



REPUBLIC OF KENYA



KENYA LAW
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**Obonyo & 2 others v Lisaye (Environment and Land Appeal
18 of 2021) [2024] KEELC 532 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL 18 OF 2021
AY KOROSS, J
FEBRUARY 8, 2024**

BETWEEN

JUMA OBONYO 1ST APPELLANT

ALFRED OUMA OMORO 2ND APPELLANT

VITALIS ANYANGO OMORO 3RD APPELLANT

AND

WILSON ODENYO LISAYE RESPONDENT

*(Being an appeal from the judgment and decree of the PM Hon.L.Simiyu
delivered on 16/6/2021 in Siaya SPM ELC Case Number 2 of 2015)*

RULING

1. Before this court for determination is the respondent's notice of motion dated 5/09/2022 wherein the respondent has invoked amongst others Sections 63(e) and 80 of the [Civil Procedure Act](#) and Orders 45 and 50 (6) of the Civil Procedure Rules and seeks the following reliefs: -
 - a. Leave be granted to the respondent to apply for review out of time against the judgment of this court.
 - b. The application for review be deemed as properly filed.
 - c. This court be pleased to review its judgment dated 21/07/2022.
 - d. That the judgment dated 21/07/2022 be set aside and the judgment of the lower court be reinstated.



- e. In alternative to prayer (d) and in the interests of justice, the court do issue an order directing the appellants, their agents and servants from further encroaching beyond the portion of East Ugenya/Kathieno A/491 that is occupied by them.
 - f. That each party bears their respective costs of the appeal.
2. The grounds upon which this motion has been founded are inter alia: -
 - a. The respondent is aggrieved by the decision rendered on 21/07/2022.
 - b. On 25/07/2022, the respondent received evidence which could not be tendered at the time of passing the decree.
 - c. There is a clear mistake and error apparent on the face of the judgment.
 - d. There exists sufficient reason for the court to review its decision and if not, to issue other orders for the just and effectual determination of the dispute.
 - e. The judgment of the court has exacerbated the dispute and not resolved it.
 - f. This court is empowered to grant the orders sought.
3. The motion is premised on a lengthy affidavit that is deposed on 5/09/2022 by the respondent Wilson Odenyo Lisai. In summary, the respondent avers that his motion is filed out of time and this court could enlarge time for purposes of filing the instant motion. Further, this court misapprehended the evidence of Arbitration Case No. 37 of 1969 which was between Omondi Oluanda, William Adenyo and Onyango Lisaye.
4. In addition, he avers in his witness statement, he had stated land parcel no. East Ugenya/Kathieno A/462 which was the subject of the arbitration proceedings formed one vast parcel of land. The respondent avers that this court erred in concluding there had never been prior proceedings between the parties since in Siaya District Land Disputes Tribunal Case No. Sya/87/2001, the appellants participated therein as occupiers of East Ugenya/Kathieno A 491 [suit property].
5. He contends the court erred in deeming his suit time barred and that in fact, this court has ostensibly dismissed the appellants' claim of adverse possession in another suit.

Appellants' case

6. Jointly, the appellants filed a replying affidavit which they deposed on 28/09/2023 and in brief opposition, they assert the motion is a delay tactic intended to deny them from enjoying the fruits of their judgment. Further, they aver the motion has not met the criteria for review of the judgment.

Parties' submissions

7. Despite directions, the respondent's law firm on record Ooro & Company Advocates did not file their submissions whilst the firm of Namatsi & Co. Advocates who represent the appellants filed theirs dated 28/09/2023. In it, they identified 3 issues as arising for determination which consecutively were whether the respondent should be allowed to file the motion out of time, whether the court should review its judgment and the last one is on costs.
8. On the 1st issue and placing reliance on Order 45 Rule 1 (1) of the Civil Procedure Rules, counsel submits the respondent should have filed the instant motion within 30 days from the date the judgment was rendered.



9. On the 2nd issue and equally placing reliance on this Order 45 Rule 1 (1), counsel submits the respondent has not met the threshold to warrant a review of the judgment because it would be tantamount to reopening the case and litigation must come to an end. To buttress his position, counsel relies on the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR where the court on analysis of law and jurisprudence summarized the guiding principles for review of a court decision 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 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."



10. Counsel further submits the motion is incompetent since the respondent has not annexed a decree to his affidavit and relies on the persuasive decision of *Suleiman Murunga v Nilestar Holdings Limited & Another* (2015) eKLR. On the last issue, counsel sought for costs.

Issues for determination

11. I have carefully considered the motion, its grounds, affidavits, appellants' submissions, provisions of law and authorities cited and the issues arising for determination are;
- a. Whether the respondent required leave of the court to file the instant motion.
 - b. Whether the respondent has met the threshold to warrant a review of the judgment of this court.
 - c. Whether the judgment of this court determined the dispute with finality.
 - d. What orders should this court issue including an order as to costs.

Analysis and determination

12. The issues that are identified earlier in this ruling shall be dealt with simultaneously.

a. Whether the respondent required leave of the court to file the instant motion

13. The motion that is before me invoked the provisions of Order 45 Rule 1 (1) of the Civil Procedure Rules which 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.”
Emphasis added.

14. A clear reading of this provision demonstrates that an applicant who is aggrieved by a decision can apply for review “without unreasonable delay”. The determination of such reasonableness or unreasonableness is usually left to the judicious discretion of the court.
15. Thus, as evidenced from the prayers sought in the motion and appellants' submissions, it is not lost to this court that both counsels are of the mistaken belief that the timeline of 30 days which usually applies to appeals as enounced in Section 16A (2) of the *Environment and Land Court Act* and mirrored in Section 79G of the *Civil Procedure Act* applies to reviews.



16. Considering the motion seeks a review of this court's judgment, this court is only concerned with reasonableness of time. Now, turning to this case, judgment was rendered on 21/7/2022 and the motion filed on 5/09/2022. I find and hold the motion is filed without unreasonable delay.
17. However, I must mention there appears to have been laxity by both the respondent's counsel and court registry and I say so because the motion was brought to my attention on 20/09/2023 which is one year after it had been filed and the appellants counsel was only served on 19/09/2023.

b. Whether the respondent had met the threshold to warrant a review of the judgment of this court.

18. The applicable provisions that govern review of court decisions are encapsulated by Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states 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 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.”

19. The salient conditions brought out in Order 45 Rule 1 (1) of the Civil Procedure Rules such as discovery of new and important matter, mistake and sufficient cause as grounds for review have to be proved by an applicant and in this case, the respondent. I also associate myself with the principles outlined in the persuasive decision of Republic v Advocates Disciplinary Tribunal (Supra).
20. Before I proceed, I must mention that the respondent's ground that the judgment of the court has exacerbated the dispute between the parties is not a ground for review. Therefore, this court will not consider it.
21. Similarly, the appellant's allegation that failure to attach a decree is fatal does not hold water because Order 45 (1) of the Civil Procedure Rules does not expressly state that an order or decree must be annexed to an application for review. In any case, the judgment is in the court file. On this, I adopt the Court of Appeal decision of Peter Kirika Githaiga & another v Betty Rashid [2016] eKLR which held: -

“As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective.”

22. Now, turning to the respondent's grounds, he outlined 3 grounds. The 1st ground is that on 25/07/2022, he received evidence which could not be tendered at the time of passing the decree. I have anxiously gone through the affidavit and unfortunately he has not advanced this ground either by asserting it or availing such evidence and on that basis, this ground fails.
23. The 2nd ground is on a point of law and the respondent contends as follows in paragraph 33 of his affidavit: -

“That the court therefore made an error in declaring my suit as time barred...”



24. I have perused the judgement and indeed at paragraph 27 thereof, this court stated as follows: -
- “From the adduced evidence, by the time the respondent acquired title to the suit property, the appellants and their families had been in occupation of the suit property prior to the date of 1st registration which was on or before 18/10/1973. This was close to 41 years. By virtue of Section 7 of the *Limitation of Actions Act*, the respondent’s rights or those of his predecessors in title had long lapsed over the portion of the suit property occupied by the appellant.”
25. Obviously, a scrutiny of this excerpt demonstrates the court in detail reasoned why the respondent’s suit was time barred. My understanding of the respondent’s argument is that for the reason that there is another judgment that dismissed the appellants’ claim of adverse possession, this judgement should be reviewed.
26. Unfortunately, this particular judgment was not tendered to this court but respectfully, this subsequent judgment cannot form a basis for review since it does not fall within the paradigm of Section 80 of the *Civil Procedure Act*. In addition, the ground that a different Judge or judicial officer as the case may be could have taken a divergent position does not meet the threshold for review. See *Republic v Advocates Disciplinary Tribunal (Supra)*.
27. The last ground touched on matters of evidence and stated this court misapprehended evidence adduced in Arbitration Case No. 37 of 1969 and that of Siaya District Land Disputes Tribunal Case No. Sya/87/2001. The respondent called on this court to reconsider his witness statement, proceedings in Arbitration Case No. 37 of 1969 and Siaya District Land Disputes Tribunal Case No. Sya/87/2001 and thereafter, review the judgment.
28. The respondent did not disclose which paragraphs of the judgment he referred to but I have discerned them to be paragraphs 17 and 18 of the judgment where the court stated: -
- “The decision of the land adjudication committee was upheld by the arbitration board. Neither the appellants nor Donatus were parties to these proceedings...there had been proceedings in Siaya District Land Disputes Tribunal Case No. Sya/87/2001 between the respondent as the claimant and Sijenyi and his son Raphael Omondi Ochieng as objectors... The 2nd appellant participated in these proceedings as Raphael’s witness.”
29. No doubt, a reading of this extract of the judgment cannot be perceived to be an error apparent on the face of the record, mistake or sufficient ground. I say so because, it is not prima facie and further, it calls on this court to conduct a detailed analysis and reasoning which is untenable in a review.
30. All in all, the respondent’s assertions would have been appropriate grounds for appeal and not review. I find and hold the prayer for review is not merited conclude by adopting the Court of Appeal decision of *Francis Origo & another v Jacob Kumali Mungala [2005] eKLR* which stated: -
- “Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.”



c. Whether the judgment of this court determined the dispute with finality.

31. In its judgment, this court decided on the issues in dispute with finality and it did so by dismissing the respondent's case and awarding costs of the appeal and of the lower court suit to the appellants. It is apparent from the record that parties are at the executionary stage and there are pending taxation proceedings.

32. In the guise of seeking restraining orders, the respondent is hell bent on reopening his case. The proceedings that were before this court were perfected by its judgment and this court is now functus officio. I find and hold the respondent's relief that seeks restraining orders is not merited and I hereby adopt the Supreme Court of Kenya decision of Shollei v Judicial Service Commission & another (Application 10 (E016) of 2022) [2023] KESC 8 (KLR) (Civ) (17 February 2023) (Ruling) which held: -

“We determine that this court has finalized the proceedings in this matter and does not have jurisdiction to further determine issues raised by the parties.”

33. For the foregoing reasons, I ultimately find the notice of motion dated 5/09/2022 is unmerited and it is hereby dismissed with costs to the appellants. I direct the file be placed before the Deputy Registrar on 12/03/2024 for directions on the bill of costs dated 2/02/2023.

It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 8TH DAY OF FEBRUARY 2024.

HON. A. Y. KOROSS

JUDGE

08/2/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

N/A for parties

Court assistant: Ishmael Orwa

