



Twin Properties Investment Limited v Kasarani Settlement Limited (Formerly known as Kasarani Resettlement Project) & 2 others (Environment & Land Case 532 of 2010) [2023] KEELC 18165 (KLR) (8 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 532 OF 2010**

LN MBUGUA, J

JUNE 8, 2023

BETWEEN

TWIN PROPERTIES INVESTMENT LIMITED PLAINTIFF

AND

**KASARANI SETTLEMENT LIMITED (FORMELY KNOWN AS KASARANI
RESETTLEMENT PROJECT) 1ST DEFENDANT**

GLADYS AUMA ODHIAMBO 2ND DEFENDANT

COUNCILLOR NOBERT ODUOR 3RD DEFENDANT

RULING

1. Judgment was delivered herein on December 8, 2022 in which plaintiffs suit was dismissed while the counterclaim of the 1st and 2nd defendants was allowed. By a notice of motion dated February 22, 2023, the plaintiff is seeking an order of review and or setting aside the aforementioned judgment on the grounds of discovery of new and important evidence.
2. The application is premised on grounds set out on the face of the application and the supporting affidavit sworn by one Kennedy Masese on February 22, 2023. He introduced himself as the manager of the plaintiff duly authorized by the board of its directors. He contends that in the month of January 2023 it came to his attention that there was a judgment delivered on October 3, 2022 in the case ELC No 90 of 2008 Bernard W. Kibui vs David M Mwangi, Jane M Karegi and Kasarani Settlement Limited. He contends that the said judgment depicts a dispute that is more or less similar to the current matter.
3. The deponent further states that the 3rd defendant in the aforementioned case (Kasarani Settlement Limited) had availed a witness identified as Francis Kariuki who testified that he was the secretary of the said 3rd defendant by the time of its constitution and that Kasarani Re-Settlement project was the entity which became a limited liability company known as Kasarani Settlement limited. That in view



- of that evidence, the judge had made a finding that Kasarani Resettlement Project had metamorphosed into a limited company.
4. The deponent compares these findings with those made by this court at paragraph 73 and 74 of the judgment of this court delivered on December 8, 2022 where the court stated that there was no tangible evidence of transformation of Kasarani Resettlement Project to Kasarani Settlement Limited.
 5. The deponent further states that the advocates for the 3rd defendants in the other suit ELC 90 of 2008 was Mr. Gachichio, a fact the said advocate did not disclose to them yet in the current matter the said advocates have been appearing for them (plaintiffs). That in the circumstances, the said advocate was profoundly conflicted as he failed to call Mr. Francis Kariuki as a witness in this case.
 6. It is also averred that one Mr. George K. Gatheca had lied under oath in stating that the 1st defendant did not have any affiliation to Kasarani Resettlement Project.
 7. The application has been opposed by the 2nd defendant vide her Replying Affidavit dated March 27, 2023. She contends that judgment delivered by another court does not fit the definition of new and important matter or evidence. She avers that the decision in ELC 90 of 2008 was delivered by a court of equal jurisdiction to this court and therefore this honourable court is not bound by the same.
 8. The deponent further contends that the alleged conflict of interest between the plaintiff and his advocate does not amount to either discovery of new evidence or sufficient reason for review.
 9. The 3rd defendant has opposed the application via his Grounds of opposition dated April 20, 2023. He contends that the alleged new and important matters is a means for the plaintiff to have a second bite of the cherry. That the applicant has failed to satisfy this court that the alleged new and important evidence was not within its knowledge and even after exercise of due diligence, the said evidence could not have been procured earlier. He therefore avers that the application is devoid of merits, its an abuse of the court process and ought to be dismissed.
 10. I have duly considered all the arguments advanced herein including the rival submissions; that is the ones filed by the plaintiffs dated April 20, 2023, those of the 1st and 2nd defendants dated May 18, 2023 and those of the 3rd defendants dated April 20, 2023. The issue for determination is whether the Judgment delivered by this court on December 3, 2022 should be reviewed and set aside to enable the applicant to adduce further evidence.
 11. The legal frame work governing matters of Review is to be found in Section 80 of the [Civil Procedure Act](#) as well as Order 45 of the [Civil Procedure Rules](#). One of the grounds of reviewing a judgment is “the discovery of new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of an applicant or could not be produced by him at the time when the decree was passed or the order made....”. See [Jeremiah Muku Methodist Church of Kenya Registered Trustees & Another](#) (2009) eKLR.
 12. Firstly, I find that the applicant has not demonstrated to the satisfaction of this court that the alleged new matters were not within his knowledge nor has he indicated the nature and extent of due diligence that he conducted to get the new evidence but was unable to procure it before the delivery of the judgment in this matter. How comes that it is only after the delivery of the judgment that the applicant was able to undertake research on various cases including ELC 90 of 2008 and ELC 1310 of 2013(Kasarani Settlement Limited vs, Margaret Wachira!. Equally, how did they make the discovery after judgment that their erstwhile advocates were the advocates for Kasarani Settlement Limited in other cases!.



13. This matter has been in the litigation arena for over a decade, having been filed on November 5, 2010, thus it was incumbent upon the plaintiffs to indicate the efforts they made to get the alleged new and important matters; they have failed to do so.
14. Secondly, and as rightly indicated by the 1st and 2nd defendants, the judgments mentioned by the applicant that is; in ELC No 90 of 2008 and ELC 1310 of 2013 were delivered by courts of equal jurisdiction to this court, thus this court is not bound by the said decisions. It is not fathomable that this court can proceed to set aside its own decision so as to entertain further litigation based on what transpired in the other mentioned cases.
15. In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR cited by the 1st and 2nd defendants, the court stated that;
- “ Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. [55] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. [56] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. [57] My plea is to keep the path of justice clear of obstructions which could impede it.”
16. Thirdly, it is pertinent to note that a court renders a decision based on the material placed before it. The applicants are inviting the court re-look at its judgment vis a vis the evidence that will possibly be given, particularly by one Francis Kariuki. However, this court cannot purport to analyse the nature of evidence that culminated in the judgment delivered on December 8, 2022, as doing so would be tantamount to this court clothing itself with appellate attire over its own decision.
17. As rightly stated by the 3rd defendant, the applicants are on a mission to have a second bite of the cherry. In the case of *Parliamentary Service Commission v Martin Nyaga Wambora & others* 2018 (eKLR) cited in, *Bank of Baroda (Kenya) Limited v Margaret Njeri Muiruri* [2019] eKLR it was stated that:-
- “ We further add that the review window so envisaged is not meant to grant an applicant a second bite at the cherry. It is not an opportunity for an applicant to re-litigate his/her case... at the core of the application is the Court’s exercise of discretion.....”.
18. In the final analysis, I find that the application dated February 22, 2023 in not merited, the same is hereby dismissed with costs to the defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Mukuha holding brief for Echesa for Plaintiff

M/s Adango for 1st and 2nd Defendants

