



**Nyachio v Masila (Environment & Land Case 364 of 2017)
[2024] KEELC 4987 (KLR) (2 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 4987 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 364 OF 2017**

CG MBOGO, J

JULY 2, 2024

BETWEEN

BENSON MORANGA NYACHIO PLAINTIFF

AND

RAPHAEL MUSYOKA MASILA DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion Application dated 19th December, 2023 filed by the defendant/ applicant and it is expressed to be brought under articles 40, 50 & 60 of the Constitution, order 9 rule 9, order 45 rule 1 of the *Civil Procedure Rules* seeking the following orders: -
 1. Spent.
 2. That the firm of D. Muinde Associates, Advocates be allowed to come on record for the applicant.
 3. That the judgment given herein on 31st July, 2017 be reviewed, varied and or set aside.
 4. That pending the hearing of this application an order of status quo be granted to preserve the subject matter of this suit.
2. The application is premised on the grounds on its face and in the supporting affidavit of the defendant/ applicant sworn on even date. The defendant/ applicant deposed that there are apparent and obvious errors on the face of record including lack of failure by the plaintiff/respondent to extract a formal decree that complies with the judgment. Further, he deposed that the judgment was entered against him without a hearing date, and that he only became aware that the suit was determined when auctioneers attached his vehicle.
3. The defendant/ applicant deposed that he was denied a right to be heard because he was never notified of the hearing date. He further deposed that he has been in occupation of the land for over 12 years,



and that he has acquired overriding interests by virtue of uninterrupted occupation. He deposed that the decree is statute barred for purposes of execution.

4. The plaintiff/ respondent filed grounds of opposition dated 20th May, 2024 challenging the application on the grounds that: -
 1. That the application herein is merely speculative and not supported by evidence.
 2. The application at hand does meet the threshold for review as no grounds for review have been fronted.
 3. The application has delayed inordinately without any justification from the applicant.
 4. The application herein is misconceived and incompetent.
 5. The applicant has attached no draft application for review to prove a prima facie case with likelihood of success.
 6. The notice of motion herein contravenes the respondent's right for a fair trial under Article 50 of the Constitution as it is meant to delay conclusion of the case and execution with no just cause.
 7. The defendant/ applicant is approaching with unclean hands after blatantly disregarding court orders to vacate the suit land.
 8. There is a valid decree on record and this court has to determine its validity and any ground on the validity decree herein is res-judicata.
 9. The notice of motion is served to the plaintiff in person yet there is a counsel on record.
 10. The plaintiff took the court for granted and defied its orders and now wants the courts to sanitize his ills by halting the process of execution.
 11. Stopping the process of execution by maintaining the status quo will prejudice plaintiff/ respondent since the defendant has tabled no plan on how he is going to pay the decretal sum and vacate the suit land.
 12. The defendant/ applicant fully participated in the matter preferred an appeal but has never filed any record of appeal and now seeks review therefore the present application is clearly an abuse of the court process.
5. The application was canvassed by way of written submissions. The defendant/ applicant filed his written submissions dated 27th June, 2024. The defendant/ applicant submitted that his application is based on the last ground that there are sufficient reasons to warrant a review of the judgment of this court. He further submitted that he was denied an opportunity to be heard when he was never served with hearing notices, and that the violations of one's constitutional rights is sufficient to warrant a review.
6. The defendant/ applicant further submitted that the judgment was for vacant possession, but the auctioneers attached his motor vehicle to recover the costs of the suit. Further, it was submitted that it would be pointless to appeal since he had not been heard, and the instant application is therefore ideal. He further submitted that the property rights under Articles 40 and 60 of the Constitution are protected, and cannot be taken away without a proper hearing.
7. By the time of writing this ruling, the Defendant/Respondent had not filed his written submissions.



8. Be that as it may, I have considered the application, the grounds of opposition and the written submissions filed by the parties herein. In my view, the issue for determination is whether there is merit in the application.
9. Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows: -

“Section 80. Review

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.] Application for review of decree or order.

“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.
- (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”

10. From the above provisions, it is clear that while Section 80 of the [Civil Procedure Act](#) grants the court the power to make orders for review while Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

11. In [Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya](#) [2019] eKLR, it was held,

“21. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-



appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of appellate jurisdiction, which is not permissible.”

12. Based on the above and looking at the present application, the latter perfectly fits the description of what can best be described as an abuse of the court process. As it is, the only prayer that succeeds in this application is prayer No. 2, where the firm of D. Muinde Associates Advocates seek to come on record.
13. The defendant/applicant is seeking review, first and foremost, 7 years since the judgment was delivered. Secondly, he utters lies by informing this court that he only became aware that the suit was determined when the auctioneers attached his vehicle. He goes ahead and states that he was denied a right to be heard under Article 50 of the Constitution. He contended further, that he has been in occupation of the land for over 12 years. The averments in the supporting affidavit are clearly one for appeal and not review. There is no deposition as to the error apparent on the face of the record or any new or important information that has been shown. Whereas this application is hopeless, I find that it is wasting this court’s precious time. Previously, the defendant/ applicant has sought for an order of stay of execution which was dismissed vide the ruling delivered on 6th May, 2020. Did the defendant/ applicant prosecute his appeal at the Court of Appeal, if any?
14. I find the Notice of Motion Application dated 19th December, 2023, incompetent. Same is dismissed with costs to the plaintiff/respondent. Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 2ND DAY OF JULY, 2024.

HON. MBOGO C.G.

JUDGE

02/07/2024.

In the presence of:-

C/A. Meyoki

