



**Wambua v Muthembwa (Environmental and Land Originating Summons  
E007 of 2020) [2024] KEELC 5274 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5274 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2020  
A NYUKURI, J  
JULY 10, 2024**

**BETWEEN**

**MUEMA WAMBUA ..... PLAINTIFF**

**AND**

**JOSEPHINE MWIKALI MUTHEMBWA ..... DEFENDANT**

**RULING**

1. Before court is a Notice of Motion dated 7<sup>th</sup> March 2023 filed by the plaintiff seeking the following orders;
  - a. That leave be granted to Kalwa & Company Advocates to come on record for the applicant, and the annexed copy of change of Advocates be deemed as duly filed upon payment of court requisite fees.
  - b. That this Honourable Court be pleased to set aside/vary and/or review its orders dated 25<sup>th</sup> October, 2022 dismissing the plaintiff's suit for non compliance of procedural documents.
  - c. That the plaintiff be allowed to file his supporting affidavit and statement in support of his originating summons.
  - d. That the annexed draft supporting affidavit and statement be deemed as duly filed upon payment of the court requisite fees.
  - e. That the court do fix the matter for hearing interpartes subject to convenience of the court diary.
  - f. That costs of this application be in the cause.
2. The application is premised on the grounds on its face as well as the supporting affidavit sworn by the plaintiff. The plaintiff's case as stated in the grounds on the face of the application is that although



the plaintiff's suit was dismissed on 25<sup>th</sup> October 2022 for want of compliance with procedural and supporting documents, the said documents were not within the plaintiff's knowledge as he had already furnished his details and information to his counsel who should have filed the same. He stated that he had been in court and ready to proceed with his claim but his counsel was absent and that it is unfair to punish an innocent litigant for mistakes of his counsel.

3. In the supporting affidavit, the plaintiff deponed that he owned parcel Matuu/Ikatini/872 which he acquired and possessed since 1959. That in July 2020, the respondent served him with notice requiring him to demolish his structures and that he reported the matter to the Deputy County Commissioner who ordered that status quo be maintained pending the determination of an application filed before the Land Registrar by the plaintiff on 29<sup>th</sup> July 2020.
4. He complained that the defendant was interfering with his quiet possession of the suit property; which he fraudulently changed into her name and got a title deed. He claimed that in 1990's when survey was done, the suit property was demarcated to him and therefore does not understand how the same was registered in the defendant's name. He attached his statement; a licence for hide and skin trade; letter from the area Chief Ikaatini Location dated 13<sup>th</sup> July 2020; letter from Deputy County Commissioner dated 14<sup>th</sup> August 2020; application for registration; caution; affidavit and title deed.
5. The application was opposed. Josephine Mwikali Muthembwa, the respondent herein filed a replying affidavit dated 16<sup>th</sup> October 2023. She deponed that when the plaintiff filed the Originating Summons herein, he failed to file a supporting affidavit thereto as required in law. That the respondent filed and served his response to the suit in September 2021. She stated that the matter came up severally namely 29<sup>th</sup> November 2021; 24<sup>th</sup> February 2022 and on 24<sup>th</sup> May 2022 but there was no compliance on the part of the plaintiff.
6. She stated that the application was defective as the order sought to be reviewed was not attached thereto and that the application has been brought after unreasonable delay.
7. In a rejoinder, the plaintiff filed further affidavit dated 21<sup>st</sup> November 2023. He stated that he was not given his day in court.
8. The application was canvassed by way of written submissions. On record are submissions filed by the plaintiff on 23<sup>rd</sup> November 2023, both of which this court has duly considered.

### **Analysis and determination**

9. I have carefully considered the application, response, submissions and the entire court record. Two issues arise for determination;
  - a. Whether leave should be granted to Kalwa & Company Advocates to come on record for the applicant in this matter.
  - b. Whether the applicant has met the threshold for setting aside/varying and or reviewing the court's orders of 25<sup>th</sup> October 2022.
10. Order 9 Rule 9 requires that in a suit where judgment has already been entered and one of the parties therein intends to change their advocates, they can only do so with leave of the court. A party is entitled to be represented by counsel of their choice. It is clear that in this matter there was a different counsel who represented the applicant until judgment was entered. The applicant now intends to change his counsel. He is within his Constitutional rights to do so and there is no reason why leave should not be granted accordingly. In the premises, I find and hold that the prayer for leave is merited and therefore I grant leave to the firm of Kalwa & Company Advocates to come on record for the applicant.



11. The record shows that this matter was on 24<sup>th</sup> May 2022 fixed for hearing on 25<sup>th</sup> October 2022 by consent of both parties. On 25<sup>th</sup> October 2022, the plaintiff was in court while his advocate was absent. On the said date, while the court was ready to hear the parties, there was no affidavit supporting the Originating Summons and neither had the plaintiff filed a witness statement or trial bundle as ordered by the court on 14<sup>th</sup> October 2021; 29<sup>th</sup> November 2021; 24<sup>th</sup> February 2022 and 24<sup>th</sup> May 2022. Therefore, this court found that there being no affidavit supporting the Originating Summons and no witness statement, there was no evidence on record presented by the plaintiff upon which he could present his testimony. Therefore the court dismissed the Originating Summons for want of supporting evidence.

12. The law granting this court power to review its orders is enshrined in Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#). 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](#) 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.

(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.

13. Therefore to obtain review of the court's orders, an applicant must demonstrate that they have discovered new and important evidence which they could not produce at the material time even upon exercise of due diligence; or where there is a mistake or error apparent on the face of the record or where there is sufficient cause. An application for review must be made without unreasonable delay.



14. In the case of *Republic v. Public Procurement Administrative Review Board & 2 Others* [2018] eKLR, it was held as follows;

Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;

- a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
15. In the instant case, having considered the supporting affidavit attached to the application, there is no mention of discovery of new and important evidence; error apparent on the face of the record or an allegation of existence of a sufficient cause. What the applicant states in the supporting affidavit is that he owns the suit property and does not understand how the same was registered in the defendant's name. There is no mention of anything concerning the orders of 25<sup>th</sup> October 2022.
16. Although on the grounds on the face of the application, the applicant stated that the documents referred to were not within the plaintiff's knowledge, in a contradiction, he states that he had already furnished his information to his counsel. He stated also that mistakes of counsel should not be borne by the innocent litigant. The allegation that the applicant supplied the alleged information to his counsel is not part of the plaintiff's deposition in his supporting affidavit; which as I earlier pointed out does not allege any of the conditions under Order 45 Rule 1. This suit was dismissed in the presence of the plaintiff on 25<sup>th</sup> October 2022. He filed the instant application on 24<sup>th</sup> May 2023, which is 7 months later. This in my view is unreasonable delay, which has not been explained and therefore inexcusable.
17. The applicant has not provided the information that he could not produce with exercise of due diligence.
18. In the premises, save that leave is hereby granted to the firm of Kalwa and Company Advocates to come on record for the applicant, I find no merit in the other prayers in regard to the application dated 7<sup>th</sup> March 2023 which are dismissed with costs.
19. It is so ordered.

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

**A. NYUKURI**

**JUDGE**

In the presence of;

Ms. Njagi for respondent

No appearance for the applicant

Court assistant – Josephine

