



**Tina Holdings Limited v Housing Finance Company of Kenya (HFCK) & another
(Environment & Land Case 206 of 2016) [2022] KEELC 3752 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 206 OF 2016
CA OCHIENG, J
JUNE 9, 2022**

BETWEEN

TINA HOLDINGS LIMITED PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA (HFCK) 1ST DEFENDANT

HOTEL CONNECTIONS LIMITED 2ND DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated July 9, 2021 brought pursuant to sections 1A, 1B, 3A & 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*. The plaintiff seeks the following orders:
 1. Spent
 2. That the court reviews its directions/orders given on February 21, 2017 relating to transfer of Nairobi ELC files no 9 of 2017 (now Machakos ELC 115 of 2017) and ELC 10 of 2016 (now Machakos ELC 113 of 2017) to Machakos ELC and directs that the 2 files be transferred back to Nairobi ELC for more cost-efficient adjudication.
 3. That the court further directs that Machakos ELC 206 of 2016 be transferred to Nairobi ELC for more efficient adjudication together with Nairobi ELC no 10 of 2016 and ELC no 9 of 2017.
 4. That the court directs that there be a stay of proceedings in ELC 206 of 2016 while the ELC 113 of 2017 (formerly Nairobi ELC 10 of 2016) and ELC 115 of 2017 (formerly Nairobi ELC 9 of 2017) are transferred to Nairobi for hearing and determination.
 5. That costs of the application be in the cause.



2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Titus Kitonga. The applicant contends that the defendant herein filed an application dated February 6, 2017 seeking to stay this suit pending the hearing and determination of another suit being Nairobi ELC no 10 of 2016. Further, on February 16, 2017, Justice E Obaga of Milimani ELC ordered that Machakos ELC 206 of 2016 be transferred to Nairobi and a mention was slotted for March 9, 2017. It avers that on February 21, 2017, the court ordered that Nairobi ELC no 9 of 2017 and 10 of 2016 should be transferred to Machakos ELC for hearing and final determination. It states that there are two separate conflicting directions of different High Courts and the plaintiff seeks this court's intervention to review and or vary its directions. It explains that on March 22, 2017, the court confirmed that the Nairobi ELC no 9 of 2017 and Nairobi ELC no 10 of 2016 had already been transferred to Machakos as earlier directed and given Machakos reference numbers ELC 115 of 2017 and ELC 113 of 2017 respectively and that the Machakos ELC 206 of 2016 was to be heard alongside these two files. Further, that the said two files have never proceeded and hence the plaintiff seeks a review of the orders issued on February 21, 2017 and for the court to direct that the two files be transferred back to Nairobi ELC for hearing and determination. It insists ELC 115 of 2017 concerns issues relating to land reference number 14968/173-Muthithi Gardens Kiambu which is in the jurisdiction of Nairobi ELC and not Machakos ELC. Further, the deponent, defendants as well as the advocates are all based in Nairobi and it would be cost effective to transfer the said files back to Nairobi ELC where they were initially filed for expeditious hearing including determination. It confirms that ELC 113 of 2017 (formerly Nairobi ELC 10 of 2016) relates to a contractual dispute affecting two suit properties being reference numbers 14968/173 – Muthithi Gardens in Kiambu but administered in Nairobi and Athi River/Athi River Block 1/87 which is in Machakos county. Further, the advocates of the interested party also has an office in Nairobi and hence it would be cost efficient if the matters were heard and determined in Nairobi. It reiterates that on account of the number of ELC judges at each court station and workload issues of various ELC courts, it believes that parties would be heard faster in Nairobi where there are more ELC judges as opposed to Machakos where there is only one ELC judge. The applicant in the alternative sought a stay of proceedings in ELC 206 of 2016 pending the hearing and determination of ELC 113 of 2017 (formerly Nairobi ELC 10 of 2016) in Nairobi, particularly because of the Athi River property which is the suit property in the Machakos ELC 206 of 2016 and one of the suit properties in ELC 113 of 2017. Further, that if ELC 113 of 2017 (formerly Nairobi ELC no 10 of 2016) were to be heard and determined, the results of this would substantially determine the direction and way forward for ELC 206 of 2016 as well as ELC 115 of 2017 (formerly Nairobi ELC 9 of 2017) and hence lead to a more expeditious including cost-efficient disposal of the suits for the benefit of both parties. It avers that the defendants and the interested party shall not be prejudiced at all if the orders sought are granted.
3. The 2nd defendant opposed the instant application and filed Grounds of Opposition where it states that the application is without any merits both on facts and the applicable law. Further, that it is frivolous, vexatious and scandalous and an abuse of the process of the court hence bad in law. It contends that the application is merely intended to frustrate, obstruct or delay the course of justice in the 2nd defendant's enjoyment of quiet possession, the use and benefit of their parcels of land. Further, it is intended to delay and/or derail the expeditious hearing of the case. It avers that the instant application is brought in bad faith; grossly misconceived and ought to be dismissed with costs. It explains that contrary to the plaintiff's averments in the Supporting Affidavit, there are no conflicting directions of different courts and furthermore the requisite directions on the three (3) files were issued on March 9, 2017. Further, the application seeks to review orders of this court but brought under wrong provisions of the law. It reiterates that application has been brought nearly 5 years after delivery of the ruling/directions of the court on March 9, 2017 and thus it is not made in good faith and suffers from inordinate delay. Further, it is defective in form and substance as the order/decreed sought to be impugned has not been



exhibited nor has the applicant even bothered at the very least to annex the proceedings leading to the orders of March 9, 2021. It reaffirms that the reason given for review do not qualify as “an apparent error” as envisaged in order 45 rule 1 of the Civil Procedure Rules. Further, it is premised on falsehoods and utter deception as the applicant deliberately fails to make disclosure of crucial and pertinent facts which led to the directions of the court and especially after previously having been cited for misleading the court on February 9, 2017. It insists the applicant has concealed material facts specifically court proceedings of March 9, 2017 before Hon Justice Obaga wherein the applicant was represented by counsel and the court after hearing the parties, made its considered directions regarding the files herein. Further, the prayer for stay is speculative, has no clean legal basis and thus the same should not issue. It insists there is evidence before the court that the suit property, Land Title Number Athi River/Athi River Block 1/87, is in Makutano junction, near Machakos town which is within the jurisdiction of this honourable court.

4. The application was canvassed by way of written submissions.

Analysis and determination

5. Upon consideration of Notice of Motion application dated July 9, 2021 including the Supporting Affidavit, Grounds of Opposition and rivaling submissions, at this juncture the following are the issues for determination: Whether this court should review/vary its orders issued on February 21, 2017 and transfer Machakos ELC 115 of 2017 and Machakos ELC 113 of 2017 to Nairobi ELC for hearing and final determination. Whether the court should stay proceedings in ELC 206 of 2016 while the ELC 113 of 2017 and ELC 115 of 2017 are transferred to Nairobi for hearing and determination.
6. The plaintiff in its submissions reiterated its averments as per the Supporting Affidavit and insists it was not aware of the defendant’s application dated February 6, 2017 including the court directions/orders issued on February 21, 2017. It further submits that there are errors apparent on the face of record as the two courts gave conflicting orders. Further, mistake to counsel ought not to be visited upon it. It further submits that there will be efficient, affordable and expeditious disposal of the parties’ suits if the files are transferred to Nairobi. To buttress its averments, it relied on the following decisions: *Omwoyo vs African Highlands & Produce Co Ltd* (2002) 1KLR; *Belinda Muras & 6 Others v Amos Wainaina* (1978) eKLR; *Philip Chemwolo & Another v Augustine Kubede* (1982 – 88) KLR 103 and *Benjob Amalgamated Limited & Another v Kenya Commercial Bank Limited* (2014) eKLR.
7. The 2nd defendant in its submissions relied on the averments in the Grounds of Opposition and insists there are no conflicting directions of different court and that the requisite directions on the three files were issued on March 9, 2017. It submits that there is no basis for the court to grant orders to stay proceedings herein. Further, there is no basis for review of the court’s directions. It insists the instant application is defective in substance and form as there is no order/decreed exhibited. It further submits that the conduct of the applicant is inexcusable as the application has been brought after an inordinate delay. It reiterates that this court has jurisdiction to hear the cases. To support its arguments, it relied on the following decisions: *Re estate of Philip Nthenge Mukonyo (Deceased)* (2018) eKLR and *Anthony Gachara Ayub V Francis Mahinda Thinwa* (2014) eKLR.
8. As to whether this court should review/vary its orders issued on February 21, 2017 and transfer Machakos ELC 115 of 2017 and Machakos ELC 113 of 2017 to Nairobi ELC for hearing and final determination.
9. On review of the orders sought, I wish to make reference to section 80 of the *Civil Procedure Act* and order 45 rule 1(1) of the Civil Procedure Rules.



10. Section 80 of the *Civil Procedure Act* provides that:-

“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.”

11. While order 45, rule 1(1) of the Civil Procedure Rules stipulates thus:

“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.”

12. In this instance the applicant seeks for review of the order issued on February 21, 2017 where the court directed that Nairobi ELC files no 9 of 2017 (now Machakos ELC 115 of 2017) and ELC 10 of 2016 (now Machakos ELC 113 of 2017) were to be transferred to Machakos ELC for hearing and final determination. The applicant seeks for the said files to be transferred back to Nairobi ELC and claims it will be cost-efficient adjudication. Its main reason for seeking review is that the Nairobi ELC and Machakos ELC made conflicting orders in respect to the two files.

13. In the case of *Muyodi V Industrial and Commercial Development Corporation and Another* EALR (2006) EA 243, the Court of Appeal while dealing with issues of review held as follows:-

“For an application for review under order 45 rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason.”

14. While in the case of *Grace Akinyi Vs Gladys Obiri & Another* (2016) eKLR in which the court favourably made reference to the case of *National Bank of Kenya Vs Ndungu Njau*, wherein the Court of Appeal stated that a court can grant a review to correct an apparent error or omission which is self-evident and should not require elaborate argument.

15. I note the instant application for review was brought after an inordinate delay. Upon perusal of the court record, I note on February 21, 2017, the court after being informed of Justice Obaga’s Order of February 16, 2017, made a decision by ordering for the transfer of the two aforementioned files from Nairobi ELC to Machakos ELC for hearing and final determination, noting that the suit land was in Machakos County. To my mind, I am unable to find if there was an error apparent on the face of record as envisaged in order 45 rule 1 of the Civil Procedure Rules. Further, except for the claim that the plaintiff including the respective advocates are residents of Nairobi County and that there is only one ELC judge in Machakos which is not the position, the applicant has not disputed the fact that one of the suit lands is situated in Machakos County. It is my considered view that there are no there are no conflicting directions of different court as claimed by the applicant and furthermore the



requisite directions on the three (3) files were issued on March 9, 2017. This court takes judicial notice of the fact that the applicant seeks to select the court that can deal with its matter and has failed to appreciate the legal tenets that confer jurisdiction to a court. Based on the facts before me while relying on the legal provisions cited above as well as associating myself with the decisions quoted, I find that the applicant has failed to meet the threshold set for review/variation of the orders issued on February 21, 2017 and will decline to transfer Nairobi ELC files no 9 of 2017(now Machakos ELC 115 of 2017) and ELC 10 of 2016 (now Machakos ELC 113 of 2017)back to Nairobi ELC. Further, I find this court has jurisdiction to hear and determine these matters. Since I have declined to grant the application to transfer the two abovementioned files to Nairobi, I will also decline to stay proceedings in ELC 2016 of 2016 while the ELC 113 of 2017 and ELC 115 of 2017 are transferred to Nairobi for hearing and determination.

16. It is against the foregoing that I find the Notice of Motion dated July 9, 2021 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF JUNE, 2022

CHRISTINE OCHIENG
JUDGE

