



Ngeta & 3 others v Mutuku & 4 others (Environment and Land Miscellaneous Application 3 of 2020) [2024] KEELC 5275 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5275 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 3 OF 2020**

A NYUKURI, J

JULY 10, 2024

BETWEEN

**ONESMUS NDOLO NGETA 1ST APPLICANT
JOHN KIBAI KIKOLE 2ND APPLICANT
STANLEY MUNYAO 3RD APPLICANT
BENARD ARUBANOS NDUBA MUTUA 4TH APPLICANT**

AND

**GABRIEL MUTUKU 1ST RESPONDENT
FRANCIS MAKAU MUASYA 2ND RESPONDENT
MONICA MUENI MUTUA 3RD RESPONDENT
ALPHONCE MULI MBUVI 4TH RESPONDENT
MBATHA MBITHI KIATINE 5TH RESPONDENT**

RULING

1. Before court is a notice of motion dated 7th June 2023 filed by the Respondents seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That the court do review, vary and or set aside the ruling delivered on the 29th day of may 2023 allowing the notice of motion dated 1st October 2020.



- d. That upon granting prayers 1, 2 and 3 above, the court does allow the cross-examination of the process server as ordered on 28.09.2021 and does allow the respondents/applicants herein to file their submissions in respect to the application dated 1/10/2020.
 - e. That costs of this application be provided for
2. The application is supported by the grounds on its face and the affidavit sworn by Brian Munyao Advocate for the respondents. The respondents' case is that there was a prayer for attendance of the process server for cross examination. Further that the respondents' advocate failed to file submissions regarding the motion dated 1st October 2020 and failed to attend court as they were not notified. That the said motion was allowed on grounds that there was no evidence of pending appeal. That at the time of filing response, the respondent only had orders granting them leave to appeal and that documents at the court of appeal are filed electronically and it is impossible to bring before this court a rubberstamped appeal. Further that the respondent has since filed the appeal being appeal No. E203 of 2021 and have also filed submissions.
 3. The respondent faulted this court's finding that service of eviction notice was not challenged, arguing that that was an error apparent on the face of the record. That the respondent having found crucial documents that were not in their possession at the time of filing their reply, they ought to be allowed to produce the said evidence. He attached the motion dated 1st October 2020; replying affidavit; notice to cross examine; witness summons; ruling dated 29th May 2023; letter; ruling of Court of Appeal dated 21st July 2022 and email extract.
 4. The application is opposed. Onesmus Ndolo Ngeta filed a replying affidavit dated 6th December 2023. She stated that the respondent was issued with three months eviction notice prior to filing this suit but that they did not file any suit against the notices. Further that a ruling dated 20th November 2020 allowed the notices. He termed as untrue the allegations by the respondent that it was impossible to demonstrate the documents filed in the court of appeal because filing is by e-filing, because there would be evidence of receipt of payment for filing. He stated that he was unaware of the appeal in the Court of Appeal and that no submissions have been served on his advocate as alleged. He stated that the respondent failed to file documents in his possession. And that the respondent is not entitled to an order of review.
 5. The application was canvassed by way of written submissions. On record are submissions filed by the applicant on 6th December 2023 which the court has duly considered.

Analysis and determination

6. The court has carefully considered the application, the response and the submissions. The only issue for determination is whether the respondent has met the conditions for review.
7. Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* provide for review and the conditions for review. Section 80 of the *Civil Procedure Act* 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 provide as follows;

Application for review of decree or order.

- (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. Therefore to obtain orders of review, an applicant must demonstrate that he has found new evidence which he could not get even with exercise of due diligence, or that there is an error apparent on the face of the record or for any just cause.
9. A prayer for review cannot be entertained on a question that ought to be dealt with on appeal, neither is it an avenue for an applicant to have a second bite at the cherry.
10. In the instant case the respondent has cited two reasons. One is that this court fell into error by stating that service of eviction notice was not contested. The affidavit supporting the application was sworn by the advocate of the respondent and not the respondent. The applicant's counsel cited paragraph 4 of the replying affidavit to argue that the applicant contested service of notice of eviction. That paragraph is as follows;

That I am advised by my advocate on record which advice I verily believe to be true that the applicants herein have not complied with the statutory provisions which are mandatory prior to filing the application before this honourable court.

11. The respondent argues that the above paragraph disputed service of eviction notice. In my ruling of 29th May 2023, I held that the service of eviction notices was not challenged. I still hold the same view today, because the applicant herein pleaded and deponed to serving the respondent with eviction notice on 16th June 2020. The notices filed have been signed by several person including the Deputy County Commissioner and the Divisional Police Headquarters and the respondents. The respondents did not categorically deny service of the notice on 16th June 2023 or on any other date, neither did they challenge the signatures on the notice. The generic response in paragraph 4 which is based on what they were allegedly advised by their advocate, cannot at any rate be interpreted as a denial of service. If they were not served, that was a matter of fact which they personally must have had knowledge of, and ought to have plainly stated so. It was not a matter of advice from their counsel. If my finding on that issue of service is erroneous, as alleged by the respondents, then that is a matter they ought to challenge in



the Court of Appeal, and not by application for review. I therefore find and hold that there is no error apparent on the face of the record to warrant a review.

12. On the question of new documents, Order 45 provides that the applicant must demonstrate that he could not produce the documents even with due diligence. In this case, the applicant relies on documents from the Court of Appeal dated 21st July 2022 and email extracts of 24th January 2022. The respondent has not shown that he could not have produced the said documents upon exercise of due diligence. The respondent made allegations of a pending appeal and failed to provide supporting evidence of the same and now wants opportunity to bring evidence that he ought to have brought when filing reply which he failed to bring. Court records are not confidential documents that cannot be produced. In any event if the respondent filed the appeal, he was the source of the same document and there is no reason why he did not provide it with his reply. Allowing him to present evidence which was available then, would be allowing the respondent to abuse the court process by having a second bite at the cherry. In any event, the affidavit in support was sworn by an advocate on contested matters, which matters could only be deponed by the respondent personally since it is him who knows whether he was served with eviction notice or not and not his advocate.
13. In the premises, I find no merit in the application dated 7th June 2023 and the same is hereby dismissed with costs to Onesmus Ndolo Ngeta & 3 Others, the applicants in this suit.
14. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Abonyo for applicant

Ms. Mutua for respondent

Court assistant – Josephine

