



**Gichuki v Gichu & 2 others (Environment and Land Appeal
4 of 2018) [2022] KEELC 15527 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 4 OF 2018**

JG KEMEI, J

DECEMBER 20, 2022

BETWEEN

TERESIA NJOKI GICHUKI APPLICANT

AND

PAULINE KANYIRU GICHU 1ST RESPONDENT

MILLENIUM PLOT DEVELOPERS 2ND RESPONDENT

SAMUEL NJOROGE MUIRURI 3RD RESPONDENT

RULING

1. *Vide* an application dated 17/5/2021 the appellant seeks orders as follows;
 - a. The hon court be pleased to review the judgement delivered on the 18/3/2021 for a mistake or error apparent on the face of record.
 - b. That the costs of this application be provided for.
2. The application is supported by the affidavit of the applicant where she deponed that she complied with the direction of 4/9/2020 issued by the court and that in the interest of justice the judgement be reviewed. That in the judgement delivered on the 18/3/2021 the court noted that the submissions had not been filed. She averred that her advocate filed the written submissions on the 21/9/2020 as shown by the attached receipts marked as TNG1. That this amounts to an error apparent on the face of the record which forms grounds of review of the judgment delivered on 18/3/2021.
3. The application is opposed. The 2nd and 3rd respondents filed grounds of opposition dated the 7/3/2022 on the grounds that; there is no sufficient evidence to show that the appellant filed and paid for her submissions seeing that they were not served; there is no new material evidence that has arisen to warrant the review order and that the judgement was delivered on the 18/3/2021 and the appellant



did not file the application until 17/5/2021 and the delay has not been explained; that the application lacks merit and should be dismissed.

4. The 1st respondent through her Advocate Mbiyu Kamau opposed the application and stated that the appellant failed to serve the submissions nor complied with the directions of the court issued on the 4/9/2020 and further the appellant has been indolent in moving the court.
5. On the 20/6/2022 the appellant and the 1st respondent argued the application orally in court and adopted the pleadings on record.
6. Having read the application the rival affidavits and the oral submissions presented before me in court the issue for determination remains one, which is whether the application is merited.
7. The legal provision governing this court's power to review a decision is found in section 80 of the Civil Procedure Act and amplified by order 45 rules 1 & 2 of the Civil Procedure Rules that;

“

“ 80. Review

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.

Application for review of decree or order [order 45, rule 1]

(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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

8. In the persuasive decision of Mativo J (as he then was) in Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others [2021] eKLR in analyzing the preconditions for a court to exercise review of its



decision reiterated that 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 court cited with approval the Indian Supreme Court case of Ajit Kumar Rath vs State of Orisa & others, 9 Supreme Court Cases 596 at page 608 that;

“The power can be exercised on the application of a person on 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 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”

9. It is trite that review is a creation of statute as opposed to the court’s inherent powers. The power of review must be conferred by law or by necessary implication. For an applicant to succeed in such an application, he must therefore demonstrate the following; 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; on account of some mistake or error apparent on the face of the record or for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
10. The gist of the application is that the judgement should be reviewed because there is an apparent error on record. That the error on record is that the court noted that the submissions were not filed. The respondents have argued that the appellant failed to comply with the orders of the court to file written submissions on the 21/9/2021.
11. I wish to revisit the orders of the court issued on the 4/9/2020 as follows;
 - a. This appeal is hereby admitted for hearing.
 - b. The appeal to be canvassed by way of written submissions.
 - c. The appellant to file and serve their submissions within 14 days (21/9/2020).
 - d. The respondent to file and serve their submissions thereafter by October 19, 2020.
 - e. The matter to be mentioned before the deputy registrar on October 21, 2020 to confirm the filing of submissions.
 - f. In the event of noncompliance on the part of the appellant the appeal shall stand dismissed.
 - g. In the event of noncompliance on the part of the respondent the documents/submissions filed by the said respondents shall stand as expunged.
 - h. The file thereafter to be transmitted to me (Judge Mbugua) for the writing of the judgment.
 - i. Judgment shall be delivered on notice.
12. It is not in dispute that the said orders were self-executing and non-compliance led to the eventual outcome which in this case was the dismissal of the appeal.



13. I have painstakingly looked for the written submissions of the appellant and find none on record. The appellant has annexed receipts for November 11, 2021. There are no written submissions annexed to the application nor in the file. It follows that no submissions are on record. The receipts do not demonstrate that they have any nexus to the alleged written submissions.
14. I find that there are no reasons for review of the judgment and the application fails. It is dismissed with costs to the respondents.

DELIVERED, DATED AND SIGNED AT THIKA THIS 20TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muturi Njoroge for Appellant

Karuga Wandai for 2nd and 3rd Respondents.

Court Assistant – Phyllis / Kevin

