



**Tuimising v Ngeno & another (Environment & Land Case  
14 of 2015) [2023] KEELC 21375 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21375 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 14 OF 2015  
MC OUNDO, J  
NOVEMBER 9, 2023**

**BETWEEN**

**ELIZABETH CHEPTOO TUIMISING ..... PLAINTIFF**

**AND**

**JANE CHERONO NGENO ..... 1<sup>ST</sup> DEFENDANT**

**GEOFFREY CHERUIYOT ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated the April 6, 2023 brought pursuant to the provisions of section 1A, 1B, 3A and 80 of the Civil Procedure Act, order 45 and order 51 rule 1 of the Civil Procedure Rules 2010, and all enabling provisions of the law where the Applicant herein seek that the court reviews, varies and/or sets aside the judgment delivered on the June 23, 2022, and thereafter set aside the Decree thereto and substitute it with an appropriate decree that conforms with the said review. That thereafter the court to make such further orders as it may deem fit and just in the circumstances.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Elizabeth Cheptoo Tuimising, the Applicant herein.
3. In summary the main basis for seeking of the review of the judgment together with all consequential orders therein was that the plaintiff's case had been dismissed vide a judgement dated the 23<sup>rd</sup> June 2023 citing lack of a title in relation to the suit property being Kericho/Kipchimchim/2782.
4. That a copy of the green card had been availed to the Applicant's previous Counsel who had proceeded to close the Applicant's case without producing the said document as an exhibit. That the mistake of her previous Counsel on record ought not to be visited on her.



5. That secondly, the delay in filing the instant application was caused by the delay in the issuance of the typed proceedings, despite numerous attempts to get the same, to enable Counsel prepare an Appeal.
6. That in addition, there had been an attempt by the Applicant to have the matter settled amicably by the clan members and the village elders but the same bore no fruit which led to the filing of the instant Application albeit out of time.
7. In response and in opposition of the application, the Defendants through their representative replying affidavit sworn on May 8, 2023 by Jane Cheronu Ngeno, the 1<sup>st</sup> Defendant herein, deponed that the instant Application was irredeemably defective, incompetent ill-founded, untenable, unsubstantiated, wish-washy and devoid of any merit. That the same was filed to frustrate them from having costs of the judgement herein and should be dismissed with costs. That further, the instant Application was filed by Counsel who had inappropriately and improperly come on record.
8. That there was laxity in filling the instant Application the same having been filed almost 1 year after the impugned judgement was delivered which delay was inordinate, unreasonable and not excusable. That the Plaintiff/Applicant neither demonstrated a sufficient reason to warrant a review nor the error apparent on the face of the record. That the Plaintiff/Applicant had already expressed her intention to appeal through filing the notice of appeal dated 6<sup>th</sup> July, 2022 annexed to the instant Application as "ECT 3" hence she could not approach the court for review as it was not open for a party to invoke the appellate and review jurisdiction at the same time. That the filing of the Notice of Appeal unless withdrawn, excluded the procedure on Review under order 45 of the *Civil Procedure Rules*.
9. That allowing the instant Application would subject them to suffer irreparable loss and damage which could not be redressed through monetary means. That further they would not have a chance to cross-examine the Plaintiff/Applicant and her witnesses thereby occasioning an injustice to them.
10. That although the plaintiff/applicant's claim was that her advocate failed to annex the Green Card to the originating summons, blaming an advocate could never be a good excuse for the lack of diligence by the litigant to ensure that their case was properly prosecuted.
11. That the issues raised by the plaintiff/applicant in the instant Application related to the evidence adduced or not adduced during the hearing of the instant matter hence the review application ought to be dismissed with costs.
12. The Application was canvassed by way of written submissions to which the Plaintiff/Applicant filed written submissions dated July 26, 2023 wherein she framed her issues for determination as follows;
  - i. Whether closing of a case by the Plaintiff/Applicant's previous Counsel before the Plaintiff/Applicant could produce a copy of the green card is sufficient reason to enable the court review, vary and/or set aside the Judgement delivered on June 23, 2022, and all other consequential decrees or orders as prayed.
  - ii. Whether the Plaintiff/Applicant had demonstrated the error apparent on the face of record as contemplated by order 45 of the *Civil Procedure Rules*.
  - iii. Whether by filling a Notice of Appeal by the Plaintiff/Applicant, in law, she cannot approach the Court for review under order 45 of the *Civil Procedure Rules*. (sic)
  - iv. Whether mistake of Counsel on record resulting out of Counsel's fault and/or negligence can be visited on the Plaintiff/Applicant.



- v. Whether the court has discretion to allow review 10 months after the judgement has been passed, the delay being occasioned by the delayed typed proceedings from the court registry.
  - vi. Whether the Respondents will be prejudiced by grant of orders prayed in the Application dated April 20, 2023.
13. On the first issue for determination, the Plaintiff/Applicant contended that failure of the previous Counsel to present crucial evidence, the green card, amounted to grave mistake and a miscarriage of justice since the premature closure of the case deprived the Plaintiff/Applicant of an opportunity to substantiate her title to the suit property leading the dismissal of the suit.
  14. That for review to issue a party only needed to prove sufficient reason and not necessarily prove new facts as was held in the case of *Official Receiver and Liquidator v Freight Forwarders Kenya Limited* [2000] eKLR and that closing the case before the green card could be availed was a mere technicality which was curable under article 159 of the *Constitution* of Kenya 2010. That the court had inherent power to review its own decisions in exceptional circumstances where the interests of justice demanded it and that in the instant Application, the negligence of the previous Counsel rose to such exceptional circumstances. That to uphold the integrity of the judicial process, the court must ensure that the outcome of a case was not unjustly determined by the Counsel's mistakes or omissions. Reliance was placed on a combination of decisions in the case of *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR and Supreme Court of India case of *Ajit Kumar Rath v State of Orisa & others*, 9 Supreme Court Cases 596 at page 608.
  15. She further submitted that the principles of natural justice demanded that no person should suffer the consequences of someone else's fault or negligence and that the court was obliged by the rules of natural justice and in particular by article 50 of the *Constitution* of Kenya, 2010 to hear and determine each case on its merit hence no litigant should be driven from the seat of justice without being heard. That by allowing the impugned Judgement to stand without a review, the court would be punishing the Plaintiff/Applicant for the shortcomings of her previous Counsel, denying her fundamental right to a fair trial and a just determination of her case.
  16. On the second issue for determination as to whether the Plaintiff/Applicant had demonstrated the error apparent on the face of record as contemplated by order 45 of the *Civil Procedure Rules*, the plaintiff/applicant relied on the provisions of section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules* on conditions for the grant of review orders as well as the cases of *West Bengal v Kamal Sengupta* AIR 2009 SC 476 on the definition of mistake and error apparent and the case of *Edison Kanyambwera v Pastori Tumwebaze* 920050 UGSC 1 on what constitutes an error apparent on the face of the record to submit that given that the Plaintiff/Applicant had substantially complied with the requirements by submitting the copy of the green card as evidence of her title, the error apparent on the face of the record was the dismissal of her suit based on the absence of an extract of the title deed or any other document of title as required by order 37 rule 7(2) of the *Civil Procedure Rules*.
  17. Further reliance was placed on the decision in the case of *Ndungu Njau v National Bank of Kenya Ltd* [2001] eKLR to submit that the error highlighted a miscarriage of justice in the impugned judgement as the Plaintiff/Applicant had provided clear and compelling evidence of the errors, pointing to the negligence of the previous Counsel hence satisfying the requirements of order 45 of the *Civil Procedure Rules* and establishing a strong case for the review, variation and/or setting aside of the judgement.
  18. On the third issue for determination, the Plaintiff/Applicant submitted that the mere filing of a Notice of Appeal did not in itself amount to the formal filing of an appeal since the process of appeal was not complete until the appeal was formally preferred and registered before the appropriate appellate



court. Reliance was placed on the decided case in *Yani Haryanto v E. D. & F. Man (Sugar) Limited* Civil Appeal No. 122 of 1992 to submit that in the instant matter, the Plaintiff/Applicant had filed a notice of Appeal but had not yet proceeded to formally prefer an appeal. That a strict reading of the provisions of rule 77(1) of the *Court of Appeal Rules* on the Notice of Appeal contemplates that the notice may be served before the same is lodged hence in those circumstances, a Notice which has not even been lodged could not be equated to an appeal thus the Notice of appeal did not necessarily preclude the Applicant from seeking a review.

19. On the fourth issue for determination as to whether the mistake of the Counsel on record resulting out of the Counsel's fault could be visited on the Plaintiff/Applicant, it was submitted by the said Plaintiff/Applicant that the relationship between a litigant and their Counsel was not that of Principal and Agent but that one of trust and reliance whereby the litigant entrusts their case to the Counsel, relying on their knowledge, expertise and professionalism to advance their legal rights and interests.
20. That the previous Counsel's negligence in closing the case before crucial evidence could be presented was a mistake that adversely affected the Plaintiff/Applicant's case and such failure on the part of the Counsel should not automatically prejudice the litigant's interest since the Counsel's fiduciary duty to their clients required them to act diligently, competently and in the best interest of their client. Reliance was placed on the decided case in *Belinda Muras & 6 others v Amos Wainaina* [1978] KLR.
21. The Plaintiff/Applicant further relied on the case of *Philip Chemwolo & another v Augustine Kubende* [1986] eKLR, to submit that the litigant should not be penalized for the shortcomings of their Counsel, as they had no control over their Advocate's actions. That the right to effective legal representation was a fundamental principle enshrined in the *Constitution* hence denying the Applicant the opportunity to seek a review based on the mistake of the Counsel would violate the said right. That the Plaintiff/Applicant should not bear the burden of the Counsel's negligence which led to the dismissal of her case and the consequent deprivation of her legal rights.
22. On the fifth issue for determination, reliance was placed on the decided case in *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) to submit that the court had unlimited discretion to allow an application for review beyond the usual time framework. That the Plaintiff/Applicant diligently pursued the proceedings by making repeated requests and follow-up calls to the registry hence the delay was beyond the Applicant's control. That although time limits were set to ensure the efficient resolution of disputes and to prevent undue delays in the legal process, in exceptional circumstances, the court may exercise its discretion to extend the time limit to avoid injustice and uphold the principle of fairness and access to justice.
23. Her further submission was that allowing the application for review ensured that the case was adjudicated on its merits and that the Applicant was not prejudiced by the Court's delay. That the said extension of the time limit would not result in any undue prejudice to the Defendant/Respondent, as the objective of the same is to correct errors and ensure a just determination of the dispute.
24. On the sixth issue for determination, the Plaintiff /Applicant submitted that granting review orders would serve the interest of justice and the principles of fairness. That principles of justice dictated that any party should not be adversely affected by the correction of errors that led to an unjust outcome. That if errors were made in the initial judgement that deprived the Plaintiff/Applicant of her right to present crucial evidence, it would be unjust to maintain the status quo solely on the ground of potential prejudice to the Respondents.
25. The Plaintiff/Applicant concluded that she had presented compelling arguments and evidence demonstrating the error apparent on the face of the record and the negligence of the previous Counsel.



That the Plaintiff/Applicant's Application was premised on the pursuit of justice and fairness and that granting of the orders sought would not prejudice the Defendants/Respondents.

#### **Defendant/Respondents' submissions.**

26. The Defendants/Respondents submissions in opposition to the application was based on the allegations that the firm of M/S Kipnetich & Kamonya Advocates was inappropriately and improperly on record in violation of the provisions of order 9 rule 9 that requires that where there is change of Advocate after judgement had been passed, such change could only be effected through an order of court upon an application with notice to all parties or upon consent filed between the outgoing advocate and the proposed incoming advocate or the party intending to act in person as the case may be. That there was no evidence that the firm of M/S J.K Kirui & Co. Advocates were served with the said Application neither was there a consent executed by the two firms of advocates hence in the circumstances no leave was granted to M/S Kipnetich & Kamonya Advocates to come on record.
27. The Defendant/Respondent reiterated that once a Notice of Appeal had been filed, then review was not available under order 45 of the Civil Procedure Rules. That the Plaintiff/Applicant had earlier opted to pursue an appeal when she lodged a notice of appeal on 6<sup>th</sup> July, 2022. That the filing of the Notice of Appeal unless withdrawn excluded the procedure under Order 45 of the Civil Procedure Rules. That it was not open for the applicant to invoke both jurisdiction of an appeal and review at the same time, thus the instant application was incompetent and ought to be dismissed. Reliance was placed on the decided case of *Rayford Riungu Kuura & 2 others v M'kuura Riria & 2 others* [2016] eKLR.
28. The Defendant/Applicant further relied on the decision in the case of *Vincent Narisa Krop & 3 others v Martin Semero Limakou & 12 others* [2020] eKLR to submit that the issues raised in the instant Application did not met the requirements for grant of review orders. That the Plaintiff/Applicant herein filed the instant application after 1 year which amounted to unreasonable delay.
29. That it was trite that the granting of a review was based on the orbit shence to wit;
  - i. Discovery of new and important matter or evidence
  - ii. Some mistake or error apparent on the face of the record or
  - iii. Any other sufficient reason
30. That the Plaintiff/Applicant was always in court during the hearing of her case but had not annexed a green card or anything to do with the title deed to her suit. That it was the cardinal duty of a litigant to follow up the progress of their cases with their Advocates. That allowing the application would deprive them the opportunity to cross examine the plaintiff and her witnesses.

#### **Determination**

31. I have considered the Applicant's application herein, the Respondents' Replying Affidavit the authorities cited, the law as well as the submissions herein filed.
32. Judgment in this matter had been delivered on the 23<sup>rd</sup> June 2022 wherein the Plaintiff/Applicant's case had been dismissed she having not proved her case to the required standard. The Applicant has faulted this finding and seeks that the court reviews, varies and/or sets aside the said judgment. The said application was objected to by the Respondent to the effect that, first it was filed by a stranger contrary to the provisions of Order 9 Rule 9 of the Civil Procedure Rules, secondly, that the Applicant having filed a Notice of Appeal, then review was not available under Order 45 of the Civil Procedure



Rules and lastly that the application did not meet the threshold required for Review under Order 45 Rule 1 of the Civil Procedure Rules.

33. I am minded, before considering the merit of the Application and with reference to the provisions of section 1A and 3A of the *Civil Procedure Act*, to consider a vital element in the Respondent's response to the application, which alluded to the fact that the Application was filed by Counsel contrary to the provisions of order 9 rule 9 of the *Civil Procedure Rules*, and therefore he was not properly before the court. The said response, in essence seeks to oust the entire application. To save on judicial time, I shall have a look at the provision of the law so cited.

34. The provisions of order 9 rule 9 of the *Civil Procedure Rules* provide as follows:

“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”

35. Order 9 rule 10 of the *Civil Procedure Rules* provides;

“An application under rule 9 may be combined with other prayers provided the question of change of Advocate or party intending to act in person shall be determined first.”

36. In the present case, and having gone through the proceedings herein, it is evident that the Originating Summons had been filed by the firm of J.K Kirui & Co Advocates on behalf of Applicant herein, which firm had proceeded to represent the Plaintiff/Applicant up to the delivery of the impugned judgment.

37. The provisions of order 9 rule 9 of the *Civil Procedure Rules* make it mandatory that for any change of Advocates after judgment has been entered to be effected, then there must be an order of the Court upon an application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate.

38. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi v Veronica Mueblmann* [2019] eKLR where the judge observed as follows:

“...In my view, the essence of the order 9 rule 9 of the *CPR* was to protect Advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”

39. In the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

The court went further to quote with approval the holding by Hon. Sitati Judge, in *Monica Moraa v Kenindia Assurance Co. Ltd.* [2010] eKLR where the court held as follows:



“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant’s Advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

40. In the present case, Judgment had been rendered on the June 23, 2022 and therefore the provision of order 9 rule 9 was applicable herein. The firm of M/S Kipngetich & Kamonya Advocates, without leave of the Court, then filed their Certificate of Urgency dated the April 6, 2023 wherein they purported to come on record seeking for orders as herein above stated, which action clearly offended the express provisions of order 9 rule 9 of the Civil Procedure Rules.
41. It must be remembered that the provisions of order 9 rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change Counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his/her Counsel after judgment had been passed, must notify the Court and other parties.
42. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under order 9 rule 9 of the Civil Procedure Rules above is mandatory and thus cannot be termed as a mere technicality.
43. Thus having found that this procedure was not followed by M/S Kipngetich & Kamonya Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore all pleadings and the application by Notice of Motion under Certificate of Urgency dated the April 6, 2023 filed by the said firm is hereby struck out with costs to the Respondent.



DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 9<sup>TH</sup> DAY OF NOVEMBER 2023.

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

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