



**Kariuki v Wolff; Kariuki (Interested Party) (Environment & Land  
Case 330 of 2017) [2022] KEELC 115 (KLR) (27 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 115 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 330 OF 2017**

**LN MBUGUA, J  
APRIL 27, 2022**

**BETWEEN**

**RICO KINYARIRO KARIUKI ..... PLAINTIFF**

**AND**

**RENATE WOLFF ..... DEFENDANT**

**AND**

**RENE NJUGUNA KARIUKI ..... INTERESTED PARTY**

**RULING**

1. Coming up for determination is a Notice of Motion application dated 25<sup>th</sup> March 2021 by the Defendant/Applicant seeking:
  - i. Spent
  - ii. Spent
  - iii. That this honorable court be pleased to order that the judgment delivered by this court dated 1<sup>st</sup> day of October, 2018 be reviewed particularly the assessed sum of Kshs 7,058,197.25 as the value of the plaintiff's developments on the suit property upon hearing and determination of this application.
  - iv. That this honorable court be pleased to issue eviction orders against the plaintiff from the subject suit property known as LR NO. 12661/61 comprised in Title No. I.R 72109.
  - v. That further orders as ends of justice may require be made.
  - vi. That the cost of this application be provided for.



2. This application premised on the grounds on the face of the application and in the Applicant's affidavit dated 11<sup>th</sup> March 2021 sworn in Germany states that the assessment arrived by this court that the Respondent's/Plaintiff's developments in the suit property were Kshs. 7,058,197.25 was arrived at erroneously since the value was inflated and should be reviewed by appointing an independent Valuer to establish their accurate value.
3. On the prayers for eviction, the applicant avers that the Plaintiff had made it difficult for her to access the suit property and sell it because willing buyers were shying away from the property because they had to be escorted by police officers to view it. She noted that the Plaintiff had another property in Utawala and thus an eviction order would not render him homeless.
4. She also stated that she was incurring unnecessary costs by travelling from Germany due to the ongoing tussle. She added that selling the suit property would let her enjoy the fruits of her labour and cater for her medical expenses noting that she is elderly and in her Eighties.
5. The Interested Party in his replying affidavit dated 14<sup>th</sup> July 2021 is supporting the application.
6. The Plaintiff in his replying affidavit dated 27<sup>th</sup> October 2021 contested the application stating that it should be dismissed because the court on 1<sup>st</sup> October 2018 directed that the suit property should not be sold or transferred until the Applicant/ Defendant deposited in court Kshs. 7,058,197.25 which was the assessed value of the developments of the suit property. He stated that court arrived at the amount after taking into consideration valuation reports submitted by the Plaintiff and Defendant of Kshs. 10,594,394.50 and Kshs. 3,522,000 respectively. Adding that the Defendant had not presented any new evidence to demonstrate how the court's assessment was erroneous or prejudicial to her. He also stated that he had never denied the Defendant or her agents access to the suit premises.

#### **Defendant/ Applicant's Submissions**

7. It was submitted for the Applicant that Order 45 Rule 1(a) *Civil Procedure Rules* espoused on review of judgement stating that the court's assessed sum of Kshs. 7,058,197.25 was arrived at erroneously and it would be imperative that the court appoints an independent valuer to establish the true value of the property and file a report. Reference was made to the case of *Isaak Kariuki Kamwitha & Anor vs Joseph Muriithi Ndegwa* [2019] eKLR which allowed a review application for a fresh valuation report.
8. It was further submitted that the prayer for eviction was necessary because the Plaintiff was sabotaging efforts to sell the suit property which process would enable her to pay the Plaintiff the amount of the developments. Reference was made to the case of *Leonard Brandenburg vs Ann Atemo Makoba* [2014] eKLR.

#### **Plaintiff/Respondent's Submissions**

9. It was submitted for the Plaintiff/Respondent that Defendant had not proven any reasonable grounds for review as was outlined in the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR which held that ...The rules restrict the grounds for review... discovery of new and important matter or evidence... on account of some mistake or error apparent on the face of the record...for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay...
10. It was also submitted that the judgement dated 1<sup>st</sup> October 2018 clearly explained the manner in which the amount of Kshs. 7,058,197.25 had been arrived at. Plaintiff contended that the Defendant had not demonstrated the error made by the court that would be highly prejudicial to her. Adding that the Defendant had an opportunity to cross examine on the Plaintiff's valuation report. It was therefore



an abuse of the Court process to bring such issues three years after the judgement was passed and if at all the Defendant had been aggrieved, then she ought to have appealed the judgement and not seek a review.

11. While still making reference to the Advocates Disciplinary Tribunal case (supra) counsel highlighted that the court held: If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act.
12. On the issue of eviction orders, it was submitted that the Judgement dated 1<sup>st</sup> October 2018 stipulated that for the Defendant to sell the suit property, the first offer should be given to the Plaintiff and if that was not possible, the defendant was at liberty to proceed to deal with the suit property as she desires after depositing Kshs. Kshs. 7,058,197.25 in court. Therefore the eviction prayer should not be sustained.
13. It was pointed out that the Defendant sat on her rights for a period of over three years since the judgement was passed without reasonable explanation. As such, the prayers sought would be highly prejudicial to the Plaintiff if granted and should be dismissed with costs and the judgement dated 1<sup>st</sup> October 2018 maintained.

### **Analysis and Determination**

14. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence and finds that the issue for determination is; Whether the prayer for review on valuation assessment and eviction of the plaintiff should be granted to the defendant.
15. As submitted by both parties, Order 45, Rule 1 of the Civil Procedure Rules 2010 provides for the application for review of decree or order:

“ Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred or: 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...”
16. The Applicant/Defendant stated that the amount of Kshs. 7,058,197.25 assessed by Court in the judgement dated 1<sup>st</sup> October 2018 was arrived at erroneously, the Plaintiff's valuation having been grossly inflated. The Applicant did not adduce evidence of the said mistake.
17. This court also notes (and as submitted by the Plaintiff) that the judgement dated 1<sup>st</sup> October 2018 at paragraphs 34 and 35 explains how the amount of Ksh. 7, 058,197 was arrived at. The court, while considering the valuation report of the plaintiff containing the sum of Ksh.10,594,394 against the valuation report of the defendant containing the sum of Ksh. 3,522,000 stated as follows;

“ 35. ... Doing the best that the Court would do when confronted with sharply contrasting figures such as the above figures, I would assess the fair estimate of



costs of the developments at an average of the two figures. This translates to Kshs. 7,058,197.25...”

18. It is trite law that litigation must come to an end and once a court has adjudged a matter, it becomes *functus officio* although it retains residual jurisdiction to reopen cases on very limited circumstances. The doctrine of *functus officio* is discussed at length in the Supreme Court decision of *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* [2013] eKLR:

“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.....A court is *functus* when it has performed all its duties in a particular case.....Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”.

19. Therefore, the question whether the applicant has established the threshold for review of the said judgement has been answered by the Court of Appeal case of *Kamau James Gitutho & 3 others v Multiple Icd (K) Limited & another* [2019] eKLR in the following words:

“... As stated in the opening paragraphs of this ruling, the residual jurisdiction of this Court to re-open its own decision is exercised with caution and only in exceptional cases. It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. In other words, the following must be demonstrated:

- 1) The decision in issue has occasioned injustice or a miscarriage of justice; and
- 2) The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and
- 3) No appeal lies against in the decision in issue. (Emphasis own)”

20. Guided by the above case law, I find that the issue of assessment was clearly adjudged in the judgement dated 1<sup>st</sup> October 2018 as highlighted in the relevant paragraphs. There is no mistake or error on the face of the record. Therefore, the Defendant’s prayer for review is akin to asking this court to act as an appeal court, hence the prayer for review is not merited.
21. On the issue of eviction of the Plaintiff, again I find that the judgment dated 1<sup>st</sup> October 2018 was very clear on its disposal orders. In the event that clause (b) of the judgment doesn’t take place (sale of the suit premises to the plaintiff), then the amount of sh. 7,058,197 is to be deposited in court to pave way for the sale of the suit premises to other persons.
22. In the final analysis, the application dated 25.3.2021 is dismissed. No orders as to costs, considering that the protagonists are close family members.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF APRIL, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**



In the presence of:-

Owade for the Plaintiff/Respondent

Court Assistant: Eddel

