



**Kolil & another v Kenya Commercial Bank & 3 others (Environmental and Land Originating Summons E025 of 2021) [2022] KEELC 12730 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12730 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2021  
EK WABWOTO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**JULIUS KIPKENY KOLIL ..... 1<sup>ST</sup> APPLICANT**

**RUTH JEMUTAI KAMAR ..... 2<sup>ND</sup> APPLICANT**

**AND**

**KENYA COMMERCIAL BANK ..... 1<sup>ST</sup> RESPONDENT**

**NANCY WAITHIRA KIRURI ..... 2<sup>ND</sup> RESPONDENT**

**MUGANDA WAKULWA T/A KEYSIAN AUCTIONEERS ..... 3<sup>RD</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR NAIROBI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicants filed a Notion of Motion Application dated 12<sup>th</sup> April 2022 which was accompanied by a Supporting Affidavit sworn by Joel Kimutai Bosek. The Applicant sought the following orders:
  - i. This suit be certified urgent and be given an early date due to the nature of issues therein
  - ii. The Court do review its order of 15<sup>th</sup> February 2022, set aside and reinstate the suit for it to proceed to full hearing and determination
  - iii. Costs of this Application be provided for
2. The said ruling upheld the objection raised by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents based on res judicata being that the suit before this Court had similar issues that had been dealt with in Nairobi High Court 407 of 2012- Julius Kipkeny Kolil & Ruth Jemutai Kamar vs Kenya Commercial Bank Limited and 2 others.
3. The Applicant submitted that they did not lodge their submissions to counter the Preliminary Objection. Moreover, the issue for determination was recovery of land that had been lost through



fraudulent transactions which falls within the jurisdiction of the Environment and Land Court and not the High Court.

4. The Applicants also posited that they were waiting to be served with the Respondents' submissions and had been denied their right to fair hearing as enshrined in Article 50 of *the Constitution*.
5. In the 2<sup>nd</sup> Respondent's replying affidavit dated 23<sup>rd</sup> May 2022, it was reiterated that the Application was an abuse of the court process that had prejudiced her and restricted her enjoyment of the suit property
6. Having considered the written submissions, supporting evidence and court proceedings, it is clear that the issues for determination before this court are as follows:
  - i. Whether the Applicant's application for review and reinstatement of the suit is merited?
  - ii. Who should bear costs of the Application?

7. Section 80 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya 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.

8. Order 45 Rule 1 (1) of the *Civil Procedure Rules* provides as follows:

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 judgement to the court which passed the decree or made the order without unreasonable delay.

9. Rule 3(2) of the same Order provides that:

Where the court is of the opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.



10. My perusal of the court proceedings confirms that on 18<sup>th</sup> November 2021, the Court directed that the preliminary objection application be canvassed by way of written submissions. The Respondents and Applicants were granted 14 and 21 days respectively to file submissions, with a further mention date to confirm compliance and set a ruling date. On 17<sup>th</sup> January 2022, the Applicants did not appear in court and the court moved to set a ruling date for 15<sup>th</sup> February 2022.
11. Once the application for review was filed, with all parties in Court, the Court again directed the same to proceed by way of written submissions. The Parties were granted corresponding 14 days to file and exchange submissions. On 21<sup>st</sup> July 2022, the Court confirmed that parties did not compile with the directions and moved to set a ruling date.
12. By recanting the specified proceedings, it is clear that Applicants' assertions of denial of fair hearing are misplaced. This Court has continuously extended its grace towards Parties and consequently finds the Applicants indolent in prosecuting their matter.
13. In *Salama Mabmoud Saad vs Kikas Investment Limited & Anor* [2014] eKLR review of Court orders;  

“Applications on this ground must be treated with great caution and as required by R 4(2) (b) the court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed in the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”
14. In view of the above, I find that the grounds cited do not qualify to be grounds for review to bring the applicants' application. It is my finding that this is not a proper case for the court to grant the review sought or even to exercise its discretion in favour of the applicants. The Applicants have neither presented new evidence nor presented a justifiable cause for reinstatement of the suit. In the foregoing, the Court hereby finds that the Application is unmerited and the same is dismissed in its entirety with costs to the 2<sup>nd</sup> Respondent.
15. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**No appearance for Applicants.**

Ms. Otieno for 1<sup>st</sup> Respondent.

No appearance for 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

Court Assistants; Caroline Nafuna and Philomena Mwangi.



**E. K. WABWOTO**  
**JUDGE**

