



**Baadad v County Commissioner of Lamu & 3 others; Canistel Limited (Interested Party)
(Environment & Land Petition 3 of 2019) [2023] KEELC 20342 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 3 OF 2019
MAO ODENY, J
OCTOBER 4, 2023**

BETWEEN

ABDULRAHMAN SALIM BAADAD APPLICANT

AND

COUNTY COMMISSIONER OF LAMU 1ST RESPONDENT

ADMINISTRATION POLICE SERVICE LAMU 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

AND

CANISTEL LIMITED INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated February 3, 2023 by the applicant seeking the following orders ;-
 - a. Spent.
 - b. That this honourable court be pleased to review, vary the judgment and decree of this honourable court.
 - c. That this honourable court be pleased to declare the applicant as the owner of the suit property.
 - d. That the costs of this application be in cause.



2. The application was based on the grounds listed in support together with the supporting affidavit sworn by the applicant on February 3, 2023. Judgment was delivered in this petition on February 24, 2022 in respect of the property L.R No. 79568/111, LMU/1633/1/3/98 Mtangawanda – the suit property.

Applicant's Submissions

3. According to the applicant, at the hearing of the petition, the court was not privy to the fact that the suit property had never been declared or gazetted as forest land.
4. It was the applicant's case that the court relied on the replying affidavit sworn by the then County Commissioner Samson Irungu Macharia on July 25, 2019, which was marred with false information about the status of the suit property.
5. Counsel for the applicant submitted that the suit property did not form part of the proclamation No. 44 of 1932 as was stated in the impugned judgment, further that the suit property did not fall within the boundaries of the mangrove swamp area but it was 60 meters away from the lowest and highest watermark.
6. Counsel urged the court to allow the application as prayed.

Respondent's submissions

7. The application was opposed vide the 1st Respondent Replying Affidavit sworn on March 15, 2023 by Charles Kitheka, Lamu County Commissioner, who deponed that the judgment could not be reviewed as there was no discovery of new facts and that the application was filed out of time.
8. Ms. Lutta, submitted that the conditions for filing an application for review is provided for under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* which conditions were also highlighted in the case of *Republic v Public Procurement Administrative Review Board and 2 others* [2018] eKLR.
9. According to Ms Lutta, the applicant had failed to meet those conditions as there were no new facts brought before the court; and that the application was filed unexplainably past the statutory period of 6 months.
10. On the issue of time, Ms. Lutta relied on the case of *Lewis Faida Mbogo v Salim Said t/a Sadin Timber and Woods Products* [2019] eKLR where the court dismissed a similar application that had been filed after a delay of 11 months. It was counsel's submission that a delay of 12 months in this case was inordinate and unexplained.
11. Ms. Lutta further submitted that the prayer seeking a declaration of ownership of the suit property was res judicata having been determined by this court, and that the application was only an attempt to retry the petition. Counsel urged the court to dismiss the application.

Analysis And Determination

12. The issue for determination is whether this is an application for review properly so called. The power of the court to review its orders is anchored under section 80 of the *Civil Procedure Act* cap 21 and the rules under Order 45 of the *Civil Procedure Rules*, 2010. Section 80 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.

13. Order 45 rule 1 restricts the grounds for review 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.

14. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR the court held that: -

- “i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development



cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.”
15. It should be noted that this application is couched in a way that the orders sought do not support an application for review. The submissions by the applicant does not support the application for review but it faults the court’s finding that the land was not available for allocation. If that is the case then the applicant should have filed an appeal to the Court of Appeal to present his grievance.
 16. The issues that counsel for the applicant wanted the court to deal with are as follows:
 - a. Whether the suit parcels of land forms part of proclamation No. 44 of 1932 as per legal notice No. 174 of May 20, 1964as provided by the Respondent.
 - b. Whether the suit parcel of land was available for alienation by the commissioner of lands.
 - c. Whether the allotment letters produced by the applicant are valid.
 - d. Whether the Respondents have violated the Applicant’s constitutional rights over the suit property.
 17. These issues had already been dealt with in the petition. This are not issues to be canvassed in an application for review.
 18. Be as it may the applicant has not shown any discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge. All the facts and correspondence that the applicant is now challenging or relying on were available to him during the hearing of the petition.
 19. Order 45 rule 1 is clear that such an application should be filed without unreasonable delay. The present application was filed on February 7, 2023 approximately one year after judgment was delivered on February 24, 2022. This delay is indeed inordinate. The applicant did not even attempt to explain why he had to wait all this while before seeking a review. In any event, the present application is improper and an abuse of the court process.
 20. It is on record that the applicant filed a notice of appeal dated March 2, 2022and did not disclose the outcome of the appeal whether, the same was still pending, abandoned or withdrawn. This was



important to reveal since a party that opts to appeal, the right for review then becomes unavailable. A person cannot exercise both the right of appeal and review at the same time. See *Oreero v Seko* [1984] KLR 238.

21. Furthermore, I note that the Applicant was prior to judgment represented by Messrs Khalid Salim and Company Advocates. The Applicant's present advocate, Messrs Soita Wafula and Advocates was therefore improperly on record for failure to seek leave of the court to come on record after judgment had been delivered, in compliance with Order 9 Rule 9 of the *Civil Procedure Rules* which provides;

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
22. The applicant in prayer No. three sought for an order that the court declares the applicant the owner of the suit property. The court is functus officio after having rendered the judgment that the land was not available for alienation.
23. I find that the application is an abuse of process and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF OCTOBER, 2023.

M.A. ODENY

JUDGE

