



Karanja Suing through her Agent M/S Eunice Muthoni Warui v Mugambi (Environment & Land Case 411 of 2010) [2024] KEELC 3272 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 411 OF 2010**

JA MOGENI, J

APRIL 8, 2024

BETWEEN

SUSAN WANJIKU KARANJA SUING THROUGH HER AGENT M/S EUNICE MUTHONI WARUI PLAINTIFF

AND

LAWRENCE MUGAMBI DEFENDANT

RULING

1. The Notice of Motion application dated 12/01/2024 seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honorable Court be pleased to issue an order of Stay of Execution of the decree and warrants in respect of this case pending the hearing and determination of the application hereof
 - d. That further this Honorable Court be pleased to review, and or set aside the judgment delivered in this matter in view of the new issues and evidence that the applicant has discovered after the delivery of the judgment in this matter and which was not within his knowledge
 - e. That the cost of this application be provided for.
2. The application is premised upon the following grounds;
 1. That the applicant has come across information and evidence that the letters of allotment issued by Nairobi county council to the plaintiff hereof and also to Sammy K. Kimani in respect of the suit plot herein were both not genuine but forgeries which indicated different sizes of the same plot and which could not give ownership of the suit plot to any of them.



2. That the applicant has also discovered that ownership of the suit plot is alleged to have passed to the plaintiff on the 11th day of August 2009 when the sale agreement between Samuel Kimani Kamau and Susan Wanjiku Karanja the plaintiff hereof was executed but by then a letter of allotment had long been issued to the plaintiff hereof on the 17th day of July 2003 by Nairobi county council which is not possible as she could not purchase a plot that already belonged to her.
3. That at the time the alleged sale of the suit plot took place in the year 2009 the town clerk of Nairobi county council was not J. M. Mbugua who appears to have signed the letter of allotment for the plaintiff but the town clerk was one Philip Kisia.
4. That the plaintiff did not produce to the court physical deep plan in respect of the sale plot at the time of the hearing of the case and it is therefore difficult to locate the sale plot on the ground and its size.
5. That the defendant/applicant has also discovered that the issue of ownership of the parcel of land from which the suit plot herein was hived or subdivided from being parcel LR NO. 7879/4 is the subject in E.L.C Petition No.4 of 2023 Nairobi which was previously constitutional petition no. 343 of 2019 which is pending between Afrison Export Import limited and another versus Nairobi City county and the Hon. Attorney General whereof Nairobi city county appears to be in possession of good evidence in respect of the suit plot and which the defendant intends to testify about in the matter hereof if given a chance.
3. The grounds for the application are reiterated in the supporting affidavit of Lawrence Mugambi, the defendant/applicant herein. He avers that there has been a discovery of new evidence which was not available at the time of delivering the judgment and the decree thereof. He avers that the suit property has never belonged to the plaintiff/respondent and that the letter of allotment issued to the plaintiff/respondent is the same as the one which was issued to one Sammy K Kimani and that both letters were issued on 17/03/2003. This yet the plaintiff/respondent claims to have bought the suit property from the same said Sammy K. Kimani.
4. Further that the two letters of allotment each bear different sizes of the suit property. For example, the plaintiff/respondent Susan Wanjiku Karanja's plot is size 0.02 hectares whereas the plot for one Sammy K. Kimani is size 0.015 hectares.
5. The applicant further avers that the town clerk at the time of the sale agreement between the plaintiff/respondent and the said Sammy K. Kimani is indicated to be J.M. Mbugua yet the town clerk at the time was Philip Kisia.
6. That the suit property which was the subject of the judgment is also the subject in ELC Petition 4 of 2023 where there is litigation of the bigger suit property from which the defendant/applicant claims his portion of the suit property was hived from.
7. The plaintiff/respondent and filed grounds of opposition and resisted the suit.
8. The matter was heard by my predecessor, PM Njoroge J, and he delivered judgment on 25/05/2016. In the judgment the Honorable Judge stated the actions of the defendant showed disdain and disrespect of an earlier court ruling issued by Hon. Lady Justice Okwengu, J (as she then was). And continued to construct on the suit property despite a ruling stopping continued construction on the suit property until the suit was heard and determined.
9. The Honourable Judge issued an order of eviction of the defendant, his agents ore employees from the plaintiff's plot reference number 32 Mathare North Drive Inn Estate. He also ordered for demolition of



the building that was standing on the impugned suit property at the defendant's (Lawrence Mugambi). The court found that the plaintiff was the owner of the suit property having bought it from one Samuel Kimani Kamau for Ksh 806,000/= and having been issued with a letter of allotment by the City Council of Nairobi upon paying the requisite fees.

10. That the applicant herein Lawrence Mugambi claimed to have bought the suit property from one Stephen Njoroge Waweru yet he exhibited documents of ownership from the City Council of Nairobi in the name of Sammy Kimani Kingori without showing the nexus between the said Sammy Kimani Kingori and Stephen Njoroge Waweru who sold the suit property to the applicant/defendant.
11. The applicant purports to have done investigations that revealed that the Identity card of the said Sammy Kimani Kingori belonged to a different person other than the Sammy Kimani Kingori. He also faults the date of issuance of the letter of allotment which was a key document produced at the trial which led to the judgment delivered on 25/05/2016.
12. The Defendant/Applicant is the only party that duly submitted. The Defendant/Applicant's written submissions are dated 23/02/2024/

Analysis and Determination

13. I have reviewed and examined the subject Application, the Supporting Affidavit thereto and the brief submissions rendered by Counsel for the defendant/applicant and the counsel for the plaintiff/respondent, it is my considered view that the following issues are the ones I need to consider for determination;
 - a. Whether there should be stay of execution of the Judgment of the court delivered on 25th May 2016.
 - b. Whether the subject Application has been made without unreasonable delay.
 - c. Whether the subject Application has espoused any of the grounds enunciated in the provisions of order 45 rule 1 of the civil Procedure Rules.
14. This application basically seeks to stay execution of the warrants, review and set aside the decision made in this matter on 25/05/2016 which is 8(eight) years since the judgment was delivered.
15. On the first issue for determination, according to the provisions of Order 42 rule 6(2) of the Civil Procedure Rules, an order of stay of execution can be granted if the court is satisfied that substantial loss may result to the Applicant unless the order is made and when the Application has been made without unreasonable delay. The Applicant is also required to give security for the due performance of the decree.
16. The court in the case of *CFC Stanbic Bank Ltd vs John Kungu Kiarie & another*, Court of Appeal No. 62/2016 (Nairobi), the court while dealing with an Application for stay of execution of a decree, held that;

“The court balances two parallel positions first, that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without a just cause. The second factor is that if the execution of the decree will render the proposed appeal nugatory, the court will be inclined to grant a stay on terms”.
17. Therefore, the first condition is that a party should prove that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss he will suffer if the stay order was not made in his favour.



18. The Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 discussed what amounts to substantial loss their Lordships stated thus;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

19. In the instant application the applicant has not addressed themselves to the issue suffering irreparable loss if he is not granted the stay of the execution. The applicant has not provided any evidence about the kind of irreparable loss he would suffer if the order of stay was not granted. There was no evidential documentation by the Applicant on the court record as regards any alleged existence of developments put up by the defendant on the suit land. No appeal had also been filed and neither was there any threat by the plaintiff/respondent that they were going to dispose and/or alienate the suit land. In this case, I find that no substantial loss has been demonstrated. In any event, there was no evidence that the Plaintiff herein was bent at disposing and/or alienating the subject suit land. The implementation of the decree herein will not occasion the applicant substantial loss.

20. On the second issue of delay I wish to state that the judgment was delivered on the 25/05/2016 and the current Application was filed on 12/01/2024 and this clearly indicates that there was inordinate delay in filing this application which has been brought to court 8 years after the court delivered its judgment.

21. Order 45 Rule 1 of the Civil Procedure Rules as well as Section 80 of the *Civil Procedure Act* to submit give the trial court unfettered discretion to allow a review on any sufficient reason which reason may relate to not only the law, but also to facts as they may emerge from adducing evidence. See the case of *Shanzu Investments Ltd vs Commissioner for Lands* Civil Appeal No. 100 of 1993.

22. The issue of inordinate delay was discussed in the case of *Mwangi S Kimenyi vs Attorney General & Another* [2014] eKLR where it was held that there was no precise measure of what amounted to inordinate delay save that it would differ from case to case. In the instant application the applicant has not even discussed the issue of delay in bringing this application before the court.

23. I am not persuaded that filing an application for review 8 years when a court already delivered its judgment is reasonable time.

24. The applicant is further guilty of laches. In dealing with laches, Halsbury’s Laws of England, 4th ed. Vol. 16(2) at page 910 states that;

“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).

25. On the last issue I will digress and refer to Section 3A of the *Civil Procedure Act* which provides as follows:

“Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”



26. Order 12 rule 7 of the [Civil Procedure Rules](#) 2010 provides that:

“Where under this Order judgment has been entered or the suit has been dismissed, the Court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

27. Order 45 of the [Civil Procedure Rules](#), 2010 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. A party who is not appealing from a decree or order may apply for 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.

28. The substantive law regarding reviewing a judgment or order of the court is found in section 80 of the [Civil Procedure Act](#) and the procedural law is order 45 of the [Civil Procedure Rules](#) which stipulate as stated above. That the jurisdiction of the court under the order 45 of the [Civil Procedure Rules](#) is restricted to the grounds set out in the said order which are well outlined in Rule 1 as follows: -

“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.

29. The Applicant therefore should satisfy any of the three grounds of (a) Discovery of new and important matter or evidence (b) some mistake or error apparent on the face of the record (c) other sufficient reason.

30. On account of some mistake or error apparent on the face of the record, it was submitted that in [Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited](#) Civil Appeal No. 270 of 2002, the Court held that:

“a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter.”

31. The instant application is based on the Affidavit of Lawrence Mugambi on grounds that Judgment was delivered on 25/005/2016 against the Defendant/ Applicant. That there is new evidence discovered which the applicant could have adduced at the time the matter was being heard.



32. The provisions of order 45 rule 1 of the *Civil Procedure Rules* were restated by the Court of Appeal in *Benjob Amalgamated Limited and another v Kenya Commercial Bank Limited* [2014] eKLR as follows:

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.

33. The court in the case of *Muyodi –vs- Industrial & Commercial Development Corporation & Ano.* (2006) IEA 243 stated as follows: -

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.

34. As already stated, the applicant in this application has not explained the delay in bringing the application and specifically why it was only in 2023 that he sought to obtain the evidence that he claims is new evidence. The same evidence existed and was available in 2016 when the suit was filed and without doubt could have been obtained by the time the suit went to trial.

35. In my view I find that there definitely has not been any discovery of any new matter or evidence that was not available at the time the judgment was delivered. Again as already stated the bringing of the application after the lapse of 8 years after the judgment was delivered in my view is dilatory and the delay is unreasonable and I would equally on this account disallow the plaintiff/respondent’s application.

36. The upshot of the foregoing is that I find the application by the defendant/applicant dated 12/01/2024 to be devoid of any merit and I accordingly order the same dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF APRIL 2024.

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MOGENI J

JUDGE

In the virtual presence of:-

Mr Kamata for the Defendant/Applicant

Ms. Sharon Njoki holding brief fir Mr.Gatumuta for the Plaintiff/Respondent

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

