



**Mjomba & Family v Mwashigadi & another (Environment & Land Case 176 of 2017) [2022] KEELC 15183 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15183 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 176 OF 2017  
NA MATHEKA, J  
DECEMBER 6, 2022**

**BETWEEN**

**HILARY MJOMBA & FAMILY ..... DECREE HOLDER**

**AND**

**FRANCIS MWASHIGADI ..... 1<sup>ST</sup> JUDGMENT DEBTOR**

**ADAN KIHARA ..... 2<sup>ND</sup> JUDGMENT DEBTOR**

**RULING**

1. The application is dated May 19, 2022 and is brought under sections 1A,1B and 3A *Civil Procedure Act* order 22 rule 28 and order 51 rule 1 of the *Civil Procedure Rules* seeking the following orders;
  1. That this application be certified urgent.
  2. That the judgment debtors/ respondents be committed to civil jail for a period of six (6) months for being in contempt of the decree of this court issued on March 28, 2022.
  3. That the judgment debtors/ respondents be summoned to appear before court to show cause why they cannot purge the contempt.
  4. That upon failure or refusal by the judgment debtors/ respondents, there be issued warrants of arrest against them to be executed by the Officer in Charge of the Mackinnon Road Police Station for their production in court and subsequent punishment for contempt of court.
  5. That in the alternative, this honourable court do issue an order for demolition and/or removal of all structures erected and being on the suit property known as Adjudication section Taru-Voi P/No 78 by the judgment debtors within fourteen (14) days of the date of this order and that in default thereof the decree-holders/ applicants to undertake such demolition and removal pursuant to warrants issued by this Honourable Court at the judgment debtors' cost.



6. That the Officer in Charge of the Mackinnon Road Police Station to supervise the order for demolition and removal for purposes of upholding law and order.
  7. That the costs of this application be awarded to the decree holders in any event.
2. It is based on the supporting affidavit of Hilary Mjomba the grounds that judgment was awarded in favour of the decree holders herein on March 23, 2022 and decree issued on March 28, 2022. That the judgment debtors advocates duly attended the reading of the judgment and are aware of its contents and import. That the decree herein was extracted and duly served upon the judgment creditors requiring their compliance. That the judgment debtors have had opportunity of obeying the decree but have willfully failed to do so.
  3. The second application is dated August 22, 2022 and is brought under sections 1A, 1B, 3, 3A and 63 (e) and 80 of the Civil Procedure Act and order 45 rules 1 and 2 & order 51 rule 1 of the Civil Procedure Rules, 2010 seeking the following orders;
    1. That, this application be certified as extremely urgent and service hereof be dispensed with in the first instance.
    2. That this honourable court be pleased to stay the operation of the judgement dated March 23, 2022 pending the hearing and determination of the application interpartes.
    3. That, this honourable court be pleased to review and/or set aside the judgement entered herein and all consequential orders of the judgement read on the March 23, 2022.
    4. That, the suit be reinstated for hearing
    5. That this honourable court be pleased to grant order 2 pending hearing and determination of the application herein.
    6. That costs of this application be in the cause.
  4. It is based on the grounds that the applicants have discovered new evidence which was not within their knowledge hence could not be produced at the hearing and when the decree was passed. That the plaintiff witness PW-5 Amos Kiplagat Rutto purported adjudication officer produced a document stating that it was sketch plan in regard to Plot No Adjudication section Taru-Voi P/ No 78. That the court erred in fact and law by failing to consider the authenticity of the sketch plan. That No Plot exists in any land registry in regard to plot number Adjudication section Taru-Voi P/No 78. That therefore there is no suit property existing as Plot No Adjudication section Taru-Voi P/ No 78. That the court erred in law and fact by admitting the evidence of PW-5 Amos Kiplagat Rutto who was induced to give false and malicious evidence and also did not produce job identification card. That the foregoing makes sufficient grounds and/or reasons for granting of the orders sought.
  5. This court has considered the applications and submissions therein. On the second application dated August 22, 2022, section 80 of the Civil Procedure Act cap 21 provides as follows: -
 

“ 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, 2010](#) provides as follows: -

“ 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.”

Discussing the scope of review, the Supreme Court of India in the case of [Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608.](#) had this to say:-

“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 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”

6. In [Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya \[2019\] eKLR](#) High Court of Kenya Nairobi Judicial Review Division Misc application No 317 of 2018 the judge set out the following principles;

- 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 reason" appearing in order 45 rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under section 80.
- 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/judgment 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 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 order/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.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in order 45 rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in order 45 rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in section 80 *CPC*. The grounds on which review can be sought are enumerated in order 45 rule 1.”

7. The Court in the case of *Kibos Sugar & Allied Industries Limited & Another v Benson Ambuti Adega & 6 Others, Civil appeal (application) No 153 of 2019* (unreported) quoted with approval the English case of *The National Guild of Removers & Storers Limited v Bee Moved Limited & Others [2018] EWCA Civ 1302* that;

“In determining whether an appellate court can admit additional evidence, the court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result.”

8. Looking at the facts of the instant case, the plaintiff witness PW-5 Amos Kiplagat Rutto an adjudication officer produced a document stating that it was sketch plan in regard to Plot No Adjudication section Taru-Voi P/ NO 78 and confirmed it belonged to the plaintiff. The defendants maintain that no Plot exists in any land registry in regard to plot number Adjudication section Taru-Voi PINo 78. That therefore there is no suit property existing as Plot No Adjudication section Taru-Voi P/ No 78. That the court erred in law and fact by admitting the evidence of PW-5 Amos Kiplagat Rutto who was induced to give false and malicious evidence. That no adjudication has ever been done according to the Kwale sub county office in Kinango. In delivering judgement in this matter the court confined its determination 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 order/decision as vitiated by an error apparent.

9. The discovery of new or important matter or evidence by the defendant is not sufficient ground for review. The defendant has not shown 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 earlier. I find that the only recourse for the applicant would be to appeal against the said judgement if aggrieved. The application dated August 22, 2022 is not merited and I dismiss it with costs. Having found so I find that the judgement still stands and the first application dated May 19, 2022 is merited and I grant the following orders;
  1. That the defendants to comply with the court order issued on March 23, 2022 within the next 60 (sixty) days after service of this order failure of which they will be cited for contempt and be directed to pay a fine of Kshs 50,000/= each and in default, the defendants to be committed to civil jail for a period of one (1) month.
  2. The defendants to pay the costs of this application.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 6<sup>TH</sup> DAY OF DECEMBER 2022.**

**N A MATHEKA**

**Judge**

