



REPUBLIC OF KENYA



KENYA LAW
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**Ahmed v Mselem & another (Environment & Land Case
57 of 2013) [2022] KEELC 4743 (KLR) (23 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 4743 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 57 OF 2013**

**MAO ODENY, J
AUGUST 23, 2022**

BETWEEN

ABDULRAHMAN MOHAMED AHMED PLAINTIFF

AND

SALIM AUNI MSELEM 1ST DEFENDANT

M ETEOR MILLINIUM K. LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion by the 1st Defendant/Applicant dated November 15, 2021 seeking the following orders: -
 1. Spent.
 2. There be stay of execution herein pending hearing of this application inter parties.
 3. To review and set aside judgment delivered on January 18, 2019 against the 1st Defendant together with all subsequential orders.
 4. This Honourable court to adopt the agreement dated September 23, 2019 as judgment of this court against the 1st Defendant.
 5. That the court be pleased to make any further or other orders or directions as it may deem fit in the circumstances.
 6. That cost of this application be provided for.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.



1st Defendant's Submissions

3. Counsel gave a brief background to the case and stated that the Plaintiff/Respondent herein filed this suit against the 1st and 2nd Defendants for trespass on L.R. 25538/51 in Hindi location within Lamu County and sought for the following orders: -
 - a) A permanent injunction do issue restraining the defendants, their servants and/or agents from continuing to trespass and or carry out any activity or in any way deal with land parcel LR. No. 25538/51 situate in Hinditownship in Lamu.
 - b) A mandatory order of injunction against the defendants jointly and severally by themselves, their servants, agents and/or anyone claiming under or through them to vacate, uproot and or remove any structures or plantations on that parcel of land known as land parcel No. 25538/51 situate in Hinditownship in Lamu.
 - c) Costs of the suit and interest.
4. Counsel further stated that the matter proceeded to hearing between the parties but the 1st Defendant did not participate due to failure by his counsel to attend court hence judgment was delivered against both the 1st and 2nd Defendants with court granting a mandatory injunction against the Defendants in the following terms –
 - a) A mandatory order of injunction is hereby issued against the defendants jointly and severally by themselves, their servants, agents and/or anyone claiming under or through them to vacate, uproot and or remove any structures or plantations on that parcel of land known as land parcel No. 25538/51 situate in Hindi township in Lamu within 45 days from the date of hereof and in default the Court Bailiff to evict them forthwith without any further reference to this Court.
 - b) Upon expiry of the said 45 days a permanent order of injunction is hereby issued restraining the defendants their servants trespassing onto, carrying out any activity or in any way dealing with all that parcel of land known as LR. No. 25538/51 situate in Hindi township in Lamu.
 - c) The Plaintiff shall also have the costs of the suit.
5. Mr. Mouko submitted that the 1st Defendant saw it wise to resolve the issue amicably to avoid forced eviction and attachment and therefore approached the Plaintiff through elders who resolved that the parties engage a government Surveyor to ascertain the extent of encroachment.
6. It was counsel's submission that the exercise was conducted on September 23, 2019 where the survey report established that the Plaintiff and the 1st Defendant were not neighbours as there is plot No Plot No. 195 belonging to a relative of the 1st Defendant namely Najim Salim. That the parties were aware that the court ruled in favour of the Plaintiff but the reality on the ground was different hence the parties reached a compromise.
7. It was counsel's submission that the parties agreed that the issue of the encroachment be dealt with between Najim Salim and the Plaintiff/Respondent whereby Najim agreed to purchase that portion which culminated in the sale agreement dated 24th September 2019 drawn by the firm of Mwaure & Mwaure Advocates which was annexed to the Supporting Affidavit.
8. Further that another agreement signed by all the parties and endorsed by the elders provided for the following terms: -



- i) The Plaintiff/Respondent to withdraw ELC No. 57 of 2013 Malindi and JR 2 of 2018 Garsen High Court.
 - ii) 1st Defendant/Applicant to withdraw application in ELC No. 57 of 2013 and Cr. No. 257 of 2018 Lamu.
 - iii) Costs for ELC No. 57 of 2013 (now being demanded for by the Respondent) be paid by the Plaintiff including costs of JR No. 2 of 2018 Garsen.
 - iv) Costs of Cr. No. 257 of 2018 and those for establishing the boundary to be paid by Salim Auni the Applicant herein.
 - v) The portion encroached on by Najim Salim to be sold to him by the Plaintiff Abdulrahman from L.R 25538/51 at a sum of Kenya shillings three hundred thousand (Ksh. 300,000/=).
9. Mr. Mouko submitted that the matter having been settled in the above manner, albeit being in an informal setting the Applicant believed that the dispute was now fully settled and that there was no need to go back to court.
10. It was counsel's submission that sometimes in 2021 the Plaintiff/ Respondent went against the aforesaid agreement by purporting to attach the 1st Defendant/Applicant's property to satisfy the costs of the decree in this suit and instead of attaching the judgment debtor's property, he attached the property belonging to Said Auni Mselem a brother to the 1st Defendant/Applicant who filed objection proceedings forcing the decree holder/Respondent to abandon that mode of execution. Upon realizing that he had attached the wrong property, he took out a notice to show cause why the judgment debtor/Applicant should not be arrested and committed to civil jail which notice is currently pending before the Deputy Registrar.
11. Counsel identified the following issues for determination namely: -
- a) Whether the court is functus officio and whether the application is an abuse of court process.
 - b) Whether an order of stay of execution can be granted in this application?
 - c) Whether the impugned agreement dated September 24, 2019 signed between the Plaintiff/ Respondent and the 1st Defendant/Applicant was ever revoked.
 - d) Whether the defence of non est factum is available to the Plaintiff/Respondent?
 - e) Whether the parties did engage a surveyor to determine encroachment if any on plot No. L.R 25538/51?
12. On the issue as to whether the court is functus officio, counsel relied on Section 80 of the [Civil Procedure Act](#) and submitted that the court has authority to review a decree or order where the Applicant satisfies the requirements. Further that where a party has obtained new evidence which was not available at the time when a decree or judgment was passed the court can review the decree or order.
13. Mr. Mouko cited the case of [Khalif Sheikh Adan vs Attorney General](#) [2019] eKLR and [Ajit Kumar Rath -vs- The State of Orisa & others](#), 9 Supreme Court of India Case 596 on review.
14. On the issue of whether the agreement was cancelled counsel submitted that the agreement was still binding as the letter written by Orina & company Advocates was addressed to nobody. The Plaintiff cannot be allowed to renege on a binding agreement without following proper procedures. Further that the Applicant has met the threshold for review as the new evidence obtained was not available at the time the decree was passed and urged the court to grant the orders as prayed.



Plaintiff/respondent's Submissions

15. The Plaintiff/ Respondent opposed the application vide a Replying Affidavit dated December 2, 2021 where he deponed that it is not true that parties had agreed to have the purported agreement of September 23, 2019 as an order of the court. He further stated that he was misled in an oral conversation between the Applicant and himself to later prepare a totally different document from the real issues that had been discussed.
16. It was the Plaintiff's averment that they discussed how the Defendant was to pay the outstanding amount and instructed the advocate to prepare the document who asked them to sign the last page as he was still polishing the document only to be surprised that the terms of the agreement were totally different from what they had discussed
17. Ms Chepkwony submitted that the unreasonable delay in filing the application has not been explained as judgment was delivered on January 18, 2019 as equity aids the vigilant and not the indolent. Counsel also admitted that it was indeed true that the parties attempted to amicably settle the matter but she stated that the terms were not agreed upon.
18. Ms Chepkwony identified two issues for determination namely whether the court can grant stay of execution and whether the Applicant has a good case to justify the grant of orders for review.
19. Counsel submitted that the court has discretionary powers to grant stay of execution but a party must establish that the application has been made without unreasonable delay, that he or she will suffer substantial loss if the order is not granted and has not offered any security for the due performance of the decree and relied on the case of *Kenya Shell Limited v Kibiru & another* (1986) KLR 410.
20. Ms Chepkwony submitted that the Applicant has not met the threshold for review under Order 45 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*, further that if the Applicant was dissatisfied with the judgment then he should have filed an appeal and not a review. Counsel therefore urged the court to dismiss the application with costs.

Analysis and Determination.

21. This is an application for review and stay of execution of the Judgment dated January 18, 2019. This case has unique circumstances where a judgment was delivered and later the parties entered into negotiations when they realized that the party sued and whom judgment was entered against was not the real person who had encroached on the suit land upon a survey being carried out and a report filed in court.
22. The issues for determination are whether the Applicant has proved that there is new evidence that was not available when the judgment was delivered in favour of the Plaintiff hence the application for review and whether the agreement between the parties compromising this suit is valid and binding.
23. 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 judgment to the court which passed the decree or made the order without unreasonable delay.”

24. Further under 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 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.”

25. An Applicant seeking an order for review must establish that the discovery of new and important matter or evidence which after the exercise of due diligence was not within his/her knowledge or could not be produced by him/her at the time when the order was made. This would essence mean that the new evidence would refer only to a discovery made since the order sought to be reviewed was passed.
26. In this case the Applicant stated that after the delivery of the judgment, the parties discovered the suit land that was allegedly encroached upon did not belong to the Applicant which culminated in the parties engaging a government Surveyor to carry out a survey whose report confirmed the same.
27. The survey was done on September 23, 2019 where the survey report established that the Plaintiff and the 1st Defendant were not neighbours as there is Plot No. 195 belonging to a relative of the 1st Defendant namely Najim Salim and the parties acknowledged the court had ruled in favour of the Plaintiff but the reality on the ground was different hence the parties reached a compromise.
28. The parties therefore entered into an agreement whose terms were to the effect that the matter was compromised in consultation with the elders in the following terms: -
- i) The Plaintiff/Respondent to withdraw ELC No. 57 of 2013 Malindi and JR 2 of 2018 Garsen High Court.
 - ii) 1st Defendant/Applicant to withdraw application in ELC No. 57 of 2013 and Cr. No. 257 of 2018 Lamu.
 - iii) Costs for ELC No. 57 of 2013 (now being demanded for by the Respondent) be paid by the Plaintiff including costs of JR No. 2 of 2018 Garsen.
 - iv) Costs of Cr. No. 257 of 2018 and those for establishing the boundary to be paid by Salim Auni the Applicant herein.
 - vi) The portion encroached on by Najim Salim to be sold to him by the Plaintiff Abdulrahman from L.R 25538/51 at a sum of Kenya shillings three hundred thousand (Ksh. 300,000/=).
29. The agreement dated September 23, 2019 by the parties is an acknowledgment that indeed there was new evidence that was not available at the time the judgment was entered hence this application meets the threshold for review.



30. It should be noted that a review is not an appeal as was held in the case of *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR where the court distinguished grounds for review and grounds of appeal and held that: -

In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue?In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose." (Emphasis added).

31. This helps in distinguishing what grounds can be considered for review and the ones that can be pursued in an appeal. The Plaintiff acknowledged that the suit land did not belong to the 1st Defendant and that is why they entered into negotiation after judgment to cure the anomaly which in effect compromised the case including the payment of costs.
32. The agreement that the parties entered into was voluntary and was to help all the parties including the Plaintiff who was the beneficiary of the outcome of the same. The Plaintiff has tried to throw the parties to the agreement under the bus so as to benefit twice from the judgment, the agreement and the costs which the agreement had compromised. The conduct of the Plaintiff of attaching the wrong property of which a party filed an objection to and later the Plaintiff tried another route to issue a notice to show cause against the 1st Defendant to recover costs is a sign of dishonesty.
33. The affidavits of County Surveyor one Zadock Shari and Najim Salim makes it clear that indeed the parties sought to settle the matter out of court based on the terms of the agreement of the September 23, 2019 hence the Plaintiff cannot be heard to renege on the same. The survey report has not been disputed by any party hence it is a valid representation of the position of the plots on the ground which is that the 1st Defendant had not encroached on the Plaintiff's parcel of land.
34. The purpose of review is to correct the anomaly which the court has discretion to do so following the laid down principles of review. As I had stated that this is a unique case where parties negotiated after judgment and sorted out the anomaly, it is easy for the court to correct the situation as the only issue is on payment of costs that the Plaintiff now demands after settling the case vide the compromise agreement.
35. On the issue of delay in filing the application, I notice that parties had agreed to compromise the case and this application was triggered by the issuance of a Notice to show cause dated October 5, 2021. This application would not have been filed if the Plaintiff had adhered to the terms of the agreement. The Notice to show cause was an afterthought therefore I find that the delay is not inordinate in the circumstances.
36. Having said so I find that the Application has merit and hold that the issue of costs was compromised by the agreement entered into voluntarily by the parties hence the Plaintiff is not entitled to issue a notice to show cause for costs. The Notice to show cause is therefore not tenable in the circumstances. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF AUGUST, 2022.

M.A. ODENY



JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Rulingt has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

