Njoki v Njuguna & 4 others (Environment & Land Case 276 of 2017) [2022] KEELC 2488 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2488 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 276 OF 2017

LN GACHERU, J

JULY 14, 2022

BETWEEN

ELIJAH NJUGUNA NJOKI ..... APPLICANT

AND

PETER MURIU NJUGUNA ..... 1ST RESPONDENT

STANLEY KARANJA NJOKI ..... 2ND RESPONDENT

GLADYS WANGUI NJOKI ..... 3RD RESPONDENT

REBECCA NYAMBURA NJOKI ..... 4TH RESPONDENT

AGNES NJERI KIRAGU ..... 5TH RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 13th May 2021, brought under Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*, the Plaintiff/ Applicant seeks for orders:

   a) That this Honourable Court be pleased to review and/or set aside the Judgment of Lady Justice Kemei delivered on 2nd May 2019;

   b) That this Honourable Court be pleased to admit as part of the record, the evidence of Joseph Mwangi, on oath and subject to cross examination;

   c) That this Honourable Court be pleased to admit as part of the Court record the evidence of Green Card for land parcel No. LOC 2/Gacharage/1148;

   d) That this Honourable Court be pleased to declare that the suit property,LOC 2/ Gacharage/1129,is a gift intervivos as it was given to the plaintiff during the lifetime of the deceased and therefore does not form part of the deceased's estate;

e) That this Honourable Court be pleased to declare the Plaintiff/Applicant the sole owner of LOC 2/Gacharage/ 1129;

f) That this Honourable Court be pleased to vacate the declaration that the Plaintiff/Applicant holds the suit property LOC 2/Gacharage/1129, in trust for himself and the Defendants in equal share;

g) That this Honourable Court be pleased to declare and Order the Defendants, their families, servants, assigns and agents/personal representatives to vacate the Plaintiff/ Applicant's suit property LOC 2/Gacharage/1129, together with all their properties there on;

h) That this Honourable Court be pleased to issue urgent and specific orders to the Officer Commanding Kamukabi Police Station to oversee compliance with the Court orders, and in defiance by the Order of this Court, the Defendants, their families, servants, assigns and agents/ personal representatives be forcibly evicted from Plaintiff/Applicant's suit property LOC / Gacharage/1129, together with all their properties there on;

i) That the Costs of the Application be awarded to the Plaintiff/Applicant.

2. The application was premise on the grounds that the Plaintiff/Applicant was aggrieved by the judgment from which no appeal has been preferred or allowed. That there is discovery of new and important evidence from a witness, Joseph Mwangi, and that the application has been brought in good faith without unreasonable delay.

3. The application is also grounded on the Supporting Affidavit of Elijah Njuguna Njoki, the Applicant herein, sworn on May 13, 2021. The Applicant affirms that there is new evidence that was not available prior to the judgment. That the new witness, one Joseph Mwangi, was previously the area Chief, where the suit property is located and settled a dispute over the suit property.

4. The 1st and 2nd Defendants/Respondents opposed the application through the Replying Affidavit of Stanley Karanja Njoki, sworn on 8th September 2021, in which the Defendants/Respondents avers that the application for stay/review was delayed by a period of 2 years and 1 month. He further affirms that the Plaintiff/Applicant has been pursuing an Appeal against the judgment and, that the Applicant filed an application for extension of time to file his Appeal, which rendered the application for review incompetent. The Respondent further poked holes in the Plaintiff/Applicant's claim stating that the purported evidence was not new and, that no viable explanation had been presented as to why the new witness was not summoned prior to judgment. Lastly, that the succession proceedings were within the Applicant's knowledge. Further that the review application is an appeal in disguise and pray that it be dismissed with costs.

5. The application was canvassed by way of written submissions, which, submissions have been duly considered. A summary is provided below; -

6. The Plaintiff/Applicant through Messrs. Wangui, Nkirote & Partners Advocates filed submissions dated 14th March 2022. He relied on various authorities to stake his claim that he had indeed received the suit property as a gift *inter vivos* from his grandfather. He also relied on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, which provide the grounds for review.

7. On whether the application for review is merited, the Applicant relied on the case of *Nasibwa Wakenya Moses v. University of Nairobi* (2019) eKLR wherein the court held as follows: -

> "Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They limit it to the following grounds; discovery of new and important

evidence, which after the exercise of due diligence, was not within the knowledge of the Applicant 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 recorded, or for any other sufficient reason and whatever grounds there is a requirement that the application is made without unreasonable delay."

8. On the issue of whether the Plaintiff/Applicant sought both a review and appeal, the Applicant relied on the case of *Mbuni Dry Cleaners Ltd v. George Mugo Kagondu* (2007) eKLR, in which it was held that an Appeal is only evidenced by the Memorandum of Appeal. The Applicant therefore states that their previous application while demonstrating intention to appeal was not an appeal.

9. On whether the application was filed without unreasonable delay, the Applicant submits that the application was filed without unreasonable delay. He relied on the case of *Nzoia Sugar Co. Ltd v. West Kenya Sugar Ltd* (2020) eKLR, in which the Court found that indolence and inaction had caused inexcusable delay. Reliance was also placed on the case of *George Kibata Vs George Mwaura & Another* (2017) eKLR, wherein the Court relied on the case of *Ivita v. Kyumbu* (1984) eKLR 441. In the latter, the Court found that if the intervening period was prolonged and inexcusable, then the same would be admissible as unreasonable delay. The Applicant submits that his delay was caused due to his contesting impugned Bill of Costs and it was therefore excusable.

10. On Whether the evidence is new and important, the Applicant submits that he had satisfactorily demonstrated that he had new and important evidence. He relied on Order 45 Rule 1 of the Civil Procedure Rules and the case of *Alphine Fine Foods Ltd v. Horeca Kenya Ltd & 4 others* (2021) eKLR, in which it was held as follows:

> "The power can be exercised on the application of a person on the discovery of new and important evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time that the order was made."

11. The Applicant submits further that the former Chief has prepared a declaration, witness statement and a letter which he seeks to be admitted in the review of the substantive suit. The Applicant further relied on the case of *Dorothy Wafula vs Hellen Nekesa Nielsen & Paul Fredrick Nelson* (2017) eKLR , in which the Court defined new and important evidence in the following terms:

> "Before this Court can permit additional evidence under Rule 29, it must be shown,
>
> 1) That such evidence could not have been obtained by reasonable diligence before and during the hearing.
>
> 2) The new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial."

12. With respect to the gifts *inter vivos*, the Applicant relied on *Halsbury's Laws of England* 4th Edition Vol 20(1) which states:

> "Where a gift rests merely in promise, whether oral or written, or in unfulfilled intention, it is incomplete and imperfect, and the Court will not compare the intending donor, or those claiming under him, to complete and perfect it, except in circumstances where the donors subsequent conduct gives the donee a right to enforce the promise. A promise made by deed is however, binding even though it is made without consideration. If a gift is to be valid the donor must have done everything which according to the nature of the property comprised

in the gift, was necessary to be done by him in order to transfer the property and which it was in his power to do."

13. The Applicant submits that in the case of ***Rebecca Nyambura v. Kiragu Harun*** **(2008) eKLR,** regarding the same proprietor, the parties grandfather gave land to his daughter. The Court in the case held as follows:

> "In my view, therefore, Harun Njuguna distributed all his parcels of land the way he wanted, and the Defendant should not claim any on the footing of a perceived trust. The suit property was therefore not registered on the name of the plaintiff in trust for the Defendant for half a share."

14. It was the Applicant's further submissions that Respondents changed their initial position from initially admitting the suit property was a gift inter vivos to insisting that it was trust property. He relied on the case of *P.K.A v. H.S.A & Another* (2017) eKLR in which the Court cited as follows:

> "In Halsbury's Laws of England, 4th Edition, that was cited by the plaintiff in his submissions, the authors have stated as follows on the elements of proprietary estoppel:
>
> > Proprietary estoppel usually arises when the representation consists of a promise of an interest in land although its principles have been used in the context of commercial relationships not involving such promise..."

15. On whether the evidence was unavailable despite the exercise of reasonable due diligence, the Applicant submits that the former chief was not available to produce evidence since he had been relocated from Murang'a to Nakuru. He states that the former Chief was unavailable despite the exercise of due diligence. The Applicant relied on the case of *Belinda Muras & 6 others vs. Amos Wainaina* (1978) KLR, in which Hon Madan J, A defined what constitutes a mistake as follows:

> A mistake is a mistake. It is no less a mistake cause it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel, Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The Court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate"

16. The 1st & 2nd Respondents/Respondents through J.N. Mbuthia & Co, Advocates filed their written submissions in opposition to the instant application.

17. On whether there was undue delay in filing the application, the 1st and 2nd Respondents relied on Order 45 Rule 1(b) of the Civil Procedure Rules, with regards to review applications and the requirement that such applications should be made without unreasonable delay. Further reliance was placed on the case of the *Judiciary of Kenya v. Three Star Contractors Ltd* (2020) eKLR where the Court held that the lack of an explanation for undue delay was fatal to an application.

18. On whether there was an appeal in place, the Respondents submitted that the Court record shows that a Notice of Appeal was filed 2 months after judgment. That the Notice of Appeal has not been withdrawn and that there is an application for the extension of time to file a Notice of Appeal, Memorandum of Appeal and Record of Appeal. That Rule 52 of the *Court of Appeal Rules* 2010, states that an application for leave to withdraw may be made informally in Court. The Respondents submit that leave to withdraw an Appeal cannot be done through a letter. That Section 2(2) of the *Court of*

Appeal Rules 2010 states that an Appeal in relations to an Appeal to the Court includes an Intended Appeal; and that an appellant includes an intended Appellant.

19. The 1st and 2nd Respondents further submit that as per Order 45 Rule 1 of the Civil Procedure Rules, it is clear that when seeking Review, a party should not have preferred an appeal as in this case. That the Applicant cannot rely on the case of Mbuni Dry Cleaners Ltd v. George Mugo Kagondu (2007) eKLR, since it is distinguishable from the current case. They stated that the latter case involved an appeal from the tribunal to the High Court and the current matter involved two matters in two Courts simultaneously.

20. On the issue of new evidence and whether the same was unavailable despite due diligence, the 1st and 2nd Respondents submitted that the explanation for the whereabouts of the Applicant's new witness prior to judgment was not sufficient. He relied on the case of *Omulele & Tololo Advocates vs. Mount Holdings Ltd* (2018) eKLR, where the court held as follows: -

> "A judge must never sit on his or her own judgment and litigants must never be allowed to abuse the Court process by litigating in instalments. Or what is referred to in common parlance as having a second bite of the cherry."
>
> The Court in the same case also held:
>
> > "An error on the face of the record is self-revealing; it does not involve protracted arguments to unearth it and does not require a great elucidation of the ruling by the same judge otherwise the matter turns into an appeal of the same judge's ruling"

21. The 1st and 2nd Respondents further submitted that the application of review is the Applicant's second bite at the cherry as an appeal following his failed first attempt.

22. This Court has now considered the pleadings in general, the rival written submissions and the relevant provisions of law and finds the main issue for determination are;

    a) Whether the grounds for review have been met

    b) Whether the application for stay ought to be granted

In its judgment delivered on 2nd May 2019, this Court ordered as follows:

a) That the suit is hereby dismissed;

b) That the plaintiff holds the suit property in trust for himself and the Defendants in equal shares;

c) A customary trust in respect of the suit property is determined;

d) That the plaintiff has 30 days to sign the requisite documents to facilitate sub-division of the suit property; in the alternative the Deputy Registrar to execute said documents.

23. The Plaintiff dissatisfied with the decision filed an application for stay pending appeal which was dismissed by this Court on 7th May 2020, on the grounds that there was no Notice of Appeal filed, and therefore the stay pending appeal could not be anchored at the Court of Appeal.

24. The Applicant then filed the current application seeking to review and/or set aside the judgment. The provisions for review are set out under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. They state as follows:

> Section 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 allowed by this Act, may apply for a review of judgment to the Court which passed the decree or made
>
> c) the order, and the Court may make such order thereon as it thinks fit.

25. The application for review is further grounded under Order 45, Rule 1 of the Civil Procedure Rules. It states:

> (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.
>
> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the appellant, or when, being Respondent, he can present to the appellate Court the case on which he applies for the review.

26. The provisions for review have also been set in case law. In the case of *Kenya Ports Authority v. Obendele* (2009) KLR 364, the Court observed as follows at page 367:-

> "We reiterate that this Court has always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this rule would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of this Court on the basis of arguments thought of long after the judgment or decision was delivered or made. It matters not whether the judgment or ruling has been perfected or not.
>
> (See *Lakhamshi Bros Ltd v Rajah & Sons* [1966] EA 313 and *Somani's v Shirinkhanu (No 2)* [1971] EA 79)
>
> The only exception, of course, is where the Applicant has been wrongly deprived of the opportunity of presenting his argument on any particular point, which might lead to the proceedings being held to be null and void. A consideration which, as presented itself in the latter authority, but is absent in the matter now before us."

27. Similarly, in the case of *Origo & Another vs. Mungala* (2005) 2KLR 307, the Court of Appeal held:-

> "A person who makes an application for review under the Civil Procedure Rules order XLIV rules 1 has to show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time; or that there was some mistake or error apparent on the face of the record or that there was any other sufficient reason. The Applicant must make the application for review without unreasonable delay.
>
> An erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."

28. The parameters to be considered by a Court in considering an application for review were reiterated in the case of *Ndirangu –V- Commercial Bank of Africa* (2002) 2 KLR, 603, where the Court stated that an application for review can only succeed if the Applicant proves an error or mistake apparent on the face of record, discovery of new evidence or any sufficient reason.

29. It is trite that in considering an application for review, a Court is often called upon to do justice and to apply its discretion and the aforementioned parameters on a case-by-case basis. Does the present Applicant meet the set criteria in his application?

30. The Respondents contends that there is an Appeal already in place and therefore a review application cannot be entertained. This Court is however persuaded by the case of *Nduati vs. Mukami (2002) 2 KLR*, 778, where the Court in dealing with an application for review where an appeal had been preferred held as follows:-

> Unless there is a specific provision to the contrary in other written laws, nothing in the *Civil Procedure Act* or Rules shall limit or otherwise affect the inherent power of Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.
>
> Even though the Applicant had preferred an appeal against the lower Court's decision, the appeal was not determined on merits, and it would still be open to this Court to review its original orders if the ends of justice so demanded."

31. In light of the Applicant's application for Appeal not being properly filed and the application for stay of execution pending appeal being denied, this Court finds and holds that the Applicant can indeed file for review of the Judgment delivered in this matter.

32. The next issue is whether the application for review by the plaintiff/Applicant was made without unreasonable delay. The review application was filed more than 2 years after the delivery of the judgment. This delay is inordinate and not adequately explained by the Plaintiff/Applicant. The Plaintiff/Applicant states that the delay was occasioned as he was contesting an impugned bill of costs, a matter he states had to be resolved urgently, since it was time bound. The Plaintiff/Applicant however fails to mention that the delay also occurred as he sought an Appeal of the judgment delivered on 2nd May 2019. This Court is swayed by ruling in *Kennedy Mokua Ongiri vs John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR wherein it was held as follows:

> "I doubt that an Application for Review would have succeeded because of the inordinate delay, of more than 2 years.
>
> The Respondent, by bringing application after application on the same issue at different times one after another is hell bent to frustrate the Appellant from realizing the judgment

> as awarded by the lower Court and unless something is done, the Appellant will forever be left babysitting his barren Decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice for all persons."

33. The final issue for determination is whether there is indeed new evidence which was not within the Plaintiff's/Applicant's knowledge or could not be produced at an earlier time, from the Plaintiff's witness, Joseph Mwangi, who was the Chief of the area, in which the suit property is situated.

34. The Applicant states that the new witness was present during family meetings between the parties herein. It is this Court's view the Plaintiff/Applicant was not diligent in obtaining the evidence prior to the Judgment since he knew of the witness prior to the substantive hearing and judgment in this suit. Further it was not lost to the Plaintiff/Applicant that the said new witness had been transferred and it is unlikely that he has just now met him again.

35. This Court is of the view that the Applicant has always been aware of the existence of the said new evidence and knowingly omitted to present it before the Court at the hearing. It appears that the Plaintiff/Applicant by filing the instant Application is trying to steal undue advantage over the Defendants/Respondents by prolonging the suit and keeping them from enjoying the fruits of the Judgment, that was delivered in their favour.

36. In the case of In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018,Mativo J culled out the following with regards to the discovery of new or important evidence:

> "Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Courttribunal earlier."

37. Considering all the above, this Court finds and holds that the Plaintiff/Applicant has failed to satisfy this Court accordingly with his application for review. The proverbial cherry is finished and there is nothing left for the Applicant to bite at.

38. The upshot of the foregoing is that the application dated May 13, 2021 brought by the Plaintiff/Applicant is found not merited and the same is denied and dismissed entirely with costs to the 1st & 2nd Defendants/Respondents.

39. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF JULY 2022.

L. GACHERU

JUDGE

In the presence of; -

Joel Njonjo - Court Assistant

M/s Kariuki for the Plaintiff/Applicant

Mr Mbuthia for the 1st – 2nd Respondents

N/A for the Other Respondents

L. GACHERU

JUDGE

14/7/2022