8th Defendant/Applicant being a Party, it appears that the 8th Defendant/Applicant was joined as a Party vide a Counter-claim mounted by the 7th Defendant dated the 14th March 2011, and thereafter same participated in the proceedings, up to and including the delivery of the Judgment on the 9th October 2018.

31. Nevertheless, it is common ground that following the conclusion of the 1st General Election under the Constitution 2010, that is, the 4th March 2013, all the Local Authorities, the 8th Defendant/Applicant herein, not excepted, were rendered defunct and were replaced by the respective County Governments. For clarity, the Defendant/Applicant was replaced and/or substituted by the City County Government of Nairobi, which therefore took over the functions and/or mandate of the 8TH Defendant, as it were.

32. Based on the fact that the Local authorities, which were created pursuant to and/or under the Local Government Act, Chapter 265 Laws of Kenya, now repealed, were rendered defunct, the 8th Defendant/Applicant herein, can no longer be in existence and be capable of maintaining proceedings before a court of law.

33. In my humble view, it was incumbent upon counsel for the 8th Defendant/Applicant to address his legal mind to the import and tenor of the Provision of Section 55 and 56 of the Urban Areas and cities Act, 2011, which provides as hereunder;

55. Rights and liabilities:

All rights, assets and liabilities accrued in respect of the properties vested in the local authorities established under the Local Government Act (Cap. 265) which shall stand repealed after the first election under the Constitution shall be dealt with as provided by law.

56. Existing bye-laws and orders of local authorities:

All directions, resolutions, orders and authorizations given by by-laws made, and licenses or permits issued by the local authorities established, under the Local Government Act and subsisting or valid immediately before the commencement of this Act shall be deemed to have been given, issued or made by the bodies established pursuant to this Act, as the case may be, until their expiry, amendment or repeal.

34. Other than the foregoing, it is also important to take cognizance of the provisions of Section 7 of the Sixth Schedule of the Constitution 2010, which provides as hereunder;

Existing laws
(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
(2) If, with respect to any particular matter—
(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and
(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.

35. Premised on the foregoing, it would have been prudent for an application to be made to substitute the 8th Defendant/Applicant with the Nairobi City County Government before the current Application was mounted. However, the current Application was mounted in the name of a non-existent legal entity. Consequently, the entire Application is a nullity.

36. In my humble view, an act which is a nullity, remains a nullity and is incapable of being cured. Consequently, I find and hold that the entire Application mounted by the 8th Defendant/Applicant is invalid and therefore void ab initio.

37. In support of the foregoing observation, I adopt and restate the Decision in the case **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, where** Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

ISSUE NUMBER 2

Whether the 8th Defendant/Applicant has met the threshold for Review on the basis of the discovery of new and important evidence as envisaged under the provisions of Order 45 Rule 1 of the Civil Procedure Rules.

38. The 8th Defendant/Applicant herein has premised and predicated the subject Application on the basis of discovery of new and important evidence, which is alleged not to have been within her possession and/or custody at the time when the impugned judgment was rendered and/or delivered.

39. For the avoidance of doubt, the documents which are alluded to relate to the documents concerning the allocation, alienation, transfer and ultimate registration of the suit properties to and in favor of the Plaintiff/Respondent herein.

40. However, it must be noted that the suit properties, are situate and/or located within the jurisdiction 8th Defendant/Applicant, as it were and therefore the 8th Defendant/Applicant would be the Rating and/or authority for collecting the rates and the various Licensing fees.

41. On the other hand, it is also common ground that prior to and/or before any such properties are transferred and/or registered in favor of the allottees, the Plaintiff/ Respondent not excepted, the 8th Defendant/Applicant herein, would ordinarily be copied, not only the allotment letter, but the approval would also be required in terms of various documents by the office of commissioner of lands, now defunct.

42. In the premises, it is important to note that the 8th Defendant/Applicant herein, would be in custody and/or in possession of various documents touching on and/or concerning the alienation, allocation, transfer and indeed registration of the suit property in favor of the Plaintiff/Respondent and in this regard, any contention that same were not within her possession, would therefore require in-depth explanation as to what happened to the documents, which ordinarily ought to have been within her custody and/or possession.

43. Notwithstanding the foregoing, there is the second aspect to the issue, namely, that the documents in question are indeed public documents obtainable at the land registry and therefore, if the 8th Defendant/Applicant did not have same in her custody and possession, then the documents would have been obtainable from the Land registry, albeit with the exercise of due Diligence.

44. Suffice it to say, that it is not enough for one to contend that same has since discovered New and important Documents and thereafter seek to accrue and/or attract an order of Review based on such discovery. For clarity, a person seeking Review on this particular Ground, must go an extra mile to justify the parameters set vide the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010.

45. Perhaps, it is now appropriate to reproduce the provisions of Order 45 Rule 1 of the Civil Procedure rules, 2010, which provides as hereunder;

- 1. Application for review of decree or order [Order 45, rule 1.]**
- (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.**

46. Having read the written submission which were filed by and/or on behalf of counsel hitherto on record for and who represented the 8th Defendant/Applicant herein, which dealt with and/or addressed the propriety and/or validity of the ownership documents possessed by the Plaintiff herein and having similarly cross examined the plaintiff and rest of the witnesses of the matter herein, I am minded to observe that the 8th Defendant/Applicant had in her possession and custody all the documents pertaining to the acquisition of the suit properties by the Plaintiff and indeed utilized same during the trial and cannot now be heard to seek Review on the basis of such Documents.

47. In my humble view, to grant an order for Review, based on the allegation that the 8th Defendant/Applicant has since discovered new and important documents, yet same were within her custody, would be tantamount, to giving the 8th Defendant a second bite at the cherry.

48. In a nutshell, I declined to exercise my discretion to grant the subject application. For clarity, I find and hold that the 8th Defendant/Applicant has not proved and/or met the statutory threshold provided and/or envisaged under Order 45 Rule 1 of the Civil Procedure Rules 2010.

49. If any authority was required for the foregoing position, I would quickly reiterate the holding in the Decision in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR**, where the Court observed as hereunder;

30. The principles which can be culled out from the above noted authorities are:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.**
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.**
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.**
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.**
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.**

vi. *While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*

vii. *Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*

viii. *A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.*

ix. *Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.*

x. *The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1. (underlining supplied)*

50. Other than the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010, it is important to take note of the legal strictures provided for vide Order 45 Rule 3, (*Ibid*) the proviso thereto which provide as hereunder;

When court may grant or reject application [Order 45, rule 3.]

(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

ISSUE NUMBER 3:

Whether the subject Application has been made without unreasonable and/or undue delay.

51. It is common ground that the impugned judgment, which is sought to be reviewed was rendered and/or delivered on the 9th October 2018, while the subject application was filed on the 16th September 2021. For clarity, the Application was filed after three years from the date of rendition and/or delivery of the judgment.

52. I must point out that when the subject judgment was delivered, the 8th Defendant/Applicant herein was duly represented by counsel Mr. Ogari who held brief for counsel Miss Omesa and hence the 8th Defendant/Applicant, has always been aware of the terms of the judgment from the onset.

53. In the premises, if the 8th Defendant/Applicant was aggrieved, (*assuming she was*) it was therefore incumbent upon the 8th Defendant/Applicant, to move with due diligence and dispatch, to either seek review and/or proceed on Appeal. However, the 8th Defendant/Applicant cannot bid her time for a whooping three years and thereafter wake up to approach the court with an Application for Review.

54. Nevertheless, where a Party approaches the court with an Application and it is apparent that there has been a delay, it behooves the Party to offer unto the court an explanation belying the delay, by placing some kind of explanation in the affidavit.

55. Nevertheless, in respect of the subject matter, the 8th Defendant/Applicant has not found it fit to dignify the court with any scintilla of explanation or at all. Perhaps, in the mindset of the 8th Defendant/Applicant, no such explanation was/is necessary or required.

56. As pertains to what constitute delay, I beg to adopt and restate the holding of the Court in the case of **Mwangi S. Kimenyi v The Attorney General & Another (2014) eKLR**, where the court held as hereunder;

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore,

inexcusable.....”

57. Based on the foregoing, the subject Application by the 8th Defendant/Applicant, does not meet the legal prescription provided and/or envisaged under the provision of Order 45 of the Civil Procedure Rules, which essentially underscore that Applications for Review must be made without unreasonable and/or un inordinate delay.

58. Premised on the foregoing, the subject Application, is barred by the Doctrine of Latches.

FINAL DISPOSITION:

59. Having addressed and/or considered the issue for determination herein, I come to the conclusion that the Notice of Motion Application dated the 16th September 2021, is not only premature and misconceived, but same is also Bad in law.

60. Consequently and in the premises, the Application dated the 16th September 2021 be and is hereby Dismissed with costs to the Plaintiff/Respondent only.

61. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Maina Makome for the Plaintiff/Respondent

No Appearance for the 1st to 7th Defendants/Respondents

No Appearance for the 8th Defendant/Applicant