



Ali & another (Suing on her behalf and on behalf of the Estate of Indejeet Singh Rattan Singh) v Hamisi Mwinyi Tsumo wrongly sued as Hamisi Nduni Mwinyamiri & 3 others; Sohanpal (Interested Party) (Environment & Land Case 8 of 2021) [2022] KEELC 14583 (KLR) (16 August 2022) (Ruling)

Neutral citation: [2022] KEELC 14583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 8 OF 2021**

AE DENA, J

AUGUST 16, 2022

BETWEEN

ASHA RAJAB ALI 1ST PLAINTIFF

RAMADHAN MOHAMMED MWASENGEZA 2ND PLAINTIFF

SUING ON HER BEHALF AND ON BEHALF OF THE ESTATE OF INDEJEET SINGH RATTAN SINGH

AND

HAMISI MWINYIAMIRI WRONGLY SUED AS AMADI

MWINYIAMIRI 1ST DEFENDANT

HAMISI MWINYI TSUMO WRONGLY SUED AS HAMISI NDUNI

MWINYAMIRI 2ND DEFENDANT

HAMISI MWINYI TSUMO WRONGLY SUED AS RAMA JUMA

MWINYIAMIRI 3RD DEFENDANT

HAMISI BUNGARI MWINYIAMIRI WRONGLY SUED AS HAMISI BUNGARI

MWINYIAMIRI 4TH DEFENDANT

AND

SUKHJI KAUR SOHANPAL INTERESTED PARTY



RULING

Application

1. The Notice of Motion subject of this ruling is dated 2/6/2022. The same is brought before court pursuant to the provisions of Orders 45 Rules 1 and 2, Order 51 Rule 1 of the [Civil Procedure Rules 2010](#), Sections 1A,1B 3A and 80 of the [Civil Procedure Act](#) Cap21. It seeks the following verbatim orders; -
 - a. The honourable court be and is hereby pleased to review its ruling delivered on 25/4/2022 dismissing the applicants Notice of Motion dated 11/1/2022.
 - b. The honourable court be and is hereby pleased to grant prayer no 2 in the Notice of Motion dated 11/1/2022
 - c. Costs of this application be in the cause.
2. The application is premised upon grounds on its face and the annexed affidavit sworn by Kevin Kinuthia Advocate. It is averred that the court vide its ruling delivered on 25/4/2022 made a finding that the estate of the late Inderjeet Singh Rattan Singh Sohandal had no proprietary interest in land parcel no Kwale/Ramisi Phase II S.S/1821 (the suit property) given that as stated in the amended plaint the deceased sold the suit property to the second Plaintiff. The court declined to grant prayer no 2 in the Notice of Motion dated 11/1/2022 for these reasons. That it was clear the ruling was made without consideration of the applicant's supplementary affidavit sworn on 22/2/2022 which discloses that the second plaintiff transferred the title to the suit property to the deceased prior to his death on 10/5/2018 as shown by annexures on the said supplementary affidavit.
3. It is deponed that a copy of the supplementary affidavit was scanned and sent to Mr. Anthony Wanjala of Kwale Law Courts to assist in having the same assessed and filed. The same was assessed and an invoice No. 2425XXX forwarded to the deponent for payment of the requisite fees. He however failed to pay the said charges and as a result the filing of the supplementary affidavit was not finalized. That the failure to file the supplementary affidavit was solely caused by an inadvertent mistake on the deponent's part and the said mistake should not be visited upon the applicant. The court is asked to allow the application and to further grant a stay of proceedings as prayed in the application dated 11/1/2022.

RESPONSE

4. In response to the application, the 1st defendant filed a replying affidavit on 24/6/2022 sworn by Hamisi Mwinyi Tsumo. It is averred that the lack of proprietary interest and lack of jurisdiction were the reasons for dismissal of the application dated 11/1/2022. That further no leave was sought to file the supplementary affidavit alluded to by the applicant. It is averred that the fact that the applicant had knowledge of transfer of the suit property back to the 1st plaintiff takes him out of the ambit necessary for issuance of the orders sought.
5. It was stated that even if it is factual that the suit property was transferred back to by the 2nd plaintiff, the applicant cannot amend the plaint and change the averments in the amended plaint which will state that the deceased sold the suit property to the 2nd plaintiff and seek for vacant possession. It is also stated that on mistake being on the part of the advocate, a client has an obligation to follow up their matter and cannot escape liabilities as a result of their legal counsel mistakes or negligence. The deponent states that the application has not met the requisite threshold to warrant issuance of the orders sought and the



applicant was simply seeking an opportunity to re-open and re litigate her previous application. The application is termed as being fatally incurably defective and not capable of grant of the orders sought.

6. The Plaintiff filed grounds of opposition on June 24, 2022 stating that the application offended the provisions of order 45 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act* for failure to attach the order. That the court was duty bound to confine its adjudication with reference to materials which were available at the time of the initial decision herein. That allowing the supplementary affidavit would be re-opening the case. That the issue being introduced can only be examined during the trial and not at interlocutory stage.

Submissions

7. The applicant's submissions were filed on 25/7/2022 and addressed Whether the applicant is entitled to the orders sought in the application and costs of the application. Citing several court decisions, it was submitted that there were three limbs that should guide the court in granting orders of review namely Discovery of new and important matter or evidence, Mistake or error apparent on the face of the record and Any other sufficient reason.
8. It was submitted that the that the court did grant the applicant leave to file the supplementary affidavit on 25/1/2022. That the delay in filing the supplementary was sufficiently explained by the applicant disclosing no indolence on the part of the applicant or her advocate but rather an inadvertent mistake. Reliance was placed on the holding in *Belinda Muras & 6 Others Versus Amos Wainaina* [1978] eKLR and in *Philip Chemwolo & Another Versus Augustine Kubede*[1982-88] KLR. It was stated that the orders sought were discretionary which discretion must be exercised judiciously. That grant of the orders will not in any way be prejudicial to the respondent as they will be allowed to comment on the same as provided under Order 45 rule 6 of the *Civil Procedure Rules*.
9. Counsel urged that the applicant has demonstrated that the 1st plaintiff procured grant ad litem to substitute the deceased by falsely claiming that she was the deceased's widow and that the deceased had died intestate. That she further failed to disclose that the suit property formed part of the deceased estate given the second defendant had it transferred back to the deceased prior to his death. The court was asked to put all this factor into consideration and for costs to be in the cause.
10. As the time of preparing this ruling there were no submissions on record on behalf of the Plaintiff/ respondents. I instructed the registry to check in the system just in the event the same were filed electronically and escaped the registry's attention but none was found.

Analysis and Determination

11. Having considered the application, the responses and submissions herein I see the main issue for determination being whether the application has met the necessary threshold of review.
12. The right to apply for review is provided for under Section 80 of the *Civil Procedure Act* and elaborated by Order 45 of the *Civil Procedure Rules* as follows;
 1. [Order 45, rule 1.] Application for review of decree or order.
 2. "1. Any person considering himself aggrieved—
 - (1) b. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - c. 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.

d.(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”

13. Order 45 of the *Civil Procedure Rules, 2010* is very explicit that a court can only review its orders if the following grounds exist: -

- a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- b. There was a mistake or error apparent on the face of the record; or
- c. There were other sufficient reasons; and
- d. The application must have been made without undue delay.

I will proceed to consider the application based on guideline i and iv above.

14. The Notice of Motion whose ruling is subject of the review orders sought in the instant application was for orders that summons be issued by this court to one Arjinderpal Singh Bamrah to be summoned so that he could be orally be examined as to why he has failed to substitute the deceased in the proceedings herein. The same further sought for an order staying further proceedings in this suit pending the proper substitution of the late Inderjeet Singh Rattan Singh Sohandalal. The court in its ruling declined to give the orders sought on grounds that it did not have the jurisdiction to grant the orders sought as they were mainly based on the issues being litigated upon by the High court on the succession suit filed over the estate of the deceased.

15. On whether there has been discovery of new and important evidence that could not by due diligence have been established at the trial of the application dated 11/1/2022. From my perusal of the court record, it is clear that having been displeased with the court’s ruling rendered on 25/4/2022, the interested party/applicant has sought evidence in an attempt to revive her case. It is also clear that the said evidence was within her knowledge. The applicant was well aware of the meeting that allegedly took place at the deceased’s residence on 15/5/2018 as she even participated in the same. She was further aware of the Succession Cause No 38 of 2018 and participated in the suit as an objector. This information was availed to the court at the filing and determination of the application dated 11/1/2022 but as was stated, the court was of the view that the orders sought were within the purview of the High Court as they mainly related to the administration of the estate of the deceased. The applicant was aware that the plaintiff in this suit was present in the meeting that allegedly took place on 15/5/2018 and had the opportunity to avail evidence in support of the same. She also had the opportunity to avail the marriage certificate she refers to in the supplementary affidavit but did not. That also applies to the title deed annexed to her affidavit.

16. In my view while this may be fresh evidence to the court the same however was within the applicant’s knowledge at the time of filing the application in January. It beats logic as to why the same is being



introduced at this point in time after the court has rendered itself on their application. Review is not a forum to open the case or application for fresh argument. In this regard I will be guided by the Court Appeal *dictum* in *DJ Lowe & Company Limited Versus Banque Indosuez* Civil Appeal Nairobi 210 of 1998[UR] where the court cautioned against allowing new evidence in review applications as the same would amount to re-opening of a case already decided upon.

17. The court is further not convinced that the application herein has been made without unreasonable delay. The court in *Anthony Gachara Versus Francis Mabinda*[2014]eKLR held that an application for review ought to be brought promptly and that inordinate delay in bringing such an application would disentitle a party of a positive order. The court's ruling was delivered on 25/4/2022. The supplementary affidavit alluded to by the applicant was sworn on 22/2/2022 but filed in court on 2/6/2022 two months after the court's decision and the application itself filed on 2/6/2022 which is also two months after the ruling. If indeed this evidence was discovered in February when the affidavit was sworn, why the delay in having the same filed before court. The explanation by the advocate on record that they forgot to make payment for filing of the affidavit is not only lame but clearly a show of indolence and negligence on their part. The plaintiff on the other hand had a duty to ensure that their case is expeditiously prosecuted in court by making follow up See *Savings & Loan Limited versus Susan Wanjiru Muritu* Nairobi[Milimani]HCCC No 397 of 2002 and *Duale Mary Ann Gurre versus Amina Mohamed & Another* [2014] eKLR.
18. The upshot of the foregoing is the application by the interested party/applicant dated 2/6/2022 is devoid of merit and the same is dismissed with costs to the respondents.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 16TH DAY OF AUGUST, 2022.

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Martin Tindi for the Plaintiff

N/A for the Defendant.

Mr. Kinuthia for the Interested Party

Mr. Denis Mwakina- Court Assistant.

