



Kariithi v National Land Commission (Environment & Land Case E001 of 2021) [2023] KEELC 532 (KLR) (7 February 2023) (Ruling)

Neutral citation: [2023] KEELC 532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E001 OF 2021
MN GICHERU, J
FEBRUARY 7, 2023**

BETWEEN

DAVID KARIITHI PLAINTIFF

AND

NATIONAL LAND COMMISSION DEFENDANT

RULING

1. This ruling is on the Notice of Motion dated 31st March, 2022. The motion which is brought under Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#), Order 45, Rules 1, 2, 5 and 51 of the [Civil Procedure Rules](#) and all other enabling provisions of the law seeks three orders.
 - i. The judgment dated 30/11/2021 be reviewed.
 - ii. The decree dated 2/2/2022 by the Deputy Registrar be reviewed.
 - iii. That the costs of this application be in the cause.
2. The motion is supported by an affidavit sworn by Brian Ikol who is the director of the Applicant's legal affairs. In the affidavit he says that the Plaintiff accepted an award of Kshs. 55, 180, 025 on 17/12/2018 which was paid to his account with Equity Bank on 23/11/2019.

According to the first Defendant, the Plaintiff is not entitled to the extra Kshs. 35,783,250/- in the decree herein or any other amount.

There are seven annexures in support of the motion. They include award acknowledgement dated 17/12/2018. In the acknowledgement, the Plaintiff has stated that he accepts the award. In the same acknowledgement, there is a paragraph that gives the claimant an option of rejecting the award and to appeal to the court under Section 128 of the [Land Act](#) 2012. It is for this and other reasons that review is sought.



3. The application is opposed by the Respondent and his counsel, Alfred Ochieng, has sworn a replying affidavit dated 3/6/2022 in which he raises the following issues.

Firstly, he says that the current application does not raise any new issue.

Secondly, it is deponed that the Applicant failed to defend the suit and cannot now be heard to re-open a concluded case when it had ample opportunity at the right time.

Thirdly, it is the Respondent's case that this application has been brought late, more than six months after the conclusion of the suit.

For all the above reasons, the current application does not meet the test for review set out in Order 45 Civil Procedure Rules.

4. Counsel for the parties filed written submissions dated 18/11/2022 and 9/1/2023 respectively. The Applicant and the Respondent's counsel have identified one issue for determination namely,
 - i. Whether the application for review should be allowed?

5. I have carefully considered the application in its entirety including the affidavits, annexures, grounds, submissions and the law cited therein. I agree with the submissions by the Plaintiff's counsel that there are several prerequisites for the grant of an order for review. They are as follows.

- a. A decree or order from which no appeal has been preferred and,
- b. Discovery of new and important matter or evidence which 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,
- c. On account of some mistake or error apparent on the face of the record or
- d. For any other sufficient reason.

The final prerequisite is that such an application be made without unreasonable delay.

In my understanding of order 45 Rule 1, an applicant does not have to satisfy prerequisites (b), (c) and (d) cumulatively. All such an applicant needs to do is to satisfy just one of the three prerequisites. However, the first and the last prerequisites are both mandatory.

6. Applying the above test to this case, I find that the current application passes the first prerequisite because no appeal has been preferred.
7. Secondly, I find that the application again passes the test in prerequisite (d) above because what is at stake is Kshs. 35, 000,000/-. The Applicant is saying that the Respondent ought not to be paid Kshs. 35,783, 250/- and he had the option to reject this payment and contest it in court.

Having accepted the Kshs. 55, 180, 025, he should then not have filed this suit. The huge sum claimed is a sufficient reason to bring the current motion.

8. The Applicant has not explained anywhere in the grounds or the supporting affidavit why it took about five (5) months to file the current application. Such an explanation was necessary. There is also no explanation why they did not file a defence and why they failed to participate in the suit where they would have brought up the issue of over compensation of the Respondent at the trial.

Be that as it may, I find that there is no inordinate delay in filing the current application bearing in mind that the judgment was in late November, which is followed by December when time stops running for more than three (3) weeks.



9. Finally, on the issue of whether the court should review the judgment and decree herein, I find that sufficient reasons have been adduced for review. It has been proved that the Respondent received the compensation of Kshs. 55, 180, 025 on 23/1/2019. He had the option of rejecting the amount offered and litigating for the higher sum of Kshs. 90, 963, 275/-.

I find that the moment he accepted Kshs. 55,180,025 he became estopped from claiming a higher sum. Under Section 120 of the *Evidence Act*, I find that the Respondent is estopped under the general estoppel from claiming a higher sum than the amount of Kshs. 55, 180, 025/- which he received on 23/1/2019.

For the above reasons, I allow the Notice of Motion dated 31/2/2022 in terms of prayers 1 and 2.

As for prayer 3, I find that the Applicant/Defendant should pay the costs for failure to defend the suit in the first instance.

It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7TH DAY OF FEBRUARY, 2023.

M.N. GICHERU

JUDGE

