



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 85 OF 2006**

**MJANAHERI FARM LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**CHINA ROAD & BRIDGE CORPORATION**

**HOLA GARSEN MALINDI ROAD PROJECT.....DEFENDANT/RESPONDENT**

**RULING**

This ruling is in respect of a Notice of Motion dated 13<sup>th</sup> November 2020 by the Plaintiff/Applicant seeking the following orders: -

***a) THAT this Honourable Court be pleased to review its judgment issued on the 8<sup>th</sup> of May 2015 by directing the Defendant/Respondent to pay the Plaintiff/Applicant Kshs. 9,200,000/- as costs of restoration of the suit property, including the replacement of the soil, replanting of trees or in any other manner that shall be acceptable by the National Environmental Management Authority.***

***b) THAT costs of this application be provided for.***

The application was based on the grounds on the face of the application and Supporting Affidavit sworn on 13<sup>th</sup> November 2020 by Mansour Naji Said, the director of the Applicant Company. Mr. Mansour deponed that on 8<sup>th</sup> May 2015, this court entered Judgment in favour of the Applicant herein that the Respondent do restore the suit property within 90 days from the date of service of judgment.

That despite being served with the Judgment and decree, the Respondent has failed to comply with those orders. The Applicant stated that due to such failure, he undertook a valuation of the required costs of restoration of the land and annexed a copy of the Environment Audit Report to the Supporting Affidavit.

It was the Applicant's submission that the review should be granted for reasons that it was not within his knowledge that the Respondent would fail to comply with the Judgment hence a new issue. That failure to include an alternative remedy in the Judgment could be interpreted as an error on the face of the record; and that failure by the Respondent to comply with the orders amounted to any other sufficient reason to justify a review.

There was no response from the Respondent despite service being effected upon its advocates E.W Njeru Advocates.

Counsel for the Applicant filed submissions and urged the court to review the Judgment on the ground that the Respondent has failed to comply with the decree hence sufficient reason for review under Order 45 Rule 1 of the Civil Procedure Rules.

**ANALYSIS AND DETERMINATION.**

The issue for determination is whether this application falls under the ambit of Order 45 Rule 1 of the Civil Procedure Rules for review. The court's power to review its own Judgment is provided under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules as follows:

***80. Review***

***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.

In the case of **National Bank of Kenya v Ndungu Njau Civil Appeal No. 2111 of 1996** cited in **Coretec Systems & Solutions Ltd v Digital Divide Data Kenya Ltd [2020] eKLR**, the Court of Appeal held that;

**“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground for review that another Judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect expansion of the law”**

In the current case the Applicant is seeking for review on the grounds that they did not anticipate that the Respondent would not comply with the order therefore wants the court to order the Defendant to pay Kshs. 9,200,000/ being the cost of the reclamation and restoration as per the annexed Environmental Audit Report.

The Judgment delivered on 8<sup>th</sup> May 2015 read as follows:

**“The 1<sup>st</sup> Defendant to restore the suit property, including the replacement of the soil, replanting of trees or in any other manner that shall be acceptable by the National Environmental Management Authority within 90 days from the date of service of this judgment.”**

The Applicant found it suitable to seek review of the Judgment rather than enforce it. Failure by the Respondent to satisfy the Judgment is not in my view discovery of new and important evidence. There is no sufficient reason to apply the provisions of Order 45 rule 1 of the Civil Procedure Rules.

Would such action be a review or amount to reopening the case and admitting documents that have not been subjected to proof and cross examination? This is tantamount to using shortcuts to relitigate in this matter.

I find that the Applicant’s view that the court should have included an alternative order for restoration costs in the event of failure to restore the land as untenable as this is not an error on the face of the record. The court only grants prayers sought by the litigants and not what it thinks should have been pleaded. Parties are bound by their pleadings.

In the case of **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.***

***v. 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.***

***vi. 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.***

***vii. 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.***

The Applicant did also not file the application for review timeously and no explanation has been offered to show why they took five years to file the application. The application lacks merit and is dismissed with each party bearing their own costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 3<sup>RD</sup> DAY OF MARCH, 2022.**

**M.A. ODENY**

**JUDGE**

***NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.***