



REPUBLIC OF KENYA



Thoya & another v Arbitration Board & 3 others; Chea (Interested Party) (Miscellaneous Application 22 of 2021) [2023] KEELC 589 (KLR) (6 February 2023) (Ruling)

Neutral citation: [2023] KEELC 589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
MISCELLANEOUS APPLICATION 22 OF 2021
MAO ODENY, J
FEBRUARY 6, 2023**

BETWEEN

SANDE BAYA THOYA 1ST APPLICANT

HAMISI GUNGA BAYA 2ND APPLICANT

AND

ARBITRATION BOARD 1ST RESPONDENT

LAND DISPUTE TRIBUNAL 2ND RESPONDENT

LAND REGISTRAR KILIFI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

ALI SUNDAY CHEA INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated February 28, 2022 by the Applicants seeking the following orders: -
 - a. That the Honourable Court do review the ruling and orders of the Court dated November 30, 2021 and set aside the same.
 - b. That upon granting prayer 2 the Honourable Court be pleased to set aside the ruling delivered on November 30, 2021 dismissing the Applicant's application and set the same for hearing on merit.
2. The Application is based on the grounds listed on the face of the motion and supported by the affidavit sworn on February 28, 2022 by Hamisi Gunga Baya who deponed that the fate of his previous



- application was utterly a mistake occasioned by his advocate who failed to annex a copy of the required consent from the Land Adjudication Officer dated April 12, 2021 which he had given his advocate.
3. In opposition, the Interested Party filed grounds of opposition dated March 31, 2022 stating that the Applicants have failed to comply with the provisions of Order 45 Rule 1 b of the [Civil Procedure Rules](#) and that the matter is res judicata.
 4. Counsel for the Applicant submitted that the Court is clothed with unfettered discretion to consider and grant the orders sought by dint of Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#). Counsel relied on the cases of [Republic v Public Procurement Administrative Review Board & 2 others](#) [2018] eKLR; [Pancras T Swai v Kenya Breweries Limited](#) [2014] eKLR; and [Shanzu Investments Limited v Commissioner for Lands](#), Civil Appeal No 100 of 1993.
 5. Counsel further relied on Article 159 (2) (d) of the [Constitution](#) which provides that justice shall be delivered without undue regard to procedural technicalities.
 6. Counsel for the Interested Party submitted that the subject matter of the present application was heard and determined by this court hence the same is res judicata as described under Section 7 of the [Civil Procedure Act](#). Counsel relied on the case of The [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), Nairobi CA Civil Appeal No 105 of 2017 [2017] eKLR and urged the court to dismiss the application.

Analysis And Determination

7. The issue for determination is whether the application for review meets the threshold for review under Order 45 rule 1 and Section 80 of the [Civil Procedure Act](#).
8. Section 80 of the [Civil Procedure Act](#) provides for Review, it states 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."
9. Order 45 Rule 1 further provides: -
 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
 - c. 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.”

10. An aggrieved party has a remedy of review or an appeal of a judgment or order of the court. The catch words under Order 45 in respect of review are that of discovery of new and important evidence which after the exercise of due diligence was not within or could not be produced at the time the decree was passed, account of mistake or error apparent of the face of the record.
11. There must be sufficient reason why a review should be allowed and the application for review must be made without unreasonable delay.
12. The applicant deponed that at paragraph 4 and 5 of the supporting affidavit as follows:
 4. That this however was utterly not of my doing since I had sought and was issued with the consent from the Land and Adjudication Officer dated April 12, 2021 which merited that we move the Court.
 5. That I provided the consent to my Advocate who in turn was tasked with the duty of providing the same as proof to this Honourable Court as I relied heavily on my advocate’s skills and professionalism.
13. From the Applicant’s averment it is clear that both the Applicant and his counsel were aware and in possession of the consent from the Land Adjudication Officer. The Applicant blames his counsel for inadvertently not attaching the consent and that he relied on his advocate’s skill and professionalism.
14. The question is whether mistake of an advocate falls under the categories provided for under Order 45 rule 1 of the *Civil Procedure Rules*. The mistake or error provided for are those apparent of the face of the record. In my opinion, mistake by an advocate to attach a document is not one that can be termed as apparent on record.
15. In the case of *Alpha Fine Foods Limited –v- Horeca Kenya Limited & 4 Others* (2021) eKLR, the court held that; -

“The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”
16. The document that the Applicant hinges his application for review on, was well within their knowledge together with his counsel. There is no discovery of new and important matter which can warrant the court to review the ruling of this court dated November 30, 2021. What we are talking of is negligence and not mistake or error apparent of record.



17. In the case of *Rosemary Wanjiru Njiraini v Officer in Charge of Station Molo Police Station & another* [2019] eKLR

“Given the above I am not therefore persuaded that the applicant has brought herself within the parameters of an application for review and I see no merit in the said application.

That aside, I have also gone through the documents alleged to be the PDPs which were said to have been inadvertently left out, and even if I was to admit them in evidence, I do not see how I would have arrived at a contrary decision. Firstly, what has been displayed and claimed to be three PDPs are nothing but two draft PDPs for residential plots, and one draft survey sketch. The first of the two draft PDPs, is dated 28 September 1994, and is for some proposed residential plots in Molo, and not the police station. The said draft PDP is unapproved, and without approval, one cannot therefore claim that it is a proper PDP. The second is dated 14 June 1995 and is also an unapproved draft PDP for some additional residential plots in Molo. Again, it is not any PDP for Molo Police Station. The third document is a survey sketch seemingly for the plots in the draft PDP of 28 September 1994. I really have not seen their bearing on the plot in dispute. Thus, even if I was to allow this application and admit the said documents in evidence, I do not see how they challenge the legitimacy of the disputed plot, and I doubt if the same would have brought me to a different decision.”

18. The impugned application was canvassed by way of application and once the issue was raised counsel for the Applicant had an opportunity to respond and put his house in order or seek the leave of the court to ensure that every document had been attached as the consent was a core document in this case.
19. Further the impugned ruling was delivered on November 30, 2021, and the application for review was made on February 28, 2022, approximately three months later. No reason has been advanced as to why the Applicant did not file the application without delay.
20. I therefore find no merit in the application and is consequently dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF FEBRUARY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

