



**African Express Airways(Kenya)Ltd v Kenya Airways PLC (Environment and Land
Case Civil Suit E282 of 2021) [2022] KEELC 22 (KLR) (27 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 22 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E282 OF 2021
SO OKONG'O, J
APRIL 27, 2022**

BETWEEN

AFRICAN EXPRESS AIRWAYS(KENYA)LTD PLAINTIFF

AND

KENYA AIRWAYS PLC DEFENDANT

RULING

1. What is before the court is the Defendant's Notice of Motion application dated December 1, 2021. The Defendant (hereinafter referred to only as "the Applicant") has sought the following orders:
 1. Spent.
 2. That the honourable court be pleased to review and/or vary its ruling delivered on September 23, 2021.
 3. That the costs of the application be provided for.
2. The application is supported by an affidavit sworn by Laura Wandera, the Applicant's Senior Legal Counsel on December 2, 2021 in which she has set out the grounds upon which the application has been brought as follows:
3. The court delivered a ruling herein in favour of the Plaintiff (hereinafter referred to only as "the Respondent") on September 23, 2021 in which the court ordered the Applicant to restore the Respondent on all that parcel of land known as L.R No. 9042/584, I.R 69013(hereinafter referred to as "the suit property" where the context so permits). After the delivery of the said ruling, the Applicant discovered new evidence that was not available at the time the Respondent's application was heard. On September 15, 2021, the Applicant received a letter from Hon. Farida Karoney, Cabinet Secretary Ministry of Lands in which she informed the Applicant that the title held by the Respondent in respect of the parcel of land known as L.R No. 9042/584 registered as I.R 69013 was not issued by the Lands



Office. In the said letter, the said Cabinet Secretary stated further that the said title I.R. 69013 was in respect of a land parcel known as L.R No. 4953/2804 situated in Thika measuring about 2.004 hectares registered in the name of one, Jimmy Angwenyi. The Applicant has contended that title I.R. 69013 is not for L.R No. 9042/584 (the suit property). The Applicant has contended that the said letter has confirmed that the Applicant is the only registered owner of all that parcel of land known as known as L.R No. 9042/584 measuring 0.6038 hectares that was formerly registered as Grant No. I.R. 67128 and now known as Nairobi Central Parcel No. L.R. 9042/1051, I.R. 233954.

4. The Applicant has contended that pursuant to the transitional provisions of the *Land Act* 2012 and *Land Registration Act* 2012, the Applicant surrendered its title, Grant No. I.R. 67128 for L.R No. 9042/584 whose lease had expired and was issued with an extension of lease over that property now known as L.R No. 9042/1051, I.R. 233954 for a term of 50 years with effect from 1st April 1996. The Applicant has contended that it was not in possession of its new title for L.R No. 9042/584, I.R. 67128 at the time the Respondent's application was heard. The Applicant has contended that it is now in possession of the same.
5. The Applicant has contended further that an official search conducted on the suit property showed that the property belonged to the Applicant even prior to the issuance of the new title in favour of the Applicant. The Applicant has contended that the position remains the same. The Applicant has contended that it has demonstrated that there exists new evidence warranting a review of the court's ruling.

The response:

6. The Respondent filed a replying affidavit sworn by its Commercial Director, Kaltuma Hassan Bonaya on December 22, 2021

The submissions by the parties:

7. The application was argued orally. The Applicant submitted that its review application was brought under Order 45 of the *Civil Procedure Rules*. The applicant submitted that the application was based on discovery of new evidence. The Applicant argued that there was an attempt to arrest the ruling before delivery so as to place before the court the new evidence but it was not successful. The Applicant submitted that the letter from the Cabinet Secretary, Ministry of Lands shows that the title held by the Respondent for the suit property was in respect of a property situated in Thika. The Applicant argued that if this information had been put before the court, the court would have made a different decision on the Respondent's application.
8. On its part, the Respondent submitted that the Applicant's application was based on a single letter from the Cabinet Secretary which it claimed to be containing new evidence. The Respondent submitted that the question to be answered by the court was whether the information contained in the said letter was new. The Respondent submitted that the court referred to and commented on the titles held by the Applicant at pages 15 and 16 of the ruling sought to be reviewed. The Respondent submitted that the fact that the Applicant had acquired a new title was not new evidence. The Respondent submitted that what was new was the fact that after the ruling, the Applicant's new title was registered.
9. The Respondent submitted further that the Applicant had not stated why and at whose request the Cabinet Secretary had given the information contained in the letter. The Respondent pointed out that the Applicant's new title that was issued in 2021 had several discrepancies and submitted that the same could not prevail over the Respondent's title. The Respondent wondered why no complaint was



made when it was developing the suit property if indeed it was holding a fake title. The Respondent submitted further that it had not been demonstrated that the Respondent had participated in the issuance of the alleged fake title. The Respondent submitted that it had held the suit property and the title in respect thereof for several years and had paid land rates and rents for the same over the years.

10. The Respondent submitted that the Cabinet Secretary whose letter formed the basis of the Applicant's application did not respond to the Respondent's letter in which the Respondent questioned the issuance of a lease to the Applicant in respect of the suit property.
11. In a rejoinder, the Applicant's advocate submitted that the Applicant's contention was that the Respondent's title was in respect of a parcel of land situated in Thika and that this fact was not brought to the attention of the court when the ruling sought to be reviewed was made.

Determination:

12. Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows:

- (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 judgement to the court which passed the decree or made the order without unreasonable delay.

13. Order 45 Rule 3 of the *Civil Procedure* provides that:

- 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.

14. In *Nasibwa Wakenya Mosesv University of Nairobi & another* [2019] eKLR, the court stated as follows:

- “19. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.”



16. In *Charles Kimaita Mwithimbu & another v Edward Mutua M' Mwithiga* [2016] eKLR the court stated as follows:

“[8] The judgement was delivered on October 5, 2012 and this application was filed on November 26, 2012. There was, therefore, no delay in filing it. But besides that, the Applicant seems to rely on the ground of discovery of new and important matter or evidence. It is not enough to merely state that there has been a discovery of new and important matter or evidence. You must show that, at the time of the decree, the new and important matter or evidence which has now been discovered, was not within your knowledge or could not have been produced even after exercising due diligence at the time of the decree. This strict proof is a requirement of the law. See the proviso to Order 45 Rule 3 (2) of the *Civil Procedure Rules*... This threshold is meant to prevent attempt by unscrupulous parties to reopen lost cases with aim of mending the weak areas which were exactly the Achilles of the lost case.”

17. As mentioned earlier, the Applicant’s review application has been brought on the basis of discovery of new and important evidence. I am not satisfied that the Applicant has met the threshold for review on the ground of discovery of new evidence. The Applicant has merely stated that it received a letter from the Cabinet Secretary, Ministry of Lands to the effect that the title held by the Respondent is in respect of a parcel of land situated in Thika. As correctly pointed out by the Respondent, the Applicant has not indicated under what circumstances this letter was written. There is no indication as to who had requested for the information contained in the letter and when. There is also no evidence that whoever sought the information could not have done so before the hearing of the Respondent’s application the ruling in which is sought to be reviewed. It has not been demonstrated by the Applicant that at the time the application that gave rise to the ruling sought to be reviewed was being argued, the information regarding the alleged fake title held by the Respondent was not within the knowledge of the Applicant despite exercise of due diligence to find it.
18. Whether or not the title held by the Respondent is fake is also questionable from the evidence placed before the court. The title, Grant No. 69013 in respect of L.R No. 4953/2804 situated in Thika allegedly issued to Jimmy Angwenyi was issued on April 10, 1996 and registered on April 26, 1996. On the other hand, the Respondent’s title was issued on June 13, 1995 and registered on the same date. It follows therefore that it was the Respondent’s parcel of land that was registered first under Grant No. 69013 and not that of Jimmy Angwenyi. In the circumstances, I wonder why it is the Respondent’s title that is fake and not that of Jimmy Angwenyi. I also find nothing new with regard to the new title now held by the Applicant and a search that it carried out on the suit property on August 4, 2021. The Applicant has not explained why it did not produce in court a copy of the registered new title and a search on the suit property during the hearing of the Respondent’s application for injunction.
19. In any event, I am of the view that even if the so called new evidence was before the court when it made the ruling of September 23, 2021, the court would not have arrived at a different decision. The fact that the Respondent held a fake title over the suit property could not have given the Applicant a license to evict the Respondent from the suit property without due process. The court would still have issued an injunction to restrain such move even with the alleged new evidence.
20. The upshot of the foregoing is that the application dated December 1, 2021 has no merit. The same is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT NAIROBI THIS 27TH DAY OF APRIL 2022



S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Mwenesi for the Plaintiff

Mr. Kiragu for the Defendant

Ms. C. Nyokabi - Court Assistant

