



**Kimani v Mwakuriwa & 5 others (Environment & Land Case
373 of 2009) [2022] KEELC 14840 (KLR) (14 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14840 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 373 OF 2009
LL NAIKUNI, J
NOVEMBER 14, 2022**

BETWEEN

RICHARD KIMANI PLAINTIFF

AND

SWALEH MOHAMED MWAKURIWA 1ST RESPONDENT

HAMISI AYUBU MWAMJITA 2ND RESPONDENT

HAMISI GOT SAT 3RD RESPONDENT

SHEILA LOVERIDGE 4TH RESPONDENT

KAWALJEET SINGH REKHI 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

RULING

I. Introduction

1. Before this Honorable Court for its determination is the Notice of Motion application dated October 21, 2022 filed by the 4th Defendant/Applicant – M/s Sheila Loverridge. The 4th Defendant/Applicant herein brought the said application under the provision of Articles 48 and 159 of the Constitution of Kenya, 2010, Sections 1A, 1B, 3A & 80 of the Civil Procedure Act Cap 21, Orders 45, 50 (6) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 of the Laws of Kenya.

II. The 4th Defendant/Applicant's case

2. The 4th Defendant/Applicant vide this Notice of Motion application sought for the following orders:-
 - a. Spent;



- b. That pending the hearing of this Application “Inter – Parte”, the period of 30 days from September 29, 2022 (within the Applicant was to furnish security in the sum of Kenya Shillings Five Million (Kshs 5, 000, 000.00) as a condition for stay of execution) be enlarged and/or extended until the date on which this Honorable Court will determine this Application;
 - c. That an order made by this Court on September 29, 2022 requiring the Applicant to furnish security of Kenya Shillings Five Million (Kshs 5, 000, 000.00) within a period of 30 days as a pre – condition for stay of execution be varied to the extent that the amount of the said security be reduced to Kenya Shillings One Million (Kshs 1, 000, 000.00) and this sum to be deposited to the joint account within 45 days of this order.
 - d. That costs of this application be provided for.
3. The said Notice of Motion is premised on the grounds, testimonial facts and the averments of the eighteen (18) Paragraphed Supporting Affidavit of Sheila Loveridgesworn and dated October 21, 2022 and three (3) annexure marked as “SL – 1 to 3” annexed thereto.
 4. She deponed being the 4th Defendant/Applicant hence conversant with the matters giving rise to this case. She affirmed that on September 29, 2022, as per her request, this Honorable Court granted her stay of execution of the Judgement delivered on January 20, 2022 on condition that she furnishes security in the sum of Kenya Shillings Five Million (Kshs 5, 000, 000.00) within a period of 30 days, else the stay of execution automatically lapses. While the Deponent appreciated the Court for granting her request, unfortunately upon the lapse of this period her Advocate had not managed to access the Court file in order to obtain a written copy of the ruling delivered on September 29, 2022. For this reason the Advocate wrote a letter to Court seeking for its assistance and hence the need to be seeking for the enlargement of time.
 5. Further, she deponed her inability to raise the amount required for the security for Costs. For instance, she was a retiree with no income; inability to secure loan for lack of a collateral to use to secure loan as the title at the land registry was destroyed, the global unprecedented deflation of the Great Britain pounds and the high legal fees payable in the matter among others. Thus, she feels as though its punishment and she may not be in a position to raise the amount. Besides, she held that the Decree in this suit was not for payment of a decretal sum but for delivery of possession of immovable property. She argued that there was no risk at all that the due performance of the decree may not be achieved in case she did not succeed in her intended appeal as all it would take is for her to vacate the suit property.
 6. She emphasized having made serious investment/development being a swimming pool, residential houses, staff quarters and so forth on the suit property which she had been occupying from the year 2004 which would satisfy the security as ordered by Court. She felt an offer of Kenya Shillings One Million (Kshs 1, 000, 000.00) would be sufficient to comfort the Plaintiff/Respondent and this Court.
 7. In order to serve fair administration of Justice, particularly the overriding right of access to Justice, right of appeal and need to preserve the land as the subject of the appeal, the Deponent urged the Court to grant the relief sought from the application which she held would not be prejudicing the Plaintiff/ Respondent in any way.

The Grounds of opposition by the Plaintiff/Respondent

8. On November 4, 2022, the Learned Counsels for the Plaintiff/Respondent herein the Law firm of Nyachoti & Company Advocates while opposing the application by the 4th Defendant/Applicant filed a six (6) Paragraphed Grounds of Opposition dated November 3, 2022. These grounds are summarized, inter alia:-



- a. That the application was incompetent, misplaced, misconceived and therefore an abuse of the due process of Court and should be dismissed with costs.
- b. That the application failed to meet the threshold of the provision of Order 45 Rule 1 of the Civil Procedure Rules, 2010.
- c. That the application was a disguised appeal against the Ruling of this Honorable Court delivered on September 29, 2022 contrary to the law.
- d. That the inability of the 4th Defendant/Applicant to comply with the Ruling of September 29, 2022 was not sufficient reason for review and/or setting aside the orders made by this Honorable Court on September 29, 2022.
- e. That all issues of facts raised by the 4th Defendant/Applicant in the said Application were the same ones that were raised before this Court while prosecuting the application for stay of execution. Thus, it offended the Doctrine of “Res Judicata” contrary to the provision of Section 7 of the Civil Procedure Act, Cap 21.
- f. the application had not demonstrated any steps taken to file the intended Appeal.

III. The Oral Submissions

9. On November 7, 2022 both the Learned Counsels , Mr Hamisi Advocate for the 4th Defendant/Applicant and Mr Nyachoti Advocate for the Plaintiff/Respondent made elaborate oral submissions before this Honorable Court with regard to the Notice of Motion Application dated October 21, 2022. Pursuant to that the Honorable Court reserved to deliver its ruling on November 14, 2022 by Microsoft Teams Virtual means accordingly.

A. The Oral Submission by the 4th Defendant/Applicant.

10. Mr Hamisi Advocate stated that the Notice of Motion application dated October 21, 2022 was brought under the provisions of Section 80 (1) of the Civil Procedure Act, cap 21, Order 45 of the Civil Procedure Rules, 2010. The application seeks for the review of the orders of stay of execution by this Court delivered on September 29, 2022. The orders directed the 4th Defendants to deposit a sum of Kenya Shillings Five Million (Kshs 5, 000, 000.00) as security for costs.
11. We are aware of the grounds enlisted under these provisions of the law. We are coming under the grounds of sufficient reasons. In our case, the sufficient reason is that the Applicant seeks for the extension of the time to be in apposition to deposit the Security for Costs for a further 45 days. There was some delay in receiving the ruling and the order as we gathered that it was still in Chambers undergoing some corrections. The bank which was considering to open the Escrow bank account needed to see the Court order prior to executing the decision. Additionally, it also took me time to access Mr Nyachoti Advocate for the Plaintiff/Applicant to enable us finalise on the formalities on the opening of the joint account. In the long run, though I managed to get through to him but we still could not open the account within the stipulated time as the Counsel insisted on the availability of the funds prior to him executing any documents.
12. The second limb of our application is that the Applicant has not been able to afford the granted amount for a sum of Kenya Shillings Five Million (Kshs 5, 000, 000.00) as security for costs. She is a retired nurse. She had been saving cash in form of British Pounds which the Court will take judicial notice of the on going global inflation and the economic depression caused by many economic factors worldwide. In its Bill of Costs before the Taxation Master, the Plaintiff/Applicant is claiming a costs of



Kshs 240, 000, 000.00. Thus, a sum of Kenya Shillings five Million (Kshs 5, 000, 000.00) is extremely on the higher side. My own assessment, perhaps an amount ranging between a sum Kenya Shillings one or Two Million should be reasonable.

13. Finally, due to the long time it is taking to execute the bank opening documents I propose the amount be deposited with the Court which may be more efficient to execute. Thus, I pray that the interim orders sought from the application be allowed.

B. The

Oral

14. Submission
by the
Plaintiff/
Respondent.

Mr Nyachoti Advocate, firstly commenced his submission by making a correction that the Billi of Costs they lodged with the Taxation Master was for a sum of Kenya Shillings Four Million Seven Eighty Three Thousand and Thirty Five (Kshs 4, 783, 035.00) and as alleged by the 4th Defendant/Applicant herein. Secondly, on the assertion that he had been causing the delay or bottleneck towards opening the bank they only send him the forms last Friday and still indicated they were not in possession of any funds. Thirdly, he averred that during the examination in Chief of the civil case, the Land Registrar, Mombasa one Mr Ng'etich testified that the Certificate of title deed was legally registered in the names of the Plaintiff/Respondent herein. Therefore, to state that the title deed was destroyed was misrepresentation of facts as there was no evidence has been adduced to that effect.

15. Fifthly, the Counsel submitted that the 4th Defendant/Applicant under the averments of Paragraph 15 of her Supporting Affidavit while pleading on the issue of Security for Costs she had undertaken of being ready and willing to abide by any conditions laid - down by Court but now recanting and seeking for the review of the orders by this Court after it was already given very favorable terms. The Counsel argued that the 4th Defendant/Applicant had failed to meet the ingredients inherent and stipulated under the provision of Section 80 of the Civil procedure Act or Order 45 of the Civil Procedure Rules, 2010 to be granted a review or setting aside or varying the orders granted on September 29, 2022. Certainly, having lack of funds could not constitute sufficient reason to warrant being granted the orders as sought. He underscored the fact that all the issues being raised here were the same ones that were presented to Court when they were seeking for the orders of Stay of Execution of the Judgement of the Court delivered on 20th January, 2021 and therefore, his contention the application was in contravention of the doctrine of "Res Judicata" under the provision of Section 7 of the Civil Procedure Act, cap 21.
16. Fourthly, the Counsel opined that the application before Court was tantamount to an appeal. The request for the reduction of the amount was equivalent to an appeal. As regards whether the Plaintiff/Respondent herein was to suffer any prejudice by the orders being sought being granted, the Counsel held that the Plaintiff/Respondent had been out of the suit property for many years and despite him having Judgement to his favour he was still not able to take possession of it and enjoy its fruits. He felt the way the prayer number 2 was crafted it would only be applicable up to the haring of the application. In the given circumstance, the only prayer manageable was Prayer number 3 of the application. He urged Court to dismiss the application.

IV. Analysis and Determination

17. I have keenly considered the Notice of Motion application dated October 21, 2022, the Supporting Affidavit, oral Submissions and the authorities cited, the relevant Provisions of the Constitution of Kenya, 2010 and Statutes herein.



In order to arrive at an informed, fair, reasonable and just decision on this matter, the Honorable Court has framed the following two (2) salient issues for its determination. These are:-

- a. Whether the 4th Defendant/Applicant through the filed Notice of Motion application dated October 21, 2022 is entitled to the reliefs of review, varying and setting aside the Courts Orders and on the enlargement of time of this Court's Orders of September 29, 2022 sought of thereof.
- b. Who will bear the costs of the filed Notice of Motion application.

Issue No. a). Whether the 4th Defendant/Applicant through the filed Notice of Motion application dated 21st October, 2022 is entitled to the reliefs of review, varying and setting aside the Courts Orders and on the enlargement of time of this Court's Orders of September 29, 2022 sought of thereof.

18. Under this Sub – heading, it is significant to note that this application was triggered fundamentally by the Judgement of this Court delivered on January 20, 2022 and the orders for Stay of execution of the Decree granted on September 29, 2022 pending the hearing of the intended Appeal before the superior courts. Pursuant to that, the 4th Defendant/Applicant felt dissatisfied particularly on two issues a). the time granted to have deposited the security for Costs to a further 45 days and b). The sum of Kenya Shillings Five Million (Kshs 5, 000,000.00) which she felt was on the higher side and felt a sum of Kenya Shillings one or two Million would be reasonable to comfort the Plaintiff/Respondent and this Honorable Court.

Hence, this Honorable Court finds it significant to critically examine the provisions for review, setting aside and/or varying court orders. These are found mainly under the provisions of Section 80 of the *Civil Procedure Act*, cap 21 and Order 45 (1) & (2) of the *Civil Procedure Rules, 2010*. A clear reading of these provisions indicates that Section 80 is on the power to do so while Order 45 sets out the rules on doing it.

Section 80 provides:- 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 Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.

Order 45 (1). States as follows:- Any person considering 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, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the 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 review of Judgement to the Court which passed the decree or made the order without unreasonable delay”.



19. From these ingredients, the 4th Defendant/Applicant underscored that they approached Court not on the other grounds but one under “.....any other sufficient reasons.....” From the stated provisions, it is quite clear that they are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably. To qualify for being granted the orders for review, varying and/or setting aside a Court order under the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required.
- a. There should be a person who considers himself aggrieved by a Decree or order;
 - b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
 - c. A decree or order from which no appeal is allowed by this Act;
 - d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
 - e. 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.
 - f. The review is by the Court which passed the decree or made the order without unreasonable delay.
20. The power of review is also available when there issufficient reason...” Discussing the scope of the review, the Supreme Court of India in the case of “Ajit Kumar Rath v State of Orisa, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule...”

21. Additionally, in his authoritative write up, Sir. Dinashah Fardunji Mulla in “Code of Civil Procedure” 18th Edition (a writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that “.....the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule.

Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out....would amount to an abuse of the liberty given to the tribunal under the Act to review its Judgement.

Further, there is another very useful guidance in the matter of “Tokesi Mambili and Others – Simion Litsanga (19) where the court held as follows:-

In order to obtain a review an applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could



not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason (Emphasis is Mine).

23. Therefore, from the instant case, I fully concur with the Learned Counsel for the 4th Defendant/Applicant that the prayers sought under the application dated October 21, 2022 indeed adequately constitute sufficient reasons as provided for under the provision of the law and above legal interpretations. I am satisfied. In as much as the Court finds it reasonable to extend time for the opening of the Escrow joint bank account between the Advocates due to unforeseen logistical drawbacks likely to occur and the reduction of the amount but feels the proposed sum of Kenya Shillings One Million (Kshs 1, 000, 000.00) extremely hilarious, unreasonable and thus unjust for three broad reasons. Firstly, I fully concur with the Advocate for the Plaintiff/Respondent to the effect that he stands being highly prejudiced taking that he never taken possession of the land for many years and also the fact that he was had the Judgement delivered in his favour on 20th January, 2022. He needed to enjoy the fruits of the said decision. Secondly, from her own admission that she had invested heavily on the suit land by developing a swimming pool, residential houses, staff quarters among other development undertaking clearly raising the value of the land to a high appreciated value. Thirdly, while applying for the stay of execution against the Judgement of this Court delivered on January 20, 2022 under the provision of Order 42 Rule 6 (1) of Civil Procedure Rules, 2010, under Paragraph 15 of the Supporting Affidavit on her quest for depositing Security for Costs, the 4th Defendant/Applicant conditionally stated that she would be ready to give undertaking as to costs provided the orders sought are granted to wit:-

“Undertake to comply with any of the conditions to be made by this Court on security for costs which included furnishing deposit for the security.....”

24. With this, it was sufficient for the 4th Defendant/Applicant for the performance of its obligation and which the Plaintiff/Respondent could be compensated with incase the Appeal is not successful, the proposition that the Plaintiff/Respondent may be compensated from the supposedly massive investment on the Suit property such as the permanent house and swimming pool although as stated above there is nothing tangible to demonstrate the said investment indeed exists. So then, the Honorable Court wonders what is this that had changed for her to be recanting and thus be requesting for the orders of review or setting aside or varying the orders granted on 29th September, 2022. Let the Court not impute that there exists some level of non commitment on the part of the 4th Defendant/Applicant.

Issue No. (c) Who will bear the costs of the filed Notice of Motion application.

25. It is well established that costs are at the discretion of Court. Costs mean the award granted to a party at the conclusion of any legal action, process and proceedings in litigation. Under the Provisions of Section 27(1) of *Civil Procedure Rules, 2010* provides that costs follow the events. Event means the result of the Suit.
26. In the instant case, the 4th Defendant/Applicant has succeeded in demonstrating that she deserves being granted the Orders sought. Nonetheless, from the given circumstances, the surrounding facts and inference of the case, it is reasonable, fair and equitable that the costs of this application be in the cause.

V. Conclusion and Disposition

27. After conducting an elaborate analysis of the two (2) framed issues herein from the filed Notice of Motion application dated October 21, 2022, and considering the preponderance of probability and



principles of natural Justice, Equity and Conscience this Honorable Court now proceeds on to make the following orders:-

- a. That the Notice of Motion Application dated October 21, 2022 be and is hereby allowed subject to the fulfilment of the conditions stipulated herein.
 - i. the period of 30 days granted from September 29, 2022 (within the Applicant was to furnish security in the sum of Kenya Shillings Five Million (Kshs 5,000, 000.00) as a condition for stay of execution) be and is hereby enlarged by a further thirty (30) days from the date of this ruling that is to December 14, 2022.
 - ii. An order made by this Court on September 29, 2022 requiring the Applicant to furnish security of Kenya Shillings Five Million (Kshs 5,000,000.00) within a period of 30 days as a pre – condition for stay of execution be varied to the extent that the amount of the said security be reduced to Kenya Shillings Three Million Five Hundred Thousand (Kshs 3,500, 000.00) and this sum to be deposited to the Escrow joint bank account of the Advocates as stated out in the Ruling and/or order of this Court on September 29, 2022 on or before December 14, 2022 pending the hearing and final determination of the Appeal time being of great essence.
- b. That in default of any these conditions, the Notice of Motion application dated October 21, 2022 will automatically stand dismissed.
- c. That costs of this application be in the cause.

28. It is ordered Accordingly

RULING SIGNED, DELIVERED AND DATED AT MOMBASA ON THIS 14TH DAY OF NOVEMBER, 2022.

HON. JUSTICE Mr L.L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

- a. M/s Yumnah - The Court Assistant;
- b. Mr Nyachoti Advocate for the Plaintiffs/Respondent;
- c. Mr Hamisi Advocate for the 4th Defendant/Applicant; and
- d. No appearance for the 1st, 2nd, 5th & 6th Defendants/Respondents;

