



**Mudigo v Agu & another (Environment & Land Case
20 of 2022) [2025] KEELC 3173 (KLR) (7 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 20 OF 2022
GMA ONGONDO, J
APRIL 7, 2025**

BETWEEN

BARNABAS MBIWA MUDIGO PLAINTIFF

AND

DENNIS KIPTANUI AGU 1ST DEFENDANT

ANTHONY KIMAGUT AGUI 2ND DEFENDANT

RULING

1. The instant ruling is in respect of an application by way of Notice of Motion dated 7th June 2024 by the plaintiff/applicant through Apollo Ambutsi and Company Advocates for orders infra;
 - a. Spent
 - b. That this Honourable Court be pleased to vary the order given in its judgment delivered on 14th May 2020 stating that the defendants do vacate L. R. No. Nandi/Koibarak "A"/667, the suit land herein, within 90 days from the date of judgment or be evicted from the same upon expiry of the said period of time.
 - c. That this honourable court be pleased to review and vary the same with orders directing the Officer Commanding Station, Kobujoi to evict the defendants from the suit land.
 - d. That this honourable court be pleased to direct the Officer Commanding Station Kobujoi to assist in enforcement of the court order herein.
 - e. That costs of this application be provided for.
2. The application is founded upon nine grounds indicated on the face thereof as well as a Supporting Affidavit of eleven paragraphs sworn by the applicant on even date alongside a copy of the judgment and decree annexed thereto and marked as BMMI.



3. In summary, it is the lamentation of the applicant that judgment was entered in his favour on 14th May 2020 in this suit. That in the said judgment, the court directed the defendants to vacate the suit land within 90 days from the date of judgment or be evicted from the same upon expiry of the said period of time. That despite being aware of the said decree and judgment, the defendants/respondents have refused to vacate the suit land thereby necessitating the instant application. That the respondents will not suffer any prejudice if the orders sought herein are granted.
4. The application was opposed by way of a Replying affidavit sworn on 23rd October 2024 by Dennis Kiptanui Agui, the 1st respondent herein. He deponed that being aggrieved by the decision of the trial court, he lodged an appeal at the Court of Appeal and the same is pending determination. That thus, the same will be rendered futile should the instant application be allowed.
5. Vide a Further Affidavit sworn on 10th February 2025, the applicant averred that he had not been served with the appeal allegedly lodged at the Court of Appeal. That no order of stay has been issued by this Honourable Court or any superior court. That the proper procedure for eviction was followed as the Respondents were served with the eviction notice prior to filing the Application herein. That further, the Respondents have not demonstrated the prejudice they will suffer if the instant Application is allowed. That the Respondents' actions herein are an afterthought, a delay tactic and are meant to delay the applicant from enjoying the fruits of the judgement.
6. The respondents' counsel filed a supplementary affidavit sworn on 25th February 2025 by the 1st respondent who deponed that the ongoing appeal between the parties herein, namely Eldoret Court of Appeal Suit No. E036 of 2023, was filed and served upon the applicant. That his counsel lodged an application dated 12th July 2024 at the Court of Appeal in Eldoret, seeking stay of execution and/or proceedings in this suit pending the outcome of the appeal. That the instant application lacks merit since the applicant is the respondents' uncle.
7. Hearing of the application proceeded by way of written submissions pursuant to this court's directions of 28th January 2025. Notably, the applicant's counsel did not file any submissions herein.
8. The respondents' Counsel, M/s Cheruiyot Melly and Associates Advocates, filed submissions dated 25th February 2025. Counsel relied on Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya as read with Order 45 Rule 1 of the Civil Procedure Rules, 2010 and submitted that this application does not meet the threshold for grant of an order of review. That failure by the trial court to issue a timeline within which the respondents ought to vacate the suit land is not an error apparent on the face of the record. That instead of lodging the instant application, the applicant ought to have filed an application for enforcement of the trial court's decree for determination by the Deputy Registrar.
9. Furthermore, counsel submitted that the respondents have not been issued with a three-months eviction notice as stipulated under the law. That the application is unmerited and ought to fail with costs to the respondents. To reinforce the submissions, reliance was placed on various authoritative pronouncements including *Mitu-Bell Welfare Society vs Attorney General & 2 others* (2013) eKLR and *Atik Mohamed Omar Atik & 3 others vs Joseph Katana & Another* (2019) eKLR.
10. I have taken into account the application, the response thereto and the respondents' submissions. The principal issue for determination boils down to whether the applicant has met the threshold for grant of a review order as well as the other orders sought in the application.
11. Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, section provides that:
 80. 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 hereby 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.
- 12. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides that:
 - (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.
- 13. It is my considered view that the present application does not disclose any new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made.
- 14. Further, the applicant did not show that there is some mistake or error apparent on the face of the record to warrant a review.
- 15. Moreover, there is no other sufficient reason advanced herein to necessitate a review of the court's judgment delivered on 14th May 2020.
- 16. I also note that the respondents' counsel lodged an application dated 12th July 2024 at the Court of Appeal in Eldoret, seeking stay of execution and/or proceedings in this suit pending the outcome of the appeal. Nonetheless, no orders of stay have been issued therein.
- 17. In the premises, the instant application lacks merit.
- 18. Afortiori, the application be and is hereby dismissed with costs to the respondents.
- 19. It is so ordered.

DATED AND DELIVERED AT KAPSABET THIS 7TH DAY OF APRIL 2025.

G. M. A ONG'ONDO

JUDGE

Present

- 1. Mr. Ambutsi, Learned Counsel for the applicant
- 2. Mr. Biwott, Learned Counsel for the respondents
- 3. Walter, Court Assistant

