



Nduhiu & 5 others v Francis Odhiambo T/A Upako Center (Environment and Land Case Civil Suit 514 of 2016) [2022] KEELC 13769 (KLR) (27 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13769 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 514 OF 2016
SO OKONG'O, J
OCTOBER 27, 2022**

BETWEEN

**RICHARD NGAHU NDUHIU 1ST PLAINTIFF
STEPHEN MUTETI 2ND PLAINTIFF
PETER KILO WAKHISI 3RD PLAINTIFF
JOSPHAT MURIITHI GATIMU 4TH PLAINTIFF
JOSEPH KINYUA CHEGE 5TH PLAINTIFF
DORCAS WANJIRU MUGO 6TH PLAINTIFF**

AND

FRANCIS ODHIAMBO T/A UPAKO CENTER DEFENDANT

RULING

1. The plaintiffs brought this suit against the defendant on May 13, 2016. The plaintiffs filed amended plaint on November 21, 2017. In the amended plaint, the plaintiff's sought among others, vacant possession of L.R No. Dagoretti/Riruta/6264 (hereinafter referred to as "the suit property"), a permanent injunction restraining the defendant from dealing or interfering in whatever manner with the property and damages for breach of contract. The plaintiffs filed a witness statement and bundle of documents together with the plaint.
2. On application by the plaintiffs that was not opposed by the defendant, the court issued an order on May 23, 2016 for the eviction of the defendant from the suit property. The defendant was evicted from the suit property on June 22, 2016 with police assistance. The defendant moved the court by way of Notice of Motion application dated June 22, 2016 seeking the setting aside of the eviction order that was given on May 23, 2016 and leave to defend the plaintiffs' application dated May 13, 2016 pursuant



- to which the said order was granted. The application was dismissed in a ruling delivered on January 17, 2019.
3. On May 7, 2019, the defendant filed a statement of defence in which he denied the plaintiffs' claim in its entirety. The defendant averred that the plaintiffs trespassed on the suit property and as such were liable to him in damages. The defendant urged the court to dismiss the plaintiffs' suit with costs. The defendant did not file witness statements and bundle of documents together with his statement of defence as required by the *Civil Procedure Rules*. After the ruling of January 17, 2019, the court listed the matter for mention before the Deputy Registrar for pre-trial case conference.
 4. When the parties appeared before the Deputy Registrar for pre-trial directions on May 15, 2019, the defendant's advocate requested for 14 days to file the defendant's witness statements and list of documents. The Deputy Registrar gave the defendant 14 days to comply with Order 11 of the *Civil Procedure Rules* and fixed the matter for mention on July 2, 2019 to confirm compliance by the defendant. When the parties appeared before the Deputy Registrar on 2nd July 2019, the defendant had not filed his witness statements and list of documents. The defendant's advocate asked the Deputy Registrar to give the defendant a last opportunity to comply. The Deputy Registrar indulged the defendant once again. The matter was listed for final mention before the Deputy Registrar on July 25, 2019 by which time the defendant was expected to have fully complied with Order 11 of the *Civil Procedure Rules*. Come July 25, 2019, the defendant had not complied and asked for further indulgence. The Deputy Registrar noted that the defendant had been given a last chance to comply with Order 11 of the *Civil Procedure Rules*. The Deputy Registrar listed the matter for mention before the court on October 29, 2019 with a direction to the defendant to comply before then.
 5. When the parties appeared before me on October 29, 2019, the defendant was yet to comply with Order 11 of the *Civil Procedure Rules* and asked for more time to do so. The court fixed the suit for hearing on November 11, 2020 and gave the defendant 90 days to comply with Order 11 of the *Civil Procedure Rules* in default of which his statement of defence was to stand struck out and the suit was to proceed to hearing as undefended. When the matter came up one year later on November 11, 2020, the defendant had not complied with Order 11 of the *Civil Procedure Rules* with the effect that his statement of defence stood struck out.
 6. What is now before me is the defendant's Notice of Motion dated March 3, 2021 filed on March 10, 2021 nearly 1 year and 4 months after the court had given the defendant 90 days to comply with Order 11 of the *Civil Procedure Rules*. In his application that was brought under Order 51 Rule 1, Sections 3A and 63(e) of the *Civil Procedure Act* and all enabling provisions of the law, the defendant sought an order that; the order made on October 29, 2019 be reviewed and the defendant's defence and counter-claim be reinstated and time be extended for the defendant to comply with Order 11 of the *Civil Procedure Rules*.
 7. The application that was supported by the affidavit of the defendant's advocate Andrew Ombwayo was brought on the grounds that; failure on the part of the defendant to comply with the order made on October 29, 2019 was caused by an associate advocate in the firm of the advocates representing the defendant who failed to prepare the witness statements and list of documents, Covid-19 pandemic and the distress for rent that was levied on the defendant's advocates' office following the said advocates' failure to pay rent due to economic down turn caused by Covid-19 pandemic. The defendant contended that the delay to comply with the court order sought to be reviewed was not inordinate and was excusable.
 8. The application was opposed by the plaintiffs through grounds of opposition dated November 1, 2021. The plaintiffs contended that the defendant's application for extension of time within which



to comply with the orders of October 29, 2019 was brought 16 months after the order. The plaintiffs contended that this delay was not adequately explained. The plaintiffs contended that in the absence of reasonable explanation for the inordinate delay, the defendant was not deserving of the exercise of the court's discretion. The plaintiffs contended that the defendant was indolent.

9. The application was argued by way of written submissions. The defendant filed his submissions on 16th December 2021 while the plaintiffs filed their submissions on December 20, 2021. I have considered the application together with the affidavit filed in support thereof. I have also considered the grounds of opposition by the plaintiffs and the submissions by the parties. The only issue arising for determination in the application before me is whether sufficient basis has been laid to justify a review of the court order made herein on October 29, 2019. The court's power to review its orders and decrees is provided for in section 80 of the [Civil Procedure Act](#) under which the defendant's application has been brought 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."

10. Order 45 of the [Civil Procedure Rules](#) lists specific grounds upon which an application for review can be made as follows:

- a. Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.
- b. Where there is a mistake or error apparent on the face of the record.
- c. For any other sufficient reason

11. The Court of Appeal set out the requirements to be satisfied by an applicant seeking review in *Francis Origo & another v Jacob Kumali Mungala*, Eldoret CA No. 149 of 2001[2005]eKLR as follows:

"...it is clear that an applicant 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 he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay."

12. Similarly, in [Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints](#), Nairobi C.A 132 of 2014 [2016]eKLR, the requirements were set out as follows:

"To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient



reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.”

13. The scope of the court’s jurisdiction to review its own orders was defined in [John Kamau Rubangi v Kenya Reinsurance Corporation](#), Civil Appeal No. 208 of 2006[2012]eKLR as follows:

“It is important to bear in mind that Order 44 Rule 1 of the [Civil Procedure Rules](#) sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal.”

14. The defendant did not come out clearly in the application as to the basis or ground upon which his application was made. I will take it that the application was brought on the basis of “any other sufficient reason”. Sufficient cause was defined in [Attorney General v Law Society of Kenya & another](#) [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See [Black’s Law Dictionary](#), 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

15. I am not satisfied that the defendant has shown sufficient cause to warrant the review of the order made herein on October 29, 2019 and extension of time within which to comply with Order 11 of the [Civil Procedure Rules](#). I am satisfied from the record that the defendant was given ample time and opportunity to file his documents and witness statements but he failed to do so even after the time was extended for that purpose on several occasions by the Deputy Registrar and by this court. The defendant has not given any explanation why he did not file his list of documents and witness statements together with his defence. The defendant has also not given any explanation why it did not comply with the various orders that were made by the Deputy Registrar requiring him to comply with Order 11 of the [Civil Procedure Rules](#) between May 15, 2019 and July 25, 2019. The circumstances which the defendant has relied on as excusing his failure to comply with the order made on October 29, 2019 were not in existence at the time. Even for the order of October 29, 2019, no justification has been given for failure to comply with the time that was given by the court within which the defendant was to file his list and bundle of documents and witness statements. Covid-19 pandemic had not hit Kenya as at the time the order was made. It was not therefore an excuse for the defendant not to act. The alleged failure on the part of unnamed associate advocate in the firm of advocates representing the defendant to perform the duties that were allegedly assigned to him and the alleged distress for rent that was levied upon the offices of the advocates representing the defendant are not valid reasons to warrant a review of the orders of October 29, 2019. The defendant’s advocates cannot use their own neglect of duty or failure to meet contractual obligations as a ground for review.
16. The review application was also filed after unreasonable delay. The application before me was filed 1 year and 4 months after the order sought to be reviewed. I am in agreement with the plaintiffs that the delay in filing the application was inordinate and that no reasonable explanation was given for the same.



I am also in agreement with the plaintiffs that the defendant was indolent and as such not deserving of a discretionary order.

17. The upshot of the foregoing is that the Notice of Motion dated March 3, 2021 has no merit. The application is dismissed with costs.

DELIVERED AND DATED AT KISUMU THIS 27TH DAY OF OCTOBER 2022

S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

N/A for the Plaintiffs

Mr. Otieno h/b for Mr. Ombwayo for the Defendant

Ms. J. Omondi-Court Assistant

