



**Wekesa v Murunga (Environment and Land Appeal E023 of 2021)
[2022] KEELC 14801 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E023 OF 2021
EC CHERONO, J
NOVEMBER 10, 2022**

BETWEEN

JOSEPH BARASA WEKESA APPELLANT

AND

BRAMWEL MURUNGA RESPONDENT

RULING

1. What is before me is the Notice of Motion application dated 2/8/2022 where the applicant is seeking the following orders;
 1. (Spent)
 2. (Spent)
 3. This honourable court be pleased to review and/or set aside order of the applicant appearing before the trial court for arrest issued on July 22, 2022 and instead order the applicant to deposit the entire decretal sum in court pending the hearing and determination of the appeal
 4. That the cost of this application be provided for
2. The application is premised on six (6) grounds apparent on the face of the said application. The application is further supported by the affidavit of the applicant sworn on August 3, 2022.
3. According to the applicant, this Honourable court on July 22, 2022 dismissed his application for stay of execution of the judgment/decreed and ordered him to surrender to Kimilili court to show cause why he should not be committed to civil jail in execution of the decree for costs issued in the former suit. He stated that if he surrenders to Kimilili court following warrants of arrest issued out, he will be forced to pay the decretal sum demanded by the respondent and further execution will follow him owing to the ex-parte judgment entered against him and the appeal will be rendered nugatory.



4. He said that he is willing to deposit the decretal sum/costs in court pending the hearing and determination of the appeal. He therefore seeks a review and/or setting aside of the orders of this Honourable court issued on 29/6/2022 requiring him to surrender at Kimilili court for notice to show cause why he should not be committed to civil jail.
5. By way of a response, the Respondent filed an affidavit sworn on 5/9/2022 in opposition to the application in which he averred that the application herein is incompetent, misconceived, incurably defective, frivolous, and a gross abuse of court process. He further stated that the instant application is res-judicata to the application filed in court on 25/1/2022 and that the court became *functus officio* upon delivery of its ruling dated 29/6/2022 and should not entertain such application.
6. The respondent also stated that the applicant has not come to court with clean hands as he has refused to comply with the order of this Honourable court requiring him to surrender himself before Kimilili court and show cause why he cannot be committed to civil jail.
7. I have considered the applicant's Notice of Motion application dated 2/8/2022, the supporting affidavit and the replying affidavit by the respondent sworn on 5/9/2022. I have also considered the rival submissions by counsels for the parties and the applicable law. Section 80 as read with Order 45 CPA and the *Rules* made thereunder are the applicable law. Order 45 Rule 1 provides as follows;

"(1) 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 judgment to the court which passed the decree or made the order without unreasonable delay--"

8. From the provisions of the law, it is clear that for an applicant to succeed in an application for review, he must establish the following conditions;
 1. The application is brought without unreasonable delay
 2. Discovery of a new and important matter which was not within his knowledge or could not be produced by him at the time the decree or order was made despite due diligence.
 3. On account of some mistake or error apparent on the face of the record or
 4. For any other sufficient reason
9. The applicant in this case is seeking a review of the orders of this court issued on 29/6/2022 in which he was ordered to present himself before the trial Magistrate at Kimilili court on 6/7/2022 at 9.00A.M in compliance with the warrant of arrest. The said order was issued pursuant to an application by the applicant filed in court on 25/1/2022 where he had sought orders for inter-alia a stay of proceedings in Kimilili PMCC No. 17 of 2018. Though this application was brought without inordinate delay, the applicant has not given any new matter or evidence which he has discovered and which was not within his knowledge at the time the order was made. The applicant has not also shown that there is an error



or mistake apparent on the face of the record in respect of the findings of this Honourable court given on 29/6/2022 to warrant the grant of the orders sought. The applicant has also not given any other sufficient reason why the order of this court issued on 22/6/2022 should be disturbed.

10. It is also to be noted that in the said Notice of Motion filed in court on 25/1/2022, the applicant was seeking numerous orders including stay of execution and setting aside of an *ex-parte* judgment in Kimilili PMCC No. 17 of 2018. I have looked at the Ruling of my brother Justice Olao delivered on 29/6/2022 and find that those issues were raised and duly considered when disallowing the said application. The applicant has not faulted the said ruling on grounds of error apparent on the face of the record or any other sufficient reason. The only reasons given by the applicant for review of the orders of this honourable court given on 29/6/2022 is contained in paragraph 3, 4, 5, and 6 of the supporting affidavit. According to the applicant, he is apprehensive that if he surrenders to Kimilili court following warrants of arrest issued out, he will be forced to pay the decretal sum demanded by the respondent and execution will follow him due to *ex-parte* judgment entered against him. The applicant also averred that he was willing to deposit the decretal sum /or cost in court pending the hearing and determination of the appeal but he cannot do so as the court never made that order. When the applicant made the application for stay of execution and stay of proceedings in the former suit PMCC ELC No. 17 of 2018 (Kimilili), this honourable court considered all the issues which are now being raised in this application for review. I find the applicant's remedy lies elsewhere and not review.
11. The upshot of my finding is that the Notice of motion application dated August 2, 2022 fails and the same is hereby dismissed with costs. It is so ordered

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 10TH NOVEMBER, 2022

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Okaka for Respondent

Applicant/Advocate-absent

Joy C/A-present

