Mwangi v Kanyi & another (Environment & Land Case 175 of 2017)
[2022] KEELC 15218 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15218 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 175 OF 2017

LN GACHERU, J

DECEMBER 8, 2022

BETWEEN

HEZEKIAH NJUGUNA MWANGI ..... APPLICANT

AND

JAMLECK CHEGE KANYI ..... 1ST RESPONDENT

MUTUA WAWERU ADVOCATES ..... 2ND RESPONDENT

RULING

1. In this Application dated 30th May 2022, the Plaintiff/Applicant has sought for the following orders:
    a. That leave be granted to the Plaintiff/Applicant to appoint the Law Firm of OG Makowade Advocates_to represent them in the matter and his former advocates Mutua Waweru Advocates tax any fees owed to them.
    b. That this court review, vary or set aside the Judgement dated 4thApril 2019, thereafter give directions on the rehearing of this matter.
    c. That this application serves as a stay of execution of orders in the Judgement due for review.
    d. That an Interlocutory Injunction be issued against the Defendants/Respondents or their agents from interfering in anyway with Land Parcel No. Makuyu/Kimorori/Block 1545(the suit property), which is sub-divided into 16 parcels and registered in the name of the Plaintiff/ Applicant.
2. This application was premised on the following grounds:
    a. That the Plaintiff/Applicant is desirous to change their advocates;
    b. That on 4th April 2019,this Court issued a judgement dismissing the Plaintiff/Applicant's suit.

c. That the correct Index Map relating to the sub-divided units of the suit property was produced in March 2020, in which it was indicated that the Plaintiff's/Applicant's and 1st Defendant's/ Respondent's properties had no boundaries. That this new and compelling evidence is the foundation of this review.

3. The application was supported by the affidavit of Hezekiah Njuguna Mwangi, who averred that he was the registered owner of the suit property and that the 1st Defendant/Respondent who owned the neighbouring property namely Makuyu/Kimorori/block 1677, had been encroaching on it.

4. The 1st Defendant/Respondent opposed the instant application through his Replying Affidavit dated 16th June 2022, sworn by Jamleck Chege Kanyi, in which he avers that the application is defective. He stated that there was a delay of two (2) years between the delivery of Judgement on 4th July 2019, and the present application for review filed on 30th May 2022, and that the Plaintiff/Applicant had not offered an explanation for the delay.

5. The 1st Defendant/Respondent further averred that the suit property was sub-divided in 1993. He stated that this matter cannot proceed without involving the owners of the other 16 parcels.

6. Lastly, the 1st Defendant/Respondent stated that the purported new and important evidence and the Registry Index Map is erroneous and the same was challenged in court. That the Survey Maps could have been obtained after an exercise of due diligence before judgement was delivered. He stated that the application is an afterthought. He prayed that the instant application be dismissed.

7. The 1st Defendant/Respondent in a Supplementary Affidavit dated 3rd August 2022, further stated that the Registry Map alluded to by the Plaintiff/Applicant was nullified and he presented a copy of his own from the Government Surveyor

8. The Plaintiff/Applicant also raised further issues through his Further Affidavit dated 20th September 2022, in which he averred that the title deed held by the 1st Defendant/Respondent was a forgery.

9. The Plaintiff/Applicant's claimed that in the Judgement dated, 4th April 2019, the suit was dismissed as he had not demonstrated any encroachment, since there was no boundary shown on the Registry Index Map despite conflicting reports from the Land Surveyor and Land Registrar.

10. Ngimu Farms Ltd filed an application on 17th August 2022, to be joined as an Interested Party in this suit on the grounds that they had obtained orders in Murang'a CMCC No. 197 of 2022, restraining the Defendant/Respondent herein from interfering with the suit property and sub-dividing it. This application was opposed through a grounds of opposition filed on 3rd October 2022, stating that the matter was concluded and Judgement entered on 4th April 2019, and thus the intended Interested Party cannot be joined in a determined matter. The Court directed that this Application for joinder would have to await the outcome of the instant application.

11. The matter was canvassed by way of written submissions.

12. The Plaintiff/Applicant through the Law Firm of OG Makowade Advocates, filed his submissions in support of the application on 12th October 2022. He relied on the following authorities:

a. On the issue of Review, the Applicant relied on Section 80 of the *Civil Procedure Act* which provides for review.

b. He further relied on Order 45 Rule 1of the Civil Procedure Rules which provides for applications for review.

13. The Plaintiff/Applicant concluded by submitting that the Court ought to allow for the review following the discovery of the new and compelling evidence, in particular the Registry Index Map, in order to end the elongated dispute between the parties.

14. The 1st Defendant/Respondent through Millimo, Muthomi & Co. Advocates filed their submissions opposing the application on 20th September 2022. They relied on the following authorities:

    a. On the grounds for review, the 1st Defendant/Respondent relied on Order 45 Rule 1 of the Civil Procedure Rules which provides for review on the grounds of discovery of new evidence;

    b. The 1st Defendant/Respondent also relied on the case of James Mwaniki Kamau v. R (2018) eKLR in which the definition of the word "new" in relation to new evidence was provided. It was held:

    In Blacks Law DictionaryEighth Edition, the word "new" as relates to the context of the application before me is defined as adj. (of a person, animal, or thing) recently come into being; 2. (of anything) recently discovered" while the word "compelling" which is derived from the verb to compel" means "to come or bring about by force, threats or overwhelming pressure." In other words new and compelling evidence is evidence that is being seen for the very first time and it must be overwhelming evidence.

    There is new evidence which must not have been available to him during the trial, and that such evidence could not have been obtained with reasonable diligence for use at the trial or that the evidence was not available at the time of the hearing of the two appeals.

    The Defendant/Respondent thus submitted that the Registry Index Map attached by the Plaintiff/Applicant was not conclusive new evidence, as it was available had the Plaintiff/Applicant conducted his due diligence. Regardless of that, the 1st Defendant/Respondent submitted that the Registry Index Map was reverted to its original number following the discovery of an anomaly on it by the Ministry of Lands.

    c. The 1st Defendant/Respondent further submitted that the application herein was an afterthought. They relied on the case of D.J. Lowe & Co. Ltd v. Banque Indosuez – Civil Application Nairobi No. 217 of 1998 wherein the court expressed itself as follows:

    > " Where such a review application is based on fact of the discovery of fresh evidence, the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

    d. On the issue of the delay of filing the review, the 1st Defendant/Respondent relied on the case of **Godfrey Wanjala Wafula & Another v. Jairus Wakhungu Mulunda (2020)eKLR**, wherein the Court stated as follows:

    > " Secondly an application for review must be filed without unreasonable delay. The judgement sought to be reviewed was delivered on 28th March 2018. This application was filed on 31st January 2020, almost 2 years later. That delay is unreasonable but has not been explained. In John Agina v. Abdulswamad Sharif Alwi 1992 LLR 5734 (CAK) the court held that:

> An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy from any Court."
>
> Court have found even lesser periods to amount to unreasonable delay. In Hussein Gulakhan & Others v. Market Mansion 2018 eKLR Yano J found an unexplained delay of 6 months to be unreasonable. The need to approach the Court for the remedy of review without unreasonable delay was emphasized in the Court of Appeal case of Francis Origo & Another v. Jacob Kimali Mungala Civil Appeal No. 149 of 2001 in the following terms, "In an application for review an Applicant must show that there has been discovery of new and important evidence which after due diligence was not within this knowledge or could not be produced at that time he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason and most importantly, the Applicant must make the application for review without unreasonable delay."

e. Lastly, on the issue of reopening the case and hearing it afresh following the alleged discovery of new evidence, the 1st Defendant/Respondent relied on the case of R. v. Council of Legal Education & 2 Others ex parte Mitchelle Njeri Thiongo Nduati (2019) eKLR,where it was stated"

> " The normal principle is that a judgement pronounced by the court is final, and departure from the principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. The court may also reopen its judgement if a manifest wrong has been done and it is necessary to pass an order to do full justice effective service. However, whatever the nature of the proceedings, it is beyond dispute that a review proceedings cannot be equated with the original hearing of the case, and the finality of the judgement delivered by the court will not be reconsidered except where a glaring omission or patent mistake or grave error has crept in earlier by judicial fallibility.

15. The 1st Defendant/Respondent concluded by submitting that the application was frivolous and an abuse of the court process and ought to be dismissed.

16. Having reviewed the pleading and rival written submissions herein, this court finds that the key issues for consideration are: -

    1. Whether the Plaintiff/Applicant has met the threshold for review?

    2. Whether a stay ought to be allowed?

17. In the determination of an application for review, Courts are guided by Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. Section 80 provides for review. It states:

    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.

Order 45 Rule 1 of the *Civil Procedure Rules* provides for applications for review. It states:

(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.

18. The abovementioned provisions were reiterated in the case of *Origo & Another vs. Mungala* (2005) 2KLR 307, in which the Court of Appeal held:-

19. A person who makes an application for review under the Civil Procedure Rules order XLIV rules 1 has to show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time; or that there was some mistake or error apparent on the face of the record or that there was any other sufficient reason. The applicant must make the application for review without unreasonable delay."

20. This Court is called upon the review the Judgment of 4th April 2019, in light of the instant application and makes a determination. The Applicant's main ground was that there was discovery of new evidence in particular a Registry Index Map, of the suit property indicating that the 1st Defendant/Respondent's property was non-existent on the Map. He submitted that he had obtained the Registry Index Map from the Government Surveyor.

21. The 1st Defendant/Respondent has opposed the instant application by stating that the Registry Index Maps were erroneous and the same had been cancelled by the Government Surveyor. He similarly produces a copy of a Registry Index Map of the suit property, which indicated that the Government Surveyor had reverted to the old Registry Map following the discovery of an error apparent on the map.

22. In the case of in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLRHigh Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018, Mativo J stated the following with regards to the discovery of new or important evidence:

> " "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."

23. The Registry Index Map was obtained from the Government Surveyor meaning that it can be obtained on application by a party at any time. This raises the question as to whether the Plaintiff/Applicant conducted his due diligence prior to filing his claim? The 1st Defendant/Respondent has further claimed that there was an error in the Registry Index Map produced and therefore the only credible source regarding that information would be the Surveyor himself who is not party to this suit. This Court is therefore not satisfied that indeed there is discovery of new evidence.

24. The final matter for consideration is whether the application was made in a timely manner as required under Order 45(1) of the Civil Procedure Rules. The judgment in question was delivered on 4{{^th} April 2019, while the instant application for review was filed on 30th May 2022. This is an inordinate period of over two years which has not been sufficiently explained by the Plaintiff/Applicant herein.

25. This Court is persuaded by the finding in *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, where the Court held as follows:

> "I doubt that an Application for Review would have succeeded because of the inordinate delay, of more than 2 years. The Respondent, by bringing application after application on the same issue at different times one after another is hell bent to frustrate the Appellant from realizing the judgment as awarded by the lower Court and unless something is done, the Appellant will forever be left babysitting his barren Decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of Article 48 of *the Constitution* which enjoins the state to ensure access to justice for all persons."

26. Considering the above, this Court finds that the instant Application is not merited as it has fallen short of the requirements for the granting of orders for review.

27. For the above reasons, the Court finds and holds that the Notice ofMotion Application dated 30th May 2022, is not merited. The same is dismissed entirely with costs to the 1st Defendant/Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Mr Makowade for the Plaintiff/Applicant

Mr Muthomi for the 1stDefendant/Respondent

N/A for the 2nd Defendant/Respondent

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

8/12/2022