



REPUBLIC OF KENYA



KENYA LAW
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**Yego v Sigisin & 3 others (Environment & Land Case E017 of 2022)
[2023] KEELC 20534 (KLR) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20534 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E017 OF 2022
MN MWANYALE, J
OCTOBER 9, 2023**

BETWEEN

JOHN KIPKORIR YEGO PLAINTIFF

AND

RAEL JEPTUM SIGISIN 1ST DEFENDANT

DENNIS KIPKOSGEI 2ND DEFENDANT

ABIGAE JEPKOECH 3RD DEFENDANT

FRANCIS KIBET MAIYO 4TH DEFENDANT

RULING

1. This Ruling related to the Notice of Motion application dated 26/6/2023 that seeks review of Section of the judgment dated 18/5/2023 that disallowed the Plaintiff's claim for 2 acres comprised in Nandi/Baraton/776 so as to substituted thereof by allowing the 2 acres having been acquired under the doctrine of adverse possession.
2. The grounds in support of the application are interalia;
 - i) that only one Agreement for sale for 3.0 acres was prepared by Mr. Kipkosgei Choge Advocate, was produced in the proceedings.
 - ii) The 2nd Agreement for 2.0 acres was prepared by Mr. K. Chumo Advocate was available but not produced, yet the said Mr. K. Chumo Advocate is available to produce the same but was not called to produce the same
3. Thus, the mistake on Counsel to produce the second agreement should not be visited upon the Plaintiff.



4. That the same is thus an error apparent on the face of record and sufficient cause for review has been demonstrated and the Application sought for the orders as prayed.
5. The application was supported by the Supporting Affidavit of John Kipkorir Yego who reiterated the history of the matter and the grounds in support of the application and has annexed a copy of the judgment sought to be reviewed, a copy of the Originating Summons as well both copies of the 1st and 2nd Agreement for Sale, and depones that his case was pegged on his acquisition of 5.0 acres and not 3.0 acres as appears in the judgment.
6. In opposition to the application the Respondent filed a Replying Affidavit deponed by Rael Jeptum Sigisin who deponed that no new evidence has been discovered to warrant the orders sought the application is an afterthought and the same ought to be dismissed as there ought to be finality in the judgment.
7. The judgment the Plaintiff did not adduce any evidence to corroborate his utilization of the extra two (2) acres he claims to sustain his claim of adverse possession.
8. That the 2nd agreement was not produced as the same was abandoned, a fact that the Applicant confirms under paragraph 20 of his affidavit.
9. The author of the 2nd Agreement was not called yet the Applicant had an option to call the said author.
10. The Court directed the matter to proceed by way of oral submissions and the Court inquired from the Applicant's Advocate before his submissions as to which ground in order 45, he was relying in support of the application and his submissions. To which Mr. C.F. Otieno Learned Counsel for the Applicant indicated that he was relying on the ground of sufficient cause.
11. It was the Applicants submission before Court; that there existed two Agreements for Sale and only on the first was produced, the second one was not produced by mistake of Counsel and the same ought not to be visited upon the client who is the Applicant; since the Applicant will not recover the purchase price of kshs 665,000/- that he paid as the same will be caught by Limitation of Actions Act.
12. The Applicant placed reliance on the decision of Banco Arable Espanol v Bank by Uganda for the proposition that an error by Counsel should not be visited on the client. The Applicant further submitted that as per annexure JKY 5 there was proof that the 1st Respondent had secured a buyer of the property at a higher price, and wanted to dispose the same.
13. The Applicant placed reliance on the decision of Banco Arable Espanol v Bank of Uganda 1999 2EA22 (SCU) for the proposition that an error by Counsel should not be visited on the client. The Applicant further submitted that as per annexure JKY 5 there was proof that the 1st Respondent had secured a buyer of the property at a higher price and wanted to dispose the same.
14. In her submissions in opposition to the application, Ms. Isiaho Sawe Learned Counsel for the Respondent submitted that the limb relied upon by the Applicant, to wit, sufficient cause is discretionary in nature and the Applicant has not demonstrated sufficient cause and is basically seeking a retrial through the back door.
15. The Respondent submits that the 2nd Agreement for sale formed part of the record and the Applicant and/or his Counsel elected not to produce the same and cannot use the present application to seek a retrial.
16. The Respondent further submits that the Applicant's claim was based on adverse possession, possession and utilization were not proven and the Court is functus officio.



17. Placing reliance on Section 4 (1) (a) of Cap 22, the Respondent submits that the Agreement sought to be introduced is time barred and would not have any value, since there was no Land Control Board consent in any event.
18. The Respondent urged the Court to dismiss the application.
19. I have analyzed the application and the submission on record together with the authorities, and frame the following as issues for determination.
 - i) whether the application meets the threshold of the principles set out for a review application; and
 - ii) whether the same should be granted.
20. Whilst on the face of the application the ground relied on is that there is an error apparent on the face of record, the Applicants' Advocates in his submission placed heavy reliance on the ground of sufficient cause.
21. The Court shall deem the application to have been grounded under both grounds. With regard to the first ground on error apparent on the face of record, the same has been deferred in the case of Kenya Orient Insurance v Zachary Nyamebane 2021 eKLR which decision quoted the Uganda Supreme Court decision in Edison Knyabwera v Pastor Tumwebaze. The Court stated

“It is stated that in order than an error may be ground for review, it must be ne apparent on the face of record an evident error which does not require any extraneous matter to show its in correctness. It must be an error so manifest and clear that no Court would permit such an error to remain on record. The error may be one of fact but it is not limited to matters of fact and includes also error in law.”
22. Our Court of Appeal equally observed the following in the decision in the case of National Bank of Kenya v Ndugu Njau 1997 (eKLR) where the Court observed as follows; -

“A review may be granted whenever the Court considers that it necessary to correct an apparent error or commissions on the part of the Court. The error or commissions must be self – evident and should not require an elaborate argument to be established.”
23. Was the non- production of the 2nd Agreement for Sale, an error apparent on the face of the record? The answer is a resounding no and this ground of review thus fails.
24. The Court shall now consider whether the non – production and/or mistake of Counsel is a sufficient cause for review.
25. The Applicant in support of this limb of argument places reliance on the decision of the Supreme Court of Uganda in Banco Arabe Espanol v Bank of Uganda (1999) 2 EA 22 (S.C.U) Where the Supreme Court of Uganda in dealing with an application of setting aside a dismissal of a suit, held that mistake of Counsel is sufficient cause to set aside the dismissal order.
26. In our local jurisprudence, sufficient cause as a ground of review, firstly “an analogous to the two other grounds (discovery of new evidence and error apparent of face of record) as was held in the decision in Nasibwa Wakenya Moses v University of Nairobi & Another 2019 (eKLR) which decision quoted the decision is Sadar Mohamed v Charan Singh & another which held that “Any other sufficient cause for the purposes of review refers to grounds analogous to the other two for example error on the face of the record and discovery of new fact.”



27. Thus whereas the mistake of an Advocate may be sufficient cause in an application for setting aside a dismissal order sufficient cause in a review application must be analogous to the other grounds and mistake of Counsel is thus not a sufficient cause in a review application, as it is not analogous with an error apparent on face of record and/or discovery of new evidence.
28. On that score, the Court finds that the ground has not been proven. Secondly, reliance of the ground of sufficient cause is discretionary, now if the Court were to allow this review application, the consequent would be to order for a retrial so as to produce the 2nd agreement that was not produced yet was available for production. In the Nasibwa Wakenya Decision the Court at paragraph 19 observed as follows.....
- “a review is permissible on the grounds of discovery by the Applicant of some new and important matter or evidence which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time the decree was passed. The underlying object of this provision is neither to enable the Court to write a second judgment no give a second innings to the party who has lost the case because of his negligence or indifference.....”
29. It follows that exercise of discretion as the second limb of sufficient cause has equally not sufficed and that the application does not succeed. I agree with the Respondents that the judgement entered for the 3 acres was in favour of the Plaintiff/Applicant was premised on the fact that the Defendants conceded to the occupation and utilization by the Plaintiff of the 3 acres acquired through the 1st Agreement for Sale, the Plaintiff himself having testified as a sole witness and not called any witness to corroborate his occupation of the same, and the extra two acres.
30. The upshot is that the application dated 26/6/2023 is dismissed with costs to the Respondents.

RULING, DELIVERED AND DATED AT KAPSABET THIS 9TH DAY OF OCTOBER, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Isiaho for the Respondents

Mr. C. F. Otieno for the Applicants.

