



REPUBLIC OF KENYA



**Kamula v Muinde & another (Environment and Land Appeal
18 of 2019) [2022] KEELC 3378 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3378 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 18 OF 2019**

TW MURIGI, J

JULY 27, 2022

BETWEEN

FREDRICK KAMULA APPLICANT

AND

KAMBUA WILFRED MUINDE 1ST RESPONDENT

MUTUA MUINDE 2ND RESPONDENT

RULING

1. Before this Court for determination is a Notice of Motion dated 27th of October 2021 brought pursuant to the provisions of Article 159 (2) of *the Constitution*, Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 2(1) & 2(2) of the Civil Procedure Rules and all other enabling provisions of the law where the Applicant seeks for the following orders: -
 1. Spent.
 2. The Honourable Court be pleased to review the Judgment delivered on 29th of January 2021 as follows: -
 - a. That parcel Nos. 128, 129 and 144 be changed to parcel Nos. 4164, 4168 and 4145.
 - b. That the name Wilfred Mukivu Muinde be deleted on the register and replaced with Fredrick Kamula Mukula.
 3. The cost of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Dr. Benjamin Munywoki Musau Advocate sworn on the even date.
3. A summary of the grounds and the averments is that the Court vide its judgment delivered on 29th of January 2021 declared that parcel numbers 128, 129 and 144 are exclusively owned by the Appellant.



Counsel averred that after the delivery of the judgment, the Applicant had discovered that the Ministry of Lands and Physical Planning had issued title deeds for the said parcels during the pendency of the trial. Counsel went on to state that upon the issuance of the title deeds, parcels numbers 128, 129 and 144 Wayani Settlement Scheme had changed to parcel numbers 4164, 4168 and 4145 which are still registered in the name of Wilfred Mukivu Muinde. Counsel contends that the Appellant cannot enjoy the fruits of his judgment unless the Court reviews the same. Counsel went on to state that the Respondents will not suffer any prejudice if the orders sought are granted.

4. Although duly served, the Respondents did not respond to the application.
5. The application was canvassed by way of written submissions.

The Applicant's Submissions

6. The Applicant's submissions were filed on 7th of December 2021.
7. Counsel for the Respondent identified the following issues for the Court's determination: -
 - i. Whether the Court should review the Judgment delivered on 29th January 2021.
 - ii. Who bears the costs of the application.
8. Counsel for the Applicant submitted that the Court upheld the Appellant's proprietary right to the suit property and that no appeal had been filed against the Court's decision. Counsel submitted that the application had met the criteria for the grant of an order for review since the Appellant had discovered new evidence that was not within his knowledge before the judgement was delivered. That upon following up with the Kibwezi Land Adjudication and Settlement Officer, the Makueni Lands Registry and the Makueni County Survey Office, the Appellant discovered that parcels Nos. 128, 129 and 144 had changed to parcels numbers 4164, 4168 and 4145. That owing to the changes, the Applicant was unable to execute the judgment. That despite being notified of the judgment of the Court, the Makueni County Survey Office and the Land Registrar had declined to issue the title deeds to the Appellant since the new parcels numbers are registered in the name of Wilfred Muinde Mukivu.
9. Counsel argued that it is in the interest of justice that the judgment is reviewed. To buttress his submissions Counsel placed reliance on: -
 1. Section 80 of the *Civil Procedure Act*.
 2. Order 45 Rule 1 of the Civil Procedure Rules.
 3. Francis Njoroge Vs Stephen Maina Kamore (2018) eKLR.
10. On the issue of costs, Counsel submitted that the Applicant was entitled to costs since he had continued to incur the same due to the fraudulent actions by the Respondents. Counsel placed reliance on Judicial Hints on Civil Procedure and on the case of *Cecilia Karuru Vs Barclays Bank of Kenya & Another* (2016) eKLR.

Analysis And Determination

11. Having considered the application and the submissions, I find that the main issue for determination is whether the judgment delivered on 29th of January 2021 should be reviewed.
12. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and on Order 45 Rule 1 of the Civil Procedure Rules.
13. 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 order, and the court make such order thereon as it thinks fit.
14. Order 45 Rule 1 of the Civil Procedure Rules provides that: -
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 the judgment to the court which passed the decree or made the order without unreasonable delay.
15. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjob Amalgamated Limited & Another Vs Kenya Commercial Bank Limited* (2014) eKLR where the Court held that: -
“In the High Court both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”
16. Similarly, in *Republic Vs Public Procurement Administrative Review Board & 2 Others* (2018) eKLR the Court held that: -
“Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”
17. It is apparent from the above provisions that for an Applicant to succeed in an application for review he must satisfy the following requirements;
1. Discovery of new and important matter or evidence which after the exercise of due diligence was not with the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.
 2. Existence of some mistake or error apparent on the face of the record.
 3. Any other sufficient reason.
 4. Application be made without unreasonable delay.
18. In the present case, the Applicant contends that there is discovery of new or important matter of evidence that the Applicant could not have placed before the Court before the judgment was delivered



on 29th of January 2021. The Applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter of evidence which was not within his knowledge or could not be produced at the time the decree was passed or the order made.

19. The Applicant stated that the Court vide its judgment delivered on 29th of January 2021 declared that land parcels number 128, 129 and 144 are exclusively owned by the Appellant. In this regard the Applicant annexed in his supporting affidavit a copy of the Court order issued on 19th of April 2021. The Applicant contends that suit parcels number 128, 129 and 144 which are registered in the name of the Respondent have since changed to parcels numbers 4164, 4168 and 4145 respectively. The Applicant annexed in his supporting affidavit a letter dated 25th of February 2021 by the Sub County Adjudication and Settlement Officer informing him of the above changes.
20. In the case of *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) Vs Kariuki Marega & Another* (2018) eKLR the Court of Appeal stated as follows;

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”
21. The Applicant stated that he had established that the parcel numbers had changed to new numbers. The judgment of Hon. Justice Mbogo dated 29th of January 2021 stated as follows;

“I will therefore allow the appeal and proceed to grant the following orders since the Appellant appears to have abandoned the other prayers in his amended plaint: -

 - a. That parcels 128, 129 and 144 are exclusively owned by the Appellant.
 - b. The costs of and incidental to this appeal to the Appellant.”
22. It is clear from the judgment that the Applicant was declared as the exclusive owner of the parcel numbers 128, 129 and 144. It is also clear from the letter dated 25th of February 2021 by the Sub County Adjudication and Settlement Officer that parcel numbers 128, 129 and 144 which are registered in the name of Wilfred Mukivu Muinde have since changed to parcel numbers 4164, 4168 and 4145. It is crystal clear that the Applicant became aware of this information after the Judgment was delivered. I am satisfied that the information contained in the letter from the Sub County Adjudication and Settlement Officer, Kibwezi Sub County dated 25th of February 2021 is a new and important matter or evidence which was not within the knowledge of the Applicant or could not be produced with the exercise of due diligence when the judgment and decree of this Honourable Court was passed.
23. In the end, I find that the Applicant has satisfied the conditions for the grant of the orders sought under Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules.
24. Consequently, the application dated 27th of October 2021 is allowed in the following terms: -
 - a. That parcels numbers 128, 129 and 144 be and are hereby changed to parcels numbers 4164, 41678 and 4145.
 - b. The name Wilfred Mukivu Muinde be deleted on the register and replaced with Fredrick Kamula.
 - c. Each party to bear its own costs.

HON. T. MURIGI
JUDGE



RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY, 2022.

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi

Ms. Munywoki for the Applicant.

