



**Symphosia Consult Limited v Kaburu & 2 others (Environment & Land
Case 256 of 2017) [2022] KEELC 13 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 13 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 256 OF 2017**

**JG KEMEI, J
APRIL 28, 2022**

BETWEEN

SYMPHOSIA CONSULT LIMITED PLAINTIFF

AND

GEORGE GIKERE KABURU 1ST RESPONDENT

COMMISSIONER OF LANDS 2ND RESPONDENT

RICHARD NJOROGE KYAMBUTHI 3RD RESPONDENT

RULING

1. The Plaintiff filed a Notice of Motion dated 17/12/2021 under Article 50(1), 2(k), 159(2) *Constitution of Kenya*, Sections 80, 45 rule (1) (sic) and 3A of the *Civil Procedure Act* and the *Civil Procedure Rules* seeking twelve orders. The Plaintiff is essentially seeking orders that this Court be pleased to Review, vary and/or set aside this Court's judgment delivered herein on 14th June, 2019.
2. The Application is based on the grounds on the face of it and the lengthy Supporting Affidavit of Aimable Rudakemwa Rumongi, the Plaintiff's Managing Director of even date. He deposed that the Plaintiff bought the suit property, a parcel of land title No. Dagoretti/Kinoo/816 measuring approximately 0.10 hectares in the early 1990s. That at the material time one could only buy agricultural land through a company and they conducted due diligence before the said purchase. However, that in 2010, he conducted an official search and learnt that the suit land had been unlawfully transferred to the 1st Defendant. That he promptly instructed the firm of Gakoi Maina & Co. Advocates who instituted this suit formally Nbi ELC Case No. 87 of 2010 based on the available evidence at that time as outlined at para. 11 of the Supporting Affidavit.
3. The deponent further deposed that he now has new evidence to wit copy of the suit land's Title Deed issued on 5/2/1993 in the plaintiff's name; copy of the previous owner's title deed; survey & valuation reports; sale agreement; proof and acknowledgement of payment of the purchase price in the sum of



Kshs 100,000/- and Land control board Consent. According to him, the said evidence adds probative value to his claim over the suit land and urged the Court to allow his application.

4. Opposing the application, the 1st Defendant, George Gikere Kaburu swore his Replying Affidavit dated 4/2/2022. He impugned the Plaintiff's Counsel's capacity to file the Application without seeking leave to come on record. That he is the bona fide owner of the suit land having purchased it lawfully. He accused the plaintiff of delay in prosecuting his case that was filed over 12 years ago and maintained that the plaintiff had ample time to present his evidence, if at all. That the case was heard on merit and all the witnesses testified before Judgment was rendered on 14/6/2019. Accusing the plaintiff for coming to court with unclean hands, the 1st defendant revealed that the plaintiff filed a notice of appeal against the said judgment and cannot therefore seek review of the same judgment after a period of over two years post Judgment. Further that the Court of Appeal rendered a decision on 22/11/2019; see annexures GGK1 (a) & (b). He avowed that the plaintiff has not demonstrated any ground to warrant Review and in any event he already took possession of the suit land and developed it. As such he therefore stands to suffer great prejudice if Review is allowed.
5. The 2nd and 3rd Defendants did not file any responses.
6. Having read and considered the application, the main issue for determination is whether the plaintiff is entitled to orders of review.
7. The underpinning legal provision for seeking Review is found in Section 80 Civil Procedure Act that;

80. Review

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.
8. The above provision is further augmented by Order 45 rule 1 Civil Procedure Rules that;

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.



9. In opposing the Application, the 1st Defendant inter alia averred that the Plaintiff filed his Notice of Appeal dated 18/7/2019 and filed in this Court on the same day. The Plaintiff did not rebut this assertion. I have perused the file and confirm that indeed a Notice of Appeal was filed by the Plaintiff through the firm of Mwaniki Njuguna & Co. Advocates. The 1st Defendant went ahead and attached the Court of Appeal ruling in respect of the Plaintiff's Application seeking extension of time to serve the Notice of Appeal as the appeal was filed out of time. The appellate court dismissed the Application for want of Plaintiff's Counsel capacity to prosecute the Application without seeking leave to come on record. The Plaintiff withheld these details in both of his Applications.
10. Moreover, the Plaintiff has not explained the inordinate delay in filing his Application. The Application was filed one and half years after delivery of the Judgement. Immediately after delivery of Judgment, the plaintiff's counsel filed a notice of appeal in his firm's name without seeking leave to come on record first. He instead proceeded to the Court of Appeal and filed the Application for extension of time to serve the Notice of appeal. The application was rejected. Apprehensive of suffering the same fate in this Court, the Plaintiff has now appointed another firm; Gitobu Imanyara & Co. Advocates to Act for him.
11. Having opted to challenge the impugned Judgement on appeal, the Plaintiff cannot engage a reverse gear now and seek Review of the same Judgment. The Application clearly offends Order 45 rule (1) (a) of the Civil Procedure Rules.
12. The upshot of is that the Application is bereft of merit.
13. It is dismissed with costs.

The notice of motion dated 9/2/2022

14. Contemporaneously, the Plaintiff filed his second Application dated 9/2/2022 seeking 14 orders with the main prayer being this Honorable Court be pleased to grant leave to the firm of Gitobu Imanyara & Co. Advocates to come on record for the Plaintiff in place of the firm of Gakoi Maina & Co. Advocates.
15. The Application is supported by the Supporting Affidavit of Muthoni Nkonge, the Plaintiff's Counsel. She deposed that there was an oversight on their part in filing a notice of change of advocates hence the Application. Copy of consent from the firm of Gakoi Maina & Co. Advocates was annexed as MN1.
16. When the matter came up for directions on 10/2/2022, the Defendant's counsel pointed out that he had only been served with the former Application which he opposed.
17. Parties were directed to canvass both applications by way of written submissions. None of the parties had complied as at 20/4/2022.
18. The relevant legal provision is found in Order 9 Rule 9 Civil Procedure Rules which provides that;
 9. Change to be effected by order of court or consent of parties When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.



19. Although the application is not opposed, the gist of the application dated 9/2/2022 goes to the root of the case; that is an Advocate's capacity to represent a client after delivery of judgment. The issue was raised by the 1st Defendant in his Replying Affidavit and in an attempt to correct the defect, the Plaintiff's Counsel filed the instant Application. It is no wonder that the Plaintiff's Counsel was incessant that this Application be heard first.
20. The former Application having been found to be unmerited, allowing the instant application is akin to issuing ineffectual orders. Granting the firm of Gitobu Imanyara Advocates leave to come on record in view of the fate of the Notice of Motion dated 17/12/2021 can only be described as an academic exercise. The sole available avenue is for the Plaintiff to pursue the Appellate Courts jurisdiction that he already invoked vide his notice of appeal already on record.
21. In the end, both Applications dated 17/12/2021 and 9/2/2022 are for dismissal with costs to the 1st Defendant who singly opposed the Application dated 17/12/2022.
22. Orders accordingly.

DELIVERED, SIGNED & DATED ON THE 28TH APRIL 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms Nkonge for Plaintiff/Applicant

Gaita for 1st Respondent

2nd & 3rd Respondents: Absent

Court Assistant: Phyllis

