



**Ondiek v Nyamula (Environment and Land Appeal 54 of 2022)
[2024] KEELC 6813 (KLR) (9 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL 54 OF 2022
GMA ONGONDO, J
OCTOBER 9, 2024**

BETWEEN

SILVANCE OTIENO ONDIEK APPLICANT

AND

MUSA OTAGO NYAMULA RESPONDENT

RULING

1. In an application by way of Notice of Motion dated 24th June 2024 and e-filed on 22nd July 2024 at 17.03 hours, the Appellant/Applicant, Sylvance Otiende Ondiek acting in person, is seeking the following principal orders;
 - a. The Honourable court be pleased to review, vary and /or set aside the judgment which was delivered on the 7th April 2024 due to or on account of some mistake or error apparent on the face of record and for basing it's decision on the Land Registrar's report which did not contain credible information to assist the honourable court to pass a fair judgment.
 - b. The Honourable court be pleased to order for a retrial to enable the court order issued by the trial court on 24th October 2019 to be implemented by the Land Registrar and thereafter based on the report and/or finding made, the honourable court do proceed to deliver judgment.
 - c. The honourable court be pleased to allow the appellant (applicant) to amend the pleadings where necessary.
 - d. The costs of the application be costs in cause.
2. The application is anchored upon the applicant's supporting affidavit of even date and the accompanying documents marked as 'SOO-1 to 7' which include; the judgments of the trial court and this court, surveyors' report and photographs. Also, the same is based on grounds (a) to (j) set out on it's face.



3. Briefly, the applicant laments that the suit land reference Kanyamwa/Kochieng/Komungu/Kakaeta/66 belongs to and is registered in his name. That he sued the respondents for trespass in Ndhiwa PMC Environment and Land Court case number 116 of 2015 where he sought re-survey and re-alignment of the boundary of the suit land by the Land Registrar and County Surveyor, Homa Bay together with private surveyor and the order was granted on 24th October 2019. That the Land registrar's report which was relied on by the trial and appellate courts, bears scanty and false information as well as contradicts the private surveyor's report.
4. In their joint Replying affidavit of sixteen paragraphs sworn on 11th July 2024, the 1st to 6th respondents opposed the application. The respondents averred, inter alia, that the trial court and the appellate court exhaustively addressed the issues raised in the application and rendered their respective judgments on the same. That both courts observed that the doctrine of exhaustion did apply in the matter. That there was no appeal preferred from the judgment of this court which is functus officio herein.
5. Further, the respondents averred that the applicant has neither demonstrated discovery of new and important matter of evidence nor mistake or error apparent on the face or omission on the part of the court to warrant the orders sought in the application. That there is no good or sufficient reason advanced thereof for the court to grant the orders sought in the application. That on that score, the application is an abuse of the court's process, vexatious and devoid of merit thus, the same be dismissed with costs.
6. Hearing of the application was by way of written submissions further to this court's directions given on 23rd July 2024 and Order 51 Rule 16 of the Civil Procedure Rules 2010 (The CPR 2010 herein).
7. The applicant did not file submissions in regard to the application. He was aware of the application and the court gave him an opportunity to canvass it pursuant to the directions (supra) and as noted in the case of Ogada v Mollin [2009] eKLR.
8. Learned counsel for the 1st to 6th respondents filed submissions dated 5th August 2024 and made reference to the orders sought in the application, the grounds, the supporting affidavit and the replying affidavit. Counsel delineated issues for discussion inclusive of discovery of new and important matters of evidence and that both the trial and appellate courts took into account the Land Registrar's report in reaching their respective determinations.
9. Furthermore, counsel submitted that the applicant has not established the three limbs for review under section 80 of the *Civil Procedure Act* Chapter 21 Laws (The CPA herein) and Order 45 of the CPR 2010 as noted in the case of Bonface Kivindio v Alfred Kavila Kivindio & 2 others [2017] eKLR. Also, that this court is functus officio over the matter and that the application be dismissed with costs to the respondents as the same is an abuse of the process of the court and devoid of merit. To fortify the submissions, counsel relied upon the case of The Board of Governors Moi High School Kabarak and others v Toroitich Arap Moi and others [2013] eKLR on res judicata and that the only option for the applicant, is to file an appeal from the judgment of this court.
10. I have duly considered the entire Notice of Motion, the replying affidavit, the 1st to 6th respondents' submissions. So, is the application meritorious?
11. Notably, the applicant's assertion is that this court's judgment be reviewed as the Land Registrar's report was wrongly relied upon in arriving at judgment. However, the respondents asserted otherwise and termed the matter res judicata and that this court is functus officio herein. I take into account the meaning of the concepts namely; 'Res Judicata' and 'Functus Officio' as captured in section 7 of the CPA and Black's Law Dictionary 10th Edition.



12. It is settled law that the focus of a review is the decision of the court and entails interference with the exercise of the court's discretion permitted only on special circumstances where an apparent injustice has been occasioned; see *Charles Karathe Kiarie and 2 others v Administrator of the Estate of John Wallace Mathare-Deceased and 2 others* [2020] eKLR.
13. Additionally, this court is quite conscious of the provisions of Section 80 of the CPA and Order 45 of the CPR 2010 on review of judgment. Furthermore, Order 45 Rule 1 (supra) provides that:
 - (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.
14. In the case of *Kaiza v Kaiza* [2009] KLR 499, it was held that an application for review must be clear and specific upon the basis made. That not every new fact would qualify for review as due diligence be exercised and that fact was not within the knowledge of the applicant or could not be produced by the applicant at the time.
15. In the application, there is no clarity as regards any particular new fact that qualify for review. Moreover, the applicant has not demonstrated any mistake or error apparent on the face of the record or sufficient reason to attract the orders for review, retrial and amendment as sought in the application.
16. Clearly, the judgment sought to be reviewed was delivered on 9th April 2024 and it is regular. There is no appeal preferred from the same. Therefore, the application is an afterthought.
17. This court has the unfettered powers under sections 3, 3A and 100 of the CPA. Nonetheless, the application does satisfy the court to exercise the said powers in the circumstances.
18. In view of the above provisions of the law and legal authorities, it is my considered view that the instant application is an afterthought and devoid of merit.
19. A fortiori, the application lodged by way of a notice of motion dated June 24, 2024, is hereby dismissed.
20. By dint of the proviso to section 27 (1) of the CPA, costs of the application be borne by the applicant.
21. It is so ordered.

DATED and DELIVERED at HOMA BAY THIS 9TH DAY OF OCTOBER 2024.

G. M. A ONG'ONDO

JUDGE

Present.

1. The applicant in person
2. Ms Sabina Ombaka instructed by Mr Gilbert Owade learned counsel for the respondents.



3. F. Mutiva, court assistant

