



Karukuma v Kariithi Substituted Karukuma Kariithi (Environment & Land Miscellaneous Case E010 of 2022) [2023] KEELC 20597 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND MISCELLANEOUS CASE E010 OF 2022**

**JM MUTUNGI, J
OCTOBER 12, 2023**

BETWEEN

WILSON NJUKI KARUKUMA APPLICANT

AND

**FRANCIS KARIITHI SUBSTITUTED KARUKUMA
KARIITHI RESPONDENT**

RULING

1. This Ruling is on the applicant's notice of motion application dated August 2, 2022 seeking this court to review and set aside its Ruling dated December 19, 2003 and the status quo obtaining on the suit property be maintained as at the date of filing the Application until further orders of the court. The Motion is predicated upon the provisions of article 47, 50 and 159(2) of the *Constitution* of Kenya 2010; Order 45 Rule 1(a) and (b) and Rule 2(1) and (2) of the *Civil Procedure Rules* and sections 80 and 3A of the *Civil Procedure Act*, cap 21 Laws of Kenya.
2. The Application is based on the following grounds;
 - i. That the Applicant filed a Notice of Appeal on December 20, 2003, a Record of Appeal dated October 28, 2004 and a Memorandum of Appeal dated October 28, 2004 and lodged in the Court's Registry on November 2, 2004.
 - ii. The Land Dispute Tribunal heard and determined an issue relating to the title vide its award dated August 21, 1998 contrary to the Law as at that date of the award.
 - iii. The aforesaid award was confirmed by W. N. Njage, Senior Resident Magistrate (as he then was) on 11th December 1998 contrary to the Law existing at that date.
 - iv. The Applicant aggrieved by the aforesaid order filed a Notice of Motion dated May 13, 1999 seeking for an order of Certiorari to move into court and quash the Judgement of W.



N. Njage, Senior Resident Magistrate (as he then was) dated December 11, 1998 made in Land Dispute Tribunal Case No. 55 of 1998.

- v. This court delivered its Ruling dated December 19, 2003 dismissing the Notice of Motion seeking to review the illegality emanating from the decision of W. N. Njage, Senior Resident Magistrate (as he then was)
 - vi. The decision of the High Court Judge G.B.M. Kariuki dated December 19, 2003 in the High Court Miscellaneous Civil Application Number 360 of 1999) was based on technicality and thus reflects a blatant error on the face of the record and has occasioned grave injustice.
 - vii. The order of the Resident Magistrate in Kerugoya remains in force and thus is a sufficient cause contemplated under articles 47, 50 and 159(2) of the Constitution of Kenya 2010; Order 45 Rule 1(a) and (b) and Rule 2(1) and (2) of the Civil Procedure Rules and sections 80 and 3A of the Civil Procedure Act cap 21 of the Laws of Kenya to cause this court to review its ruling in the interest of Justice.
 - viii. The applicant has suffered grave injustice as a result of the High court's Ruling and failure to arbitrate the real issues and to conclusively determine the matters in issue.
 - ix. It is only in the interest of fairness, truth and justice that this application be allowed and heard expeditiously.
3. The Application is supported by the affidavit of Wilson Njuki Karukumawho reiterates the grounds and states that the decision of the court in its ruling dated December 19, 2003 was based on technicality and thus reflects a blatant error on the face of the record and has thus occasioned a grave injustice.
 4. The applicant further argues that the Application for review will cure the injustice occasioned by the various Rulings and Judgments of the various courts.
 5. The Application is opposed through a replying affidavit sworn by Francis Kariithi dated April 18, 2023. The respondent's grounds of opposition to the Motion are that;
 - a. The Application is an abuse of court process since the issues raised have been determined by the court of competent jurisdiction.
 - b. There has been a delay in making this application since it is now 20 years after the said ruling was delivered by the court.
 - c. The applicant has not given any sufficient reasons why it has taken him that long duration before filing this Application.
 - d. There are no reasonable grounds brought forth by the Applicant to call upon the court to review the said Ruling.
 - e. There is no error of the face of the record in the said Ruling which will warrant the court to review.
 - f. There is no injustice which has been occasioned to the Applicant as he alleges in his Application since the said award was fair to all Parties in distributing the suit land in issue.
 6. For the foregoing reasons, the respondent urges the court to dismiss the applicant's application with costs.
 7. The parties canvassed the application by way of written submissions. I have considered the application, the affidavit in support and the replying affidavit in opposition and I have considered the submissions



by the parties. The singular issue for determination in this matter is whether the applicant has made out a case to justify the court to review the Ruling dated December 19, 2003.

8. Before considering the merits of the competing positions as advanced by the parties, it is necessary to set out the factual background and history of the matter which briefly is as follows:-
 - i. In 1998, the Land Disputes Tribunal adjudicated a land dispute regarding Land Parcel Number Kabare/Mutige/255 and its decision thereof was adopted by the Senior Resident Magistrate as an Order of the court. The Applicant being aggrieved by the decision, proceeded to the High Court and filed a Notice of Motion seeking an Order of Certiorari to declare the Orders of the Land Disputes Tribunal as confirmed by the Senior Resident Magistrate ultra vires and illegal. It was the Applicant's position that the Land Disputes Tribunal had no power to either conduct or arbitrate matters of Land Title and ownership.
 - ii. The High Court struck out the Application with costs to the respondent and the interested parties as the application was incompetent by virtue of there being no evidence to form basis on which relief sought could be granted.
 - iii. The applicant still aggrieved by the High Court's decision appealed against the same to the Court of Appeal, in Civil Appeal No. 241 of 2004 and the same was dismissed on account of the Applicant's failure to comply with Orders. The Applicant is now before this Honorable Court seeking a review of the Ruling made by the High Court dated December 19, 2003.
9. Order 45, Rule 1(a) and (b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

“(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.

- (2) A party who is not appealing from a Decree or order may apply for a review of Judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the Applicant and the Appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

The aforesaid Rule is based on section 80 of the *Civil Procedure Act*, cap. 21 Laws of Kenya which makes provision for review of decrees and orders 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.

10. Under section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously.

11. It's the applicant's contention that the High Court Judge made an error which is apparent on the face of the record and hence this application. Additionally the Applicant averred the error, was a result of a technicality that has subsequently caused a grave injustice to him. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR John M. Mativo Judge (as he then was) laid out the following principles in regard to applications for review: -

- “(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.

- (x). The power of a Civil Court to review its Judgment/decision is traceable in section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

15. I wish to state that I am in full agreement with the exposition of the applicable principles succinctly explained by Mativo, J (as he then was) in consideration of applications for review and associate myself with his observations.
16. Guided by the above principle regarding mistake or an error apparent on face of the record forming a basis for review, I am inclined to take the Respondent’s position in that the Applicant’s submission is misguided to the extent that the applicant argues a technicality amounts to an error which is prima facie visible. In the instant matter the applicant has not shown that there was an error apparent on the face of the record in regard to the Ruling dated December 19, 2003 that can justify the court to allow the Applicant’s application for review as sought.
17. The court is alive to the fact that justice should be accorded without undue regard to procedural technicalities, but the application of the principle cannot be open ended to the extent that parties can trample with abandon all procedural rules in the guise that they constitute procedural technicalities. Rules of procedure enable parties to litigation to have a level playing field in the pursuit of Justice and to the extent possible Procedure Rules should be adhered to and complied with, otherwise the practice of law would become a mine field without any predictability, consistency or reliability. The application of the principle should be restricted to cases where the invocation of the principle is necessary for the ends of Justice to be served. The facts and circumstances of each case should be given due consideration.
18. The court notes that the Ruling dated December 19, 2003, which forms the basis of this Application, was delivered nearly 20 years ago. The applicant has slept on his right for 20 years and is now seeking the indulgence of this court to afford him Justice. Twenty years delay is not a short period of time and would amount to inordinate delay in seeking Justice of whatever form. In the Case of Republic v Public Procurement Administrative Review Board & 2 others [2018] e KLR it was held: -
- “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;
- (a) discovery of new and important matter or evidence which after the exercise of due diligence, 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;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
19. The import and tenor of the above precedent concerning unreasonable delay in applying for review is that, the power of the court to review is discretionary and not fettered but must be exercised within the confines of the Law. In this instance, 20 years would be an unreasonable delay and more of an afterthought on the part of the Applicant in seeking to achieve his goal. Litigation must somehow come to an end and in my view it would be an affront and a travesty of Justice to reopen this matter to a fresh round of litigation when on the face of it, the matter was concluded by the Ruling delivered



by the court on December 19, 2003 as the resultant Appeal to the Court of Appeal against that Ruling was according to the Respondent dismissed in 2015.

20. There is no denial that the Applicant did exercise his right to appeal against the Ruling delivered by Hon. Mr. Justice G. B. M Kariuki (as he then was) as evidenced by the Memorandum of Appeal filed in Nairobi Court of Appeal Civil Appeal No. 241 of 2004 exhibited by the respondent as “FK2”. Though the application by the Respondent cites various provisions of the Constitution among other statutory provisions as its basis, the application is principally one for review and must be gauged against the provisions of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules that provide for review of Orders and Decrees of the Court. Under the said review provisions where a party exercises the right of Appeal, he cannot at the same time seek review of the same Order/ Decree. The Applicant therefore having exercised his right of Appeal forfeited the right to apply for review. Litigation ought not to be a matter of trial and error. Once a party to a litigation commences an action that is conclusively determined, he should live with the outcome. In the instant matter, the Applicant’s application to review the decision of the Tribunal and Magistrate’s Court was declined by the High Court and his Appeal to the Court of Appeal was equally dismissed. The Applicant cannot properly seek to rewind the clock through review of the High Court Ruling so as to have a fresh round of litigation.
21. The upshot is that the application lacks any merit and the same is thus dismissed with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 12TH DAY OF OCTOBER 2023.

J. M. MUTUNGI

ELC-JUDGE

ELC E010 OF 22	0
----------------	---

