



**Njuguna v Kingori (Environment & Land Case 332 of 2012)
[2022] KEELC 14978 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 332 OF 2012
MD MWANGI, J
NOVEMBER 24, 2022**

BETWEEN

GRACE WANJA NJUGUNA PLAINTIFF

AND

ANDREW KINGORI DEFENDANT

RULING

1. Judgment in this matter was delivered way back on July 27, 2017. A decree was subsequently issued by the court on October 19, 2020 while an order of eviction was issued on March 15, 2021 following an application by the Defendant dated November 27, 2020.
2. The Judgment had dismissed the Plaintiff's suit and allowed the Defendant's counter-claim. The court issued an order of mandatory injunction compelling the Plaintiff to vacate the two plots comprising 'the suit properties' and give vacant possession to the Defendant within 45 days. In default an eviction order was to issue.
3. The Plaintiff's application in essence prays that the court reviews, varies and or sets aside its judgment of July 27, 2017 and order that the case be heard afresh. The basis of the Plaintiff's application is that the Judgment and the consequential eviction order were delivered without her knowledge as her previous advocates failed to appear in court and or file submissions to secure her interests.
4. The Plaintiff avers that she filed a Notice of Appeal dated September 8, 2017 and requested for proceedings at the Thika Environment and Land Court but the same were not availed. She avers that she has pursued all reasonable avenues available to her to have the judgment overturned without success.
5. The Plaintiff further alleges that there is an error apparent on the face of the record of the judgement in that it failed to acknowledge that she purchased plots No 29 and 30, the suit properties between December 16, 2004 and November 11, 2009 during the subsistence of the marriage between her and



Josphat Keya Nyagi therefore the court ought to have pronounced the suit plots matrimonial property. Further that the Judgment failed to invalidate the sale agreement of the suit properties and declare the same illegal for lack of spousal consent.

6. It is the Plaintiff's case that she contributed to the purchase and development of the properties and was equally entitled to ownership of the same as a spouse.
7. The Applicant avers that she has discovered new evidence which was not available to her and which even after exercise of due diligence could not have been produced before delivery of the Judgment. She states that she discovered that: -
 - a. The Respondent after realizing that he was a victim of a fraudulent purchase of the matrimonial property filed a report at Ruai Police Station which upon investigation caused the Plaintiff's husband, Josephat Keya Nyagi to be charged before the Makadara Law Courts for obtaining money by false pretence contrary to section 313 of the penal code.
 - b. The Criminal proceedings against Josephat Keya Nyagi were instituted and conducted to logical conclusion regarding the fraudulent purchase of the suit matrimonial property vide Makadara Criminal Case No 4739 of 2012.
8. The Plaintiff alleges that in the Makadara Criminal Case No 4739 of 2012 there was overwhelming evidence which pointed towards the fact that the Plaintiff's husband had been purporting to be in a position to sell the suit properties but was actually not in a position to sell for lack of the Plaintiff's spousal consent. The Plaintiff alleges that she has discovered the new evidence to the effect that the Respondent presented evidence under oath in ELC 138/2017 that contradicted the statement he recorded at Ruai Police Station.

Response by the Defendant/Respondent

9. The Defendant strenuously opposes the application by the Plaintiff. Through his replying affidavit sworn on July 5, 2022, the Defendant deposes that if indeed the Plaintiff had filed an appeal, then his prayer for review offends the provisions of Order 45 rule 1(a) of the *Civil Procedure Rules*.
10. The Defendant further deposes that the Plaintiff is not being truthful in her application. He states that the Plaintiff vacated the suit properties in March 2021 without raising any issues after she was served with the eviction order. She does not therefore reside in the suit properties and the issue of being rendered homeless does not arise whatsoever.
11. The Defendant further states that he has since sold the second plot to one Peter Ngure Njuguna, who had already purchased the other by the time of the hearing of this case.
12. The Defendant denies that there is an apparent error on the face of the record. The issue of whether or not the suit property was matrimonial property was canvassed before the court and the court pronounced itself on it conclusively.
13. In respect to the Plaintiff's allegation of the existence of a Criminal case, the Defendant avers that he is the one who had reported the case against Josephat Keya Nyagi to the police when he had refused to execute the transfers in his favour despite receiving the purchase price of the suit properties. The said Josephat Keya Nyagi thereafter signed the transfer documents transferring one of the suit properties to the Defendant's name and the other to peter Ngure Njuguna.
14. The Defendant categorically states that there is nothing new in what the Plaintiff alleges. The said Josephat Keya Nyagi was her husband while her own mother was the surety for the said Josephat



Keya Nyagi. The Plaintiff/Applicant cannot therefore feign ignorance of the Makadara Criminal Case number 4739 of 2012. Her allegation that this is a ‘new discovery’ falls ‘flat on its face’.

15. Finally, the Defendant deposes that it has been 5 years since the judgment in this matter was rendered. The Plaintiff’s application is frivolous and amounts to an abuse of the process of court.
16. With leave of the court, the Plaintiff/Applicant filed a further affidavit which in essence merely contradicts the averments in the Defendant’s replying affidavit.

Court’s Directions

17. The court’s directions were that the Plaintiff’s application herein be canvassed by way of written submissions. The Plaintiff/Applicant filed her submissions dated October 11, 2022. The Defendant did not file any submissions.

Issues for determination

18. Having considered the Plaintiff’s application and the response by the Defendant, as well as the submissions filed, the only issue for determination in this court’s opinion is whether the Plaintiff’s application meets the threshold for the grant of the order of review.
19. The prayer that the law firm of S B Otieno & Company Advocates be granted leave to come on record on behalf of the Plaintiff/Applicant was not opposed. The Defendant/Respondent in his replying affidavit explicitly stated that he had no objection to the said prayer being granted. It is granted.

Analysis and Determination

20. The power of the court to review its judgement or order is provided for under section 80 of the *Civil Procedure Act*. The grounds upon which the review may be sought are enumerated under Order 45 rule 1 of the Civil Procedure Rules.
21. Rule 1 of Order 45 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 an 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. (emphasis mine)

22. In the case of *Republic-Vs- Public Procurement Administrative Review Board & 2 others* (2018) eKLR cited by the Plaintiff/Applicant, the court held that: -

‘Section 80 (of the *Civil Procedure Act*) gives the power of review and order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds:



- a. Discovery of new and important matter or 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;
 - b. On account of some mistake or error apparent on the face of the record, or
 - c. For any other sufficient reason,
- and whatever the ground, there is a requirement that the application be made without unreasonable delay.”

23. In the case of *Republic – Vs- Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* (2019) eKLR, Mativo J (as he then was) enumerated the principles to be followed in an application seeking review as follows: -

- i. A court can review its decisions on either of the grounds enumerated in order 45 rule 1 (of the Civil Procedure Rules) and not otherwise.
- ii. The expression ‘any other sufficient reason’ appearing in Order 45 rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of the power under section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground of 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 court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not required any detail examination.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.



- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
24. There is a precondition under Order 45 rule (1)(a) that one must not lose sight of. The meaning & tenor of the precondition is that an application for review is only allowable where no appeal has been preferred. A party cannot file an appeal against the judgement or order of the court and at the same time seek to review the same under the provisions of Order 45 rule 1.
25. In this case, the Plaintiff/Applicant expressly states on the face of her application that she had filed a notice of appeal dated September 8, 2017. A notice of appeal under the 'definition' in Court of Appeal Rules is regarded as an appeal. Indeed, the Plaintiff/Applicant had filed an earlier application herein dated July 13, 2021 seeking for an order of stay pending appeal under the provisions of Order 42 rule 6 of the Civil Procedure Rules, which the court however dismissed on November 4, 2021 for want of merits.
26. From the foregoing, the option of review is not therefore available to the Plaintiff.
27. Rule 1 also provides that an application for review must be file 'without unreasonable delay'. this application is coming 5 years and 4 months after the judgement. This, by any standards is inordinate, unreasonable and undue delay.
28. Additionally, I have carefully perused the judgement by my sister Judge Gacheru. The issue that the Applicant terms as an 'error apparent on the face of the record' was an issue that was before the court and that the court considered and made a determination on. The court clearly stated that it could not with certainty hold that the two plots the subject matter of the suit were matrimonial properties. It therefore declined to make the order to that effect.
29. On the aspect of spousal consent, the court found that by the time the plots were sold to the Defendant the statutes which provide for spousal consent had not been enacted by then. Spousal consent was not therefore a requirement as by law.
30. Even the alleged new evidence revolves around the issue of spousal consent. Suffice it to say that mere discovery of new or important matter or evidence is not sufficient ground of review. The party seeking review has also to demonstrate 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 court earlier. It is incumbent upon the applicant to show the relevance and 'importance' of that new evidence to the case.
31. In the case of *Evan Bwire Vs Andrew Aginda* Civil Appeal No. 147 of 2006 cited fin the case of [*Stephen Githua Kimani Vs Nancy Wanjira Waruingi T/A Providence Auctioneers*](#) (2016) eKLR, the Court of Appeal emphatically stated that:
- “An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh.”
32. The real intention of the Plaintiff is to re-litigate on a matter that has been heard and concluded by the court. Litigation must surely come to an end.
33. I find no basis for to grant the order of review under Order 45 rule 1 of the Civil Procedure Rules. The Plaintiff's application is hereby dismissed with costs to the Defendant.

It is so ordered.



Dated, signed and delivered at Nairobi this 24th day of November 2022

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Omondi h/b for Mr. Otieno for Plaintiff/Applicant.

Mr. Naibei h/b for Mrs. Rotich for the Defendant/Respondent.

Court Assistant: Hilda/Yvette

M.D. MWANGI

JUDGE

