



**Tenai v Kirongo (Environment & Land Case 99 of 2021)
[2022] KEELC 3483 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 99 OF 2021**

MN MWANYALE, J

JULY 29, 2022

BETWEEN

ESTHER TENAI APPLICANT

AND

ROSALIA CHEMATIA KIRONGO RESPONDENT

RULING

1. Before me is the notice of motion dated May 27, 2022 brought under article 50,159 (2) (b) and (d) and section 80 of the [Civil Procedure Act](#), order 42 rule 6, order 45 rule 1 and order 51 rules 1 and 3 of the [Civil Procedure Rules](#), 2010 and all other enabling provisions of the law. The applicant is seeking the following orders:
 1. Spent
 2. Spent
 3. That, this honorable court be pleased to review its orders issued on the 26th day of May 2022 with a view of varying and/or setting them aside.
 4. That, upon the grant of prayer 3 above the plaintiff's submissions dated the 28th day of March 2022 be deemed duly filed and the same be considered as part of the record.
 5. Any other orders as the court may deem fit in the interest of justice.
 6. Costs of this application be provided for.
2. The applicant has set out 16 grounds on the face of the application. The said application is supported by an affidavit by Esther Tenai sworn on May 27, 2022. In the affidavit, the applicant avers that this honorable court delivered a ruling on May 26, 2022 where upon the applicant was found to be in



- contempt of court and/or be committed to civil jail. That this was necessitated by the applicant's failure to file submissions on the application for contempt rendering the said application unchallenged.
3. The applicant further avers that prior to delivery of ruling, her submission had been filed electronically by her advocates on record on April 1, 2022 which submissions vehemently opposed the application for contempt.
 4. The applicant consequently seeks this court's intervention to stay its orders issued on May 26, 2022 with a view to review, vary and/or set it aside.
 5. To oppose the motion, the respondent filed replying affidavit dated June 9, 2022 and sworn by Rosalia Chematia Kirongo. The respondent contends that the application is a non-starter, full of falsehoods and half-truths, and abuse of the court process and ought to be dismissed with costs. She further contends that the court gave directions as to filing of submissions and set out specific timelines within which each party was to comply. That the Applicant herein filed their submissions outside the timelines expressed by this court including issuance of a receipt upon payment of requisite fees for a specific document. That the applicant has not exhibited any receipt in proof of payment of filing fees for their submissions allegedly filed on April 1, 2022.
 6. The respondent argues that submissions do not form part of evidence on which a court decides a case rather they are parties marketing language to persuade courts to rule in their favor. As a result, the applicant has failed to demonstrate any grounds for this court to interfere with its orders issued on May 26, 2022. That the application ought to be dismissed thereof.
 7. In response to the replying affidavit, the applicant filed supplementary affidavit dated June 13, 2022 reiterating the contents in the supporting affidavit which contents have been summarized herein and to avoid repetition the same shall not be recapped.
 8. Directions were given that the instant application be heard in open court with Counsels making oral submissions in support or against the application.
 9. Counsel for the Applicant made arguments in support of the application for review of the court's ruling delivered on May 26, 2022. Counsel reiterated the contents in the application particularly grounds in support as well as supporting affidavit. Reliance was made on section 80 of *Civil Procedure Act* and order 45 of *Civil Procedure Rules*.
 10. On July 18, 2022 this court directed that a Surveyor's report be prepared as to the status of the suit land as well as occupation. The same was filed on July 27, 2022 and parties invited to submit on whether there was eviction as previously alleged by the respondent counsel for the applicant, Mr Melly extensively submitted on the report stating that his client was in occupation of portion B, C, and D. However, the son to the respondent, Barnabas Arusei is currently utilizing the said portions.
 11. Counsel for the respondent, Mr. Lagat equally made oral arguments against the application stating that the applicant had not met the threshold to warrant review of the orders of the court made on May 26, 2022. Counsel reiterated the averments in replying affidavit sworn by the respondent herein. Reliance was made in the case of *Daniel Toroitich arap Moi vs Mwangi Stephen Muereithi* (2014) eKLR. Counsel further submitted that the events leading to the application for contempt of court have not been addressed therein.

Analysis and Determination: -

12. I have considered the application dated May 27, 2022, the grounds set out on the face of the motion, the facts deponed in the affidavits in support of the application, replying affidavit as well as oral submissions



by Counsels herein. The core issue for determination is whether the applicant has met the threshold to warrant review of this court's ruling delivered on May 26, 2022.

13. The applicable provision of the law addressing the question of review of a court's decision are order 45 rule (1) of the [Civil Procedure Rules](#) and section 80 of the [Civil Procedure Act](#).

14. Order 45 rule 1 (1) of the [Civil Procedure Rules](#) provided this: -

- “ 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 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.”

15. Section 80 of the [Civil Procedure Act](#) provides as follows: -

- “ Any person who considers himself aggrieved: -
- a) By a decree or order from which an appeal is allowed by the 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.”

16. The following are principles/grounds upon which an order for review can be granted from the foregoing provisions.

- a) The discovery of new and important matter or evidence, or
- b) Some mistake or error apparent on the face of the record, or
- c) Any other sufficient reason

17. The Supreme Court of India in the case of *Afit Kumar Rath vs State of Orisa* and others as cited in the case of [Khalif Sheik Adan vs AG](#) (2019) eKLR set out these grounds for review as follows: -

“The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was unto within his knowledge to could be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only, for correction of a patent error of law which states in the face without any elaborate argument



being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” used in order 47 rule 1 means a reason sufficiently analogous to those specified in the rule.”

18. On the merits of the motion, it is clear the same rides on the ground that new and important evidence has been discovered being the applicant’s submissions filed on April 1, 2022.
19. I have perused through the submissions annexed to the instant application and noted that no receipt had been provided to prove that the said submissions was paid for the judiciary before filing in the court file. The court takes judicial notice of the ordinary course of events involved in filing of pleadings in court which entails assessment of a document, an invoice generated by the judiciary registry staff, the same is paid for the party then a receipt is issued in proof of payment of the filing fees. Section 107 of the *Evidence Act* asserts that he who alleges must prove. The onus to prove filing of submissions was on the applicant who in my view has failed to prove that indeed submissions were filed on April 1, 2022 by failure to exhibit a receipt generated by judiciary.
20. Consequently this ground falls.
21. However, this court suo moto directed that a survey be conducted and a surveyor’s report be filed in respect to the status of suit property and who is in occupation. Indeed this was done and a report filed on July 27, 2022. Parties were invited to submit on it through their counsels.
22. I have perused the said report pendency of the contempt of court application the same was and is still being utilized by the defendant/respondent. This fact as entailed, in the Survey Report was not controverted by respondent or their counsel and in fact confined the same.
23. I am therefore satisfied that the information contained in the survey report filed by Surveyor on May 27, 2022 pursuant to directions of this court confirm that it is indeed the defendant/respondent’s son who has been utilizing the disputed, portion of the property and has not been disposed. In my considered opinion this information qualifies under the principle “any other sufficient reason” upon which this court can review its orders.
24. In the upshot, I am of the view that the applicant herein was not in contempt of court orders of status quo since she is equally in possession of her portion of the suit land while the defendant/respondent is in possession of the other portion. This satisfies the conditions for grant of orders sought under section 80 of the *Civil Procedure Act* as read with order 45 rule 1 of *Civil Procedure Rules*.
25. Consequently I allow prayer 3 in the application and hereby order that the orders issued on May 26, 2022 with all consequential orders be and is hereby set aside and/or reviewed.
26. It is so ordered.

DATED AT KAPSABET THIS 29TH DAY OF JULY 2022.

HON. M. N. MWANYALE,

JUDGE.

In the presence of;

Mr. Melly for the Plaintiff/Applicant

Mr. Choge holding brief for Langat for Defendant/Respondent

