



**Lihanda v Egunza (Environment & Land Case 17 of 2021)
[2022] KEELC 14727 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14727 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT & LAND CASE 17 OF 2021
E ASATI, J
NOVEMBER 10, 2022
(FORMERLY KAKAMEGA ELC NO.118 OF 2019)
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF PARCEL NO. SOUTH MARAGOLI/KEGOYE/709**

BETWEEN

**PATRICK LIHANDA (SUING ON BEHALF OF PENTECOSTAL ASSEMBLIES
OF GOD) PLAINTIFF**

AND

FREDRICK MANOA EGUNZA DEFENDANT

RULING

1. Before the court for determination is the amended Notice of Motion application dated September 12, 2022 (herein called the application). It is stated to be brought pursuant to the provisions of articles 25, 50(2) of the Republic of Kenya, Order 6 Rules 1, 7 of the Civil Procedure Rules, Sections 1, 1A, 31, 3A, 63 (e) of the *Civil Procedure Act* Cap 21 Laws of Kenya, inherent powers and jurisdiction of the Court and all other enabling provisions of the law. The application seeks for orders that: -
 - a. application be certified as urgent
 - b. leave be granted to the applicant to amend the Notice of Motion dated July 12, 2022.
 - c. That the honourable court be pleased to make a finding of perjury against Rev. Patrick Lihanda pursuant to which the honourable court has issued rulings, orders and substantive judgement.
 - d. That the honourable court be pleased to set aside, review and or discharge the judgement issued on the June 14, 2022 premised on the criminal enterprise perpetrated by the Respondent.



- e. That the honourable court be pleased pursuant to grant of prayer 3 and 4 herein issue a declaration that all that parcel of land known as parcel No South Maragoli/kegoye/709 belongs exclusively to the Applicant.
 - f. That the honourable court be pleased to issue directives to the Director of Criminal Investigations to wit; the County Criminal Investigations Officer Vihiga County to present such investigation reports, statements, and indictments before the honourable court.
 - g. That the honourable court be pleased to issue such further directions in the interest of justice
 - h. That the costs of this application be provided for.
2. The grounds upon which the Application is based are contained in the Application, the Supporting Affidavit sworn by the Applicant on September 12, 2022 and the annexures thereto.
 3. The Application was opposed vide the contents of Replying Affidavit sworn by Rev. Patrick Lihanda on July 26, 2022 and the annexures thereto.
 4. A brief background of the matter as can be gathered from the court record is that the Plaintiff herein, who is the Pentecostal Assemblies of God-Kenya filed the suit herein through Rev Patrick Lihanda who is the Respondent in the present application, against the Applicant over land parcel known as South Maragoli/kegoye/709. The Plaintiff's claim in the suit was ownership of the suit land by adverse possession. The case was heard and judgement delivered on June 14, 2022. The Applicant filed Notice of appeal under the Court of Appeal Rules and obtained an order of stay of execution of the judgement pending the hearing and determination of the Appeal in the Court of Appeal. Thereafter the applicant filed an application vide Notice of Motion dated July 12, 2022 seeking, substantially, that the honourable court makes a finding of perjury as against the Respondent and direct the Directorate of Criminal Investigations (CID) Vihiga County to conduct investigations and take appropriate criminal action against the Respondent. The Respondent opposed the application vide his Replying Affidavit sworn on July 26, 2022. Before the application could be heard, the Applicant filed the present application seeking, inter alia, to amend the earlier application. When the application came up for directions on September 21, 2022, the amendment was allowed by consent of the parties and the Replying Affidavit sworn on July 26, 2022 by the Respondent, already on the court record, deemed to be the Replying Affidavit of the Respondent to the amended Notice of Motion. Further directions were taken that the application be canvassed by way of written submissions.

The applicant's case

5. The Applicant's case is that the Respondent has perpetrated a criminal enterprise which has had the effect of misleading the court to make a judgement in favour of the Plaintiff thereby occasioning a miscarriage of justice. That on 5th of December 2018 Rev. Patrick Lihanda ceased to be the General Superintendent of the Pentecostal Assemblies of God (PAG) Kenya. That Rev Patrick Lihanda has deliberately and knowingly continued to masquerade himself, swore Affidavits before Commissioner of Oaths as the General Superintendent/Bishop representing the interests of the Pentecostal Assemblies of God Kenya a situation he knows to be false, misleading and outright lies.
6. That in spite of court orders restraining him from acting on behalf of the Plaintiff, on 31. 10. 2019 Rev. Patrick Lihanda swore a Supporting Affidavit in support of the Originating Summons in this case claiming that the Church had purchased and acquired land parcel L.R. No South Maragoli/kegoye/709 in the 1970s. That the misleading Affidavit caused the Judge to find that the Plaintiff had a prima facie case against the Applicant herein



7. Further in spite of having been convicted of contempt of court by Hon. Justice W. Musyoka, Rev. Patrick Lihanda proceeded on 8. 12. 2021 to swear a Supplementary Affidavit filed herein on 19. 12. 2021. That Rev Patrick Lihanda was ex-communicated as a member of PAG Kenya since 2018 and has no locus standi. That the Applicant has suffered, has been scandalized, demeaned, defamed hence the extent of damage is extensive. The applicant prayed that the application be allowed.

The Respondent's case

8. The Respondent's case is that the application is an attempt by the applicant to clandestinely reopen the case that had been decided on merits. That the instant court is a specialized one and legally constituted purposely to handle land related disputes. That the issues raised by the applicant have neither land nor environment aspects. That the instant court is not privy to the orders or directives mentioned by the applicant. That the court has no jurisdiction to entertain the instant application given it is functus officio. That the courts that gave the orders being relied on by the applicant are still operational. That Rev. Lihanda is one of the Trustees PAG-Kenya. That the Applicant has not availed any tangible evidence to support his allegations and the same should be treated as hearsay. That the order the Applicant is relying on was made at interim stage and was eventually not confirmed as the suit was withdrawn. That the contempt proceedings referred to by the applicant relate to general elections and not his position or being in office as General Superintendent. He prayed that the application be dismissed with costs.

Submissions

9. The Applicant filed written submissions dated 2September 9, 2022. He submitted that the burden of proof has shifted to the Respondent Rev. Patrick Lihanda to demonstrate that he did not use court process in a criminal enterprise to trample on the rights of the Applicant herein. That where it is shown that a person's conduct pertinent to the suit does not meet the approval of the court which is the subject matter the judgement /orders issued cannot be used to intimidate and oppress another party. That any orders/judgment obtained by concealing facts which if put to the Judge in first instance would have affected his/her Judgment, court will be inclined to vary, vacate, and discharge the orders in light of the new facts.
10. He submitted further that the court ought to set aside the entire proceedings. That the grounds for the application are that Rev. Patrick Lihanda swore and deposed to false contents, averments and statements. These include, that the Respondent has continued to vest the authority, office stature and proceeded to carry himself as the General Superintendent/Bishop representing the Pentecostal Assemblies of God and has extended the falsehoods to the pleadings and documents thus misrepresenting of the facts as presented before the Honourable court of law. That Rev. Patrick Lihanda has been the subject of various litigation which has been emphatic that his position in the Pentecostal Assemblies of God has been spelt out by the Applicant herein who has duly produced all the requisite documents to ascertain the position.
11. The Applicant relied on the case of Patel -v- EA Cargo handling services limited (1974) E.A 75 to submit that there are no limits or restrictions on a Judge's discretion. That a court's main concern is to do justice to the parties. That the question of functus officio cannot arise in an application to set aside, vary or discharge an order, ruling or judgment that has been premised on falsehoods. That it is not too much to request the court to invoke its discretion to investigate the pleadings, the documents and statements which have purposed the court to issue orders. Replying on the case of Raila Odinga & 2 Others -v- Independent Electoral & Boundaries Commission and 3 others (2013) eKLR the Applicant submitted that there can never be finality to a criminal act.



12. The Applicant submitted further that the issue before hand is land which is a very emotive issue that if the documents are found to be improper then there is no option other than setting aside of all orders obtained. Relying on Sections 7 and 26 (i) of the [Limitation of Actions Act](#) and the case of Edward Moonge Lengusuranga Vrs James Lanaiyara & Another (2019) eKLR, the Applicant submitted that time starts to run from the time the fraud is discovered. He prayed that the application be allowed.
13. Written submissions dated September 20, 2022 were filed by the firm of Karanigrey & Company Advocates on behalf of the Respondent. Counsel submitted that although Rev. Patrick Lihanda was cited for contempt of court the same was strictly in respect of elections conducted in the year 2018. That the contempt of court proceedings never in any way touched on the capacity of Rev. Patrick Lihanda as the General Superintendent. That the findings of the court in Petition 6- of 2018 do not vitiate the capacity of Rev. Patrick Lihanda to hold and remain in the position of General Superintendent. Counsel submitted further that the court is now by law functus officio and cannot revisit the matter whatsoever. That the available avenue for the Applicant to pursue his grievances is to appeal to the Court of Appeal and that the Applicant having initiated an appeal should stick to it.
14. Counsel submitted that Rev. Patrick Lihanda is not only the General Superintendent but also a Trustee of PAG-Kenya Church. Counsel relied on the case of [African Orthodox Church Kenya v Charles Omukora & Another \[2014\] eKLR](#) to submit that a church as a society registered under the [Societies Act](#) can only sue through its Trustees or in the names of its officials. That as the General Superintendent of the church, Rev. Patrick Lihanda is the rightful person to sue on behalf of the church.
15. Concerning case No Kisumu CMCC No 543 of 2018 Tom Olendo v Patrick Lihanda Counsel submitted that the Executive Committee had taken over from the caretaker committee and that three years had elapsed since the last extension of court orders in the case. That this court is a specialized court designated to deal with disputes relating to land and environment and that the suit herein relates to ownership to land which the court has jurisdiction to deal. That the matters raised in the application should be dealt with by the trial court where the orders emanated from.
16. Relying on the decision in Kitale ELC Case No 134 of 2017 Pentecostal Assemblies of God Kenya (through its Registered Trustees) & 3 others v Josephat Ogole Elegwa & 4 others, Counsel submitted that similar issues as raised herein were the subject in the said case and the ELC at Kitale found in favour of Rev. Patrick Lihanda. Counsel urged the court to dismiss the application.

Analysis and determination

17. After pronouncing final judgement on merits, a court of law becomes functus officio in as far as the merits of the case are concerned. The court's jurisdiction is then limited to matters of review, setting aside and execution of the judgement. Lest the court finds itself reopening the case or sitting on appeal against its own decision. The present application seeks for 2 substantive prayers; namely a prayer for review and setting aside of the judgement and secondly a prayer to find Rev Patrick Lihanda guilty of perjury. Review and setting aside is a matter within the court's post -judgement jurisdiction.
18. Review and setting aside of judgement, decrees and orders is provided for in Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules 2010. Section 80 provides that: -
 - “ 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 review of the judgement to the court which passed the decree or made the Order, and the court may make such order thereon as it thinks fit

Order 45 Rule 1 (1) provides

“ 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 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 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.”

19. From the above-quoted provisions of the law, it is clear that the grounds upon which an application for review of a judgement, order or decree can be made are: -
 - a) discovery of a new and important matter or evidence
 - b) some mistake or error apparent on the face of the record
 - c) any other sufficient reason
 - d) the application must be brought without unreasonable delay.
20. In the present case, the application is based on the grounds that the evidence advanced by Rev. Patrick Lihanda on behalf of the Plaintiff (PAG- Kenya) was full of falsehoods. That vide court order made in Vihiga Civil case No 123 of 2019 Rev. Patrick Lihanda was restrained from inter alia carrying out PAG related activities in the PAG Mission houses or anywhere else. Further that vide High Court Constitutional Petition No 6 of 2018, Rev Patrick Lihanda was found guilty of contempt of court for breaching court orders of 8. 11. 2018 and 5. 12. 2018. That in spite of the above-mentioned orders, Rev Patrick Lihanda on 31. 10. 2019 swore a Supporting Affidavit before a Commissioner of Oaths when he filed an Originating Summons and a Notice of Motion as the General superintendent of PAG-Kenya claiming that the Church had purchased and acquired L.R. No South Maragoli/kegoye/709 in the 1970s. That in spite of having been convicted for contempt of court, Rev Patrick Lihanda swore on oath before Kevin Nyenyire Advocate and Commissioner of Oaths, a Supplementary Affidavit in this case which was filed on 19th December 2021.
21. The question for the court is whether the facts relied upon by the Applicant demonstrate the grounds for review and setting aside of the judgement as provided for in the law. It is the Applicant’s case that the events narrated and relied upon in the application occurred before the filing and in the pendency of the suit. He submitted that the Respondent was cross examined on the same. In his written submissions he stated that

“ when questioned during the hearing of this suit admitted to having been convicted and claimed that he had appealed against the conviction without evidence.”



22. Secondly, it is clear that the orders relied upon by the Applicant were given long before the filing and prosecution of the suit. These cannot therefore be said to be new and important matters or evidence discovered after the judgement which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed. They were matters that were within the knowledge and reach of the applicant as the suit was instituted, prosecuted and decided. They are matters, which according to the applicant that the Respondent was cross-examined on. Such matters can only be revisited on appeal.

In the case of Republic v Advocates Disciplinary Tribunal ex Parte Apollo Mboya [2019] eKLR the court articulated the principles for grant of an application for review thus: -

- i. a court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. the expression "any other sufficient" appearing in Order 45 Rule 1 has to be interpreted in light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by long process of reasoning cannot be treated as an error apparent on the face of the record.
- 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/judgement 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 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 decision as vitiated by an error apparent
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for 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....."

The applicant has the burden to demonstrate not only that he has discovered new and important matter but that he had exercised due diligence but was unable to find or produce the new and important matter or evidence before the judgement. This burden has not been discharged herein.

23. In Evans Bwire v Aginda Civil Appeal No 147 of 2006 it was held that the grounds for review must be strong especially where the application seeks to re-open the case afresh.
24. I have read the Ruling in Kakamega H.C Const. Petition N0. 6 of 2018 annexed to the Application. Indeed Rev. Patrick Lihanda was found guilty and convicted of contempt of court for breaching the court orders dated 8/11/2018 and 5/12/2018. The orders related to election of the leaders of the Plaintiff. The court in the ruling found as follows:

"the other order was made in Kisumu CMCCC No 543 OF 2018 on 8th March 2019. It restrained the 1st Respondent and others from carrying out managerial and administrative duties in relation to the affairs of the church. The 1st Respondent challenged that order at Kisumu in HCCA No 28 of 2019. He asserted in his Supporting affidavit that he was the general superintendent of the church and articulated his arguments against the order. It is not clear whether a stay of execution order was made by the High Court but what is clear



is that in Kisumu CMCCC No 543 of 2018 the court made an order for maintenance of status quo. It is not clear who the status quo order favoured, because it is not clear who was in control of the church as at 24th October 2019 when the order was made. In his Affidavit in response to the application herein, the 1st Respondent concedes that he was aware of the order of 8th March 2019 and appears to say that the persons who were to take over from him did not take up office.

Overall, I am not persuaded that the applicants have demonstrated that the 1st Respondent breached the said order. It is not clearly articulated how and when the order was violated, nothing points at all at the 2nd Respondent with breach of the order of 8/3/2019.”

25. The final finding of the court in the application for contempt was as expressed here above, I find that with regard to the orders of 8th November 2018 and 5th December 2018, the 1st Respondent had knowledge of the said orders, he acted in breach of the terms of the orders and his conduct was deliberate. The same does not apply with respect to the other Respondents and the other orders. It is my finding that Rev. Patrick Lihanda is guilty of contempt of court orders dated 8th November 2018 and 5th December 2018 and do hereby convict him accordingly.”
26. From this ruling it is clear that the conviction for contempt concerned the elections. Secondly, the orders in the Kisumu case were interlocutory. The case was not one of the cases consolidated to Pet. 6 of 2018. There is nothing to show whether the Kisumu case ever ended and what the outcome was. The Respondent submitted that the orders were never confirmed. It appears that a lot may have transpired between March 2019 when the order was made and September 2019 when the status quo order was made. From the Affidavits filed by the parties it appears that there was appointment of care taker committee, failure of caretaker committee to take over office, attempts by the office bearers to remain in office, mediation process under court annex mediation program and elections in spite of the court orders. It is not clear what the position of the leadership of the church was as at the time of swearing the Affidavits complained of.
27. The second ground for review is the existence of some mistake or error apparent on the face of the record. This has not been demonstrated.
28. Concerning the third ground for review, “any other sufficient reason, it has been held in the case of Republic v Cabinet Secretary for Interior and Coordination of National Government Ex Parte Abulahi Said Salad [2019]eKLR that any other sufficient reason refers to grounds analogous to the other two grounds.
29. Further, the remedy of review is available where the applicant has not preferred an appeal against the decree or order sought to be reviewed. In the present case, the court record shows that the applicant lodged a notice of appeal to appeal to the Court of Appeal. There is no evidence that the appeal has since been withdrawn. The court record shows that the Applicant after lodging the Notice of appeal sought and obtained an order of stay of execution of the judgement pending hearing and determination of the appeal. As far as the record of the court shows the appeal to the Court of Appeal is still pending. The applicant cannot pursue both the remedy of appeal and review simultaneously.
30. The second substantive prayer concerns perjury. The Applicant seeks that this court makes a finding of perjury as against Rev. Patrick Lihanda in respect of the pleadings herein pursuant to which the honourable court has issued rulings, orders and substantive judgement herein. He further seeks that this court issues directives to the Directorate of Criminal Investigations that is to say the County Criminal Investigations Officer VIHIGA COUNTY to present such investigation reports, statements and indictments before the court.



31. Section 108 of the Penal Code provides that: -

any person who in judicial proceedings, or for the purpose of instituting any judicial proceedings, knowingly gives false testimony touching any matter which is material to any question then pending or intended to be raised in that proceeding is guilty of perjury.”

Perjury is a serious crime. It is an obstacle to the honest, smooth and effective dispensation of justice. Being a criminal offence, the degree of proof thereof is beyond a reasonable doubt.

32. What is the perjury complained of in the present case? It is that Rev Patrick Lihanda described himself as the General Superintendent of the PAG Church, filed the suit, swore Affidavits in that capacity- something which was not true because the court had prohibited him from doing so. Secondly that the court had found him (Rev Patrick Lihanda) guilty of contempt of court and convicted him. From the extracts of the ruling in Pet 6 of 2018 quoted herein above the court did not find Rev. Patrick Lihanda in contempt of any order restraining him from acting on behalf of the Plaintiff or regarding his position as General Superintendent. As such no sufficient material has been placed before the court to support a finding of perjury against Rev. Patrick Lihanda.

33. The conclusion is that the grounds for review and setting aside of the judgement have not been demonstrated and perjury has not been proved. In the premises the application is hereby dismissed. Each party to bear own costs.

Orders accordingly.

RULING READ, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 10TH DAY OF NOVEMBER, 2022.

E. ASATI

JUDGE

In the presence of:

Neville Court Assistant.

Applicant present in person

Karani Advocate for the Respondent.

E. ASATI

JUDGE.

