



**Isalamba v Muyonga & 4 others (Environment & Land Case  
94 of 2016) [2022] KEELC 2385 (KLR) (28 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2385 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 94 OF 2016  
DO OHUNGO, J  
JUNE 28, 2022**

**BETWEEN**

**LINUS SHIKANGA ISALAMBA ..... PLAINTIFF**

**AND**

**HENRY MUYONGA ..... 1<sup>ST</sup> DEFENDANT**

**JANE AYUMA ISHILINJI ..... 2<sup>ND</sup> DEFENDANT**

**KIZITO KONJI ..... 3<sup>RD</sup> DEFENDANT**

**BONFACE AMUKANGA ..... 4<sup>TH</sup> DEFENDANT**

**ANTONY ISHILINJI ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on May 14, 2019. The defendants' counterclaim was dismissed and judgment entered in favour of the plaintiff as follows:
  1. Permanent injunction restraining the defendants herein, their servants, agents, employees and any person acting on their behalf from interfering with the plaintiff's peaceful occupation of land parcel registration number Kakamega/shitochi/1886.
  2. The defendants are to vacate the suit land parcel registration number Kakamega/shitochi/1886 within the next six months from the date of this judgement and in default eviction order to issue.
  3. Costs to the plaintiff.
2. Subsequently, on December 19, 2019, following an application by the plaintiff, the court ordered the police to provide security during enforcement of the eviction order.



3. The defendants later filed Notice of Motion dated September 20, 2021, which is the subject of this ruling. The following orders are sought in the application:
  1. That the honourable court be pleased to grant the firm of Momanyi Manyoni and Company advocates leave to act for the defendants/applicants in the place of the firm of J.J. Mukavale and company advocates.
  2. That the honourable court be pleased to review its judgment delivered on the 14th day of May 2019 on the ground that the defendant/applicants have found new evidence which was not within their reach during the hearing of the suit which will make the court to reach a different finding if the same is considered by the Honourable court.
  3. That the honourable court be pleased to re-open the defence case and allow the defendants/applicants to adduce the new evidence in their possession before the court writes a fresh judgment.
  4. That the costs of this application be provided for.
4. The application is supported by an affidavit sworn by the first defendant. He deposed that judgment was entered after hearing of both sides and that the defendants' counterclaim was dismissed because they were unable to produce the agreement through which the original buyer purchased a portion of land from the defendants' father. That the agreement was kept by their late father and that they didn't trace it during the hearing. He added that the agreement confirms that the original buyer only purchased  $\frac{1}{4}$  of an acre and that the defendants' family stands to lose  $\frac{3}{4}$  of an acre due to failure to produce the agreement.
5. The plaintiff opposed the application through grounds of opposition in which he contended that the application offends Order 45 rule 2 of the *Civil Procedure Rules*, that the application has not been timeously brought, that the applicant does not have locus to present the application since the first and second defendants are deceased, that the application is an afterthought meant to keep the plaintiff from the fruits of his judgement, that the defendants' case was heard and closed and the issue of an agreement only came about at the cross examination, that reopening the case shall cause an injustice to the plaintiff who has wholly executed the decree and the application therefore is overtaken by events, that the application is an abuse of court's process and ought to be struck out with costs.
6. The application was canvassed through written submissions. Both sides duly filed and exchanged submissions. The applicants argued that if the court had a chance to look at the agreement, it would have come to a different conclusion. On his part, the plaintiff argued that the applicants' advocate has not complied with Order 3 rule 9A of the *Civil Procedure Rules*, that the applicants simply want to introduce new evidence, that there has been an inordinate delay of three years in bringing the application and that re-opening the case will cause prejudice to the plaintiff since the decree has been enforced.
7. I have considered the application, the affidavit in support, grounds of opposition and the submissions. The only issue that arises for determination is whether the application is merited.
8. The law relating to review is found at section 80 of the *Civil Procedure Act* which provides:

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.
9. Order 45 Rule 1 of the *Civil Procedure Rules* makes further provisions on review as follows:  
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.
10. An applicant seeking review on the basis of discovery of new evidence which needs to show that he could not produce the evidence after the exercise of due diligence. He further must bring the application without unreasonable delay.
11. The record shows that judgment was delivered on May 14, 2019 in the presence of defence counsel. The judgment required the defendants to vacate within six months, failure to which an eviction order would issue. It seems that they did not vacate and as a result, on 19<sup>th</sup> December 2019, the court ordered the police to provide security during enforcement of the eviction order. A litigant who is faced with an eviction order within six months cannot possibly bring an application to review the judgment two years and four months later. Such a delay is unreasonable. In the present application, the applicants have not offered any explanation for the delay. They have not disclosed at what date they found the agreement. The decree having been executed, I agree with the plaintiff that re-opening the case will be prejudicial. Equity does not aid the indolent.
12. In view of the foregoing, I find no merit in Notice of Motion dated September 20, 2021. I dismiss the application with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF JUNE 2022.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

**Ms Andia for the plaintiff**

**The 1<sup>st</sup> defendant**

**No appearance for the 2<sup>nd</sup> to 5<sup>th</sup> defendants**

**Court Assistant: E. Juma**

