



**Murenga (Suit on behalf of the Estate of the Arose Akhusama Kassim) v
Toloi & 3 others; Kassim & 2 others (Interested Parties) (Environment &
Land Case 149 of 2016) [2022] KEELC 2531 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 149 OF 2016**

**AA OMOLLO, J
JULY 7, 2022**

BETWEEN

**FARAJALLAH MABIANGE MURENGA APPLICANT
SUIT ON BEHALF OF THE ESTATE OF THE AROSE AKHUSAMA KASSIM**

AND

**HAMISA BASHIR TOLOI 1ST RESPONDENT
PHYLIS AKUMU TOLOI 2ND RESPONDENT
ASMAN MATSUKHU TOLOI 3RD RESPONDENT
HAJI OCHIENG TOLOI 4TH RESPONDENT**

AND

**RAMADHAN MABIALE KASSIM INTERESTED PARTY
HASSAN MURENGA KASSIM INTERESTED PARTY
BAKARI WEKHOBIA KASSIM INTERESTED PARTY**

RULING

1. The Applicant moved this Court under sections 1A, 1B, 3A, 3B and section 63 (e) of the [Civil Procedure Act](#), Order 45 Rules 1 (1) of the [Civil Procedure Rules](#) on the 21st of December, 2021 for orders THAT:
 - a) Spent;



- b) The Judgement delivered on the October 19, 2021 be reviewed since the Respondent herein frivolously, mischievously and fraudulently misled the Honourable Court and obtained a judgement against the 3rd Respondent/Applicant(and the other former Respondents herein);
 - c) The 3rd Respondent/Applicant acquired new evidence in support of point (b) above. The discovery of this new and important evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the 3rd Respondent/Applicant at the time when the judgement was delivered;
 - d) Costs of the application be provided.
2. The Application was supported by the affidavit of Asman Matsukhu Toloï dated 21st Dec, 2020 and on the following Grounds inter alia;
- a) The Applicant/Respondent herein frivolously, mischievously and fraudulently misled the Honourable Court and obtained a judgement against the 3rd Respondent and the other former Respondents herein;
 - b) The Applicant/Respondent herein presented forged/ irregular/unascertained documents before the Honourable Court in order to hoodwink/mislead the Court that the suit properties though registered in the name of Mohamud Toloï Kassim are held in trust for the business name and as such all the partners in equal shares;
 - c) The Applicant/Respondent (PW-1 herein) stated that he and or his family had been paying rates for the said properties especially plots No. 7983/7 and 7983/127. However, we can confirm from the land records that the same is nay. For Plot No. 7983/7 no rates had been paid since the 3rd Respondent/Applicant paid for the same after extending the lease of the said plot. As it stands the rent/rate arrears stand at KShs.82,191/=. For plot No. 7983/127 some of the rates had been paid, however the bill demanded by the County is KShs.32,665/=.
 - d) The Applicant/Respondent's actions of paying some rates does not necessarily mean they are shareholders in the said properties. They only paid some of the rates of the properties in question because they reside in the said properties;
 - e) That the Applicant/Respondent's second witness, Gabriel while confirming that he worked for the County Government of Busia as a Land Rates officer stated that he did not possess the original registers for plot number 7983/7 as they were with the EACC which information is a lie and that with regards to plot number 7983/127 he only produced registers for 1986 and subsequently from the years 2005-2014;
 - f) That the original registration of the Properties was in the name of Toloï Kassim (deceased and father to the 3rd Respondent/Applicant) but the names were altered in different valuation rolls to include the words "& Brother" without crosschecking as to whom the rightful owner of the properties was;
 - g) Land officials in their own volition altered some of the valuation rolls to create a narrative that the properties in question were being held in trust. The valuation rolls showed that the original registered owner of the properties was Toloï Kassim and as such it would have been easier to alter his name and add the words & Brothers at the end hence creating a narrative that all the brothers were owners of the suit properties;
 - h) The valuation records altered belonged to different distinct years. The first alteration was done on the valuation roll for the year 1986 only which was fraudulently done to mislead the Court



that the alterations begun as early as then. Other alterations took place between 2005-2014 which happened at the time when the 3rd Respondent/Applicant had begun the legal process of acquiring letters of grant of probate to administer the estate of his late father Tolo Kassim;

- i) If indeed the business name by the name Mohammed Tolloi Kassimu & Brothers owned the properties, then the alterations on the valuation rolls should have been done to capture the business name and not simply add the title “& Brothers” after the name of the legitimate and legal owner of the said properties;
3. The Respondent opposed the application by filing his Replying Affidavit on the 2nd of February, 2022 in which he deposed that the Applicant had sufficient access to the documents he alleges to be forged, irregular and or unascertained because he filed the same with his bundle of documents and the Applicant was free to cross-examine him on the same. In response to paragraph 4 and 5 of the Supporting Affidavit, the Respondent deposed that a delay in payment of rates did not diminish a lessee’s entitlement and ownership of property and that he stayed on two properties bequeathed to him by his father Arose Akhusama (deceased). That the Court made a determination that all the five (5) partners of the business were entitled to an equal share of the properties. That PW2 appeared in Court as a common witness and not as the Plaintiff’s witness and the Applicant was allowed to cross-examine the witness.
4. On the aspect of the EACC investigations, the Respondent stated that he did not recall PW2 stating that the missing valuation rolls that were not available were in respect of an investigation by EACC especially plots No. 7983/127 and 7983/7. That he however recalled PW2 stated that he did not have valuation rolls for a certain period because they were in possession of EACC for an ongoing investigation. He deposed that the documents annexed to the supporting affidavit and marked as AMT 2 and AMT-3 are the same documents that were produced in court by PW2. That the documents produced in Court were produced in their original form. That the Applicant had not presented the Court with new information as all the rates demand notices for 1993,1994 and 1995 are issues that were all pleaded in paragraph 9 of his supporting affidavit dated 8th November, 2016. That from the documents marked as AMT-11, AMT-1, AMT-12, AMT-14 and AMT-15 nothing ascribes ownership of the mentioned parcels to Tolo Kassim.
5. The Respondent in paragraph 7 of his Replying Affidavit deposes further that the Applicant had initially stated in Court that he did not have any claim in respect of Busia Municipality/7983/127 and that this application contradicts that position. He urged this Court to find that the application is statutorily bad and that the order sought is ambiguous, untenable in law, fatally defective and that the same should be dismissed with costs.
6. The Applicant sought leave to respond to the replying affidavit leading to him filing his Supplementary Affidavit on the 21st of February, 2022. He deposed that the Applicant came before this Court to determine the ownership of two parcels and the Court in its judgement while stating that the issue of ownership was not in question, stated that the estate of Arose Akhusama Kassim (deceased) has a share in Plots No. Busia Municipality/7983/127 and Busia Municipality/7983/7. While concurring with the Court’s judgement, the Applicant stated that for one to claim a share in the property they had to confirm that they had contributed to that particular estate. That the Succession Cause No. 206 of 2011 awaits judgement which was pegged in the ownership of the aforementioned properties. That this Court allowed them a share and not ownership. He reiterated that PW2 gave falsifying evidence hence misleading the Court and that upon following the issue of perjury with the Chief Officer Department of Lands who declined to respond to their demand letter.



7. The Applicant stated further that the documents attached to his application clearly indicate that the said properties belonged to his late father and that upon conducting a search at the Business Registration Service for Mohamud Toloï Kassim and Brothers he discovered that the entity was a business name which cannot own property and that the main core of registering the business was for petty trade and not property ownership. That in the event that the property registered under Toloï Kassim was being held in trust then all the property held by Arose Kassim and the other three brothers should be shared equally as well.
8. The parties agreed to canvass the application by way of written submissions but only the Applicant had filed his submissions as at the time of this Ruling. The Applicant filed his submissions on the 21st of February, 2022. He submitted on the following issues for determination: whether the Applicant has introduced enough new evidence; whether the PW2-Gabriel lied under oath leading to a miscarriage of justice; whether official government documents were amended fraudulently without following the correct amendment procedure; whether issues 2 & 3 misled this Court into coming up with the judgement delivered on the 19th of October, 2021; and whether the Applicant request for review should be granted as prayed.
9. The Applicant submitted that part of the new evidence was a letter from the EACC denying possessing any original registers of the properties. Second, is the illegal and fraudulent amendments of the ownership documents by changing the name of the proprietor from Toloï Kassim to Toloï Kassim & Bros; and that the town clerk for Busia wrote a letter directing the rates officer to revert the name on the ownership documents to the original proprietor. That for a period of 46 years all other valuation rolls were in the name of Toloï Kassim save for the 10 years when the records were illegally amended.
10. While submitting on the second and third issues, the Applicant relied on the case of *Bia Tosha Distribution Limited v Kenya Breweries Limited & 4 others* [2016] eKLR which elaborated four ways in which contempt of court can occur, in regard to this application is contempt through the making of false statement or perjury. He submits that PW2 lied under oath hence hindering the administration of justice. That despite PW2's aversions that the amendments have to be countersigned the valuation rolls presented to Court during the trial had some amendments but they were not countersigned. He relied on the case of *Guo Dong v Multi Win Trading (EA) Company Ltd & 6 others* [2015] eKLR where the court therein dealt with the issue of locus standi under section 118 of the *Companies Act*.
11. The Applicant also submitted that the Respondent's case before this Court was illegal and one which lacked locus ab-initio and his evidence and that of his witnesses were a sham and that they obstructed the dispensation of justice misleading this Court to give them judgement that partly favored them. He concluded by stating that the application meets all the parameters of granting a review of the judgement issued on the 19th of October 2021.
12. For an application for review to be successful, this Court is guided by the principles outlined under Order 45 Rule (1) of the *Civil Procedure Rules*.
 - a) Discovery if new and important matter of evidence, which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced at the time the decree was passed or the order made;
 - b) On account of some mistake or error apparent on the face of the record;
 - c) Or for any other sufficient reason; and
 - d) The application should be brought without unreasonable delay.



13. The order is buttressed by Section 80 of the Civil Procedure Act which provides in verbatim that:

‘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 an appeal is allowed by this Act;
- c) may apply for a review of judgement to the Court which passed the decree or made the order, and the court may make such orders thereon as it thinks fit.’

14. The present application is premised on the fact that this Court’s judgement was based on the misleading evidence of the Plaintiff’s second witness who stated that the original documents in relation to the suit properties were in the possession of the EACC. The Applicant has produced a letter from the EACC dated 4th November, 2021 which stated that they had did not have original valuation rolls in respect of Plots No. Busia Municipality 7983/127 and Busia Municipality 7983/7 as allegedly indicated by PW2.

15. From the proceedings of the Court during his testimony PW2, Gabriel while referring to the records for the plot number Busia Municipality 7983/7 stated that...

“... this is register for 7983/7. The original current register is with the EACC...”

In cross-examination by the 1st, 3rd and 4th Defendants, PW2 stated that...

“... EACC is investigating plots Numbers 306-311...”

16. A reading of the letter from the EACC shows that it is not absolutely denying being in possession of the impugned documents. The inference of the inconclusiveness is derived from statement that the onus is on whoever is claiming that the Commission has the custody of the documents to provide proof in form of correspondences and inventories used when handing over any such documents to the Commission. The Applicant did not ask PW2 during cross-exam to provide any correspondence forwarding the documents neither did he correspond with the County Government of any correspondence addressed to EACC on the questioned documents.

17. The Applicant wants this court to make a finding that PW2 was lying under oath based on this letter. As already above, the letter is inclusive and secondly, the Applicant had opportunity to cross-examine the witness. There is no application for contempt before the court and it go against the rule of evidence and natural justice for this court cannot to make a determination on an issue that did not arise during the trial and to find that PW2 lied on oath without a hearing. The case of Bia Tosha Distributors Ltd supra does not add value to the current application for review. In any event, the determination of the case was not solely on the evidence of PW2 but on the analysis of evidence of all witnesses who testified and documents produced

18. The Respondent deposed that the documents sought to be introduced could have easily been accessed from the County Government has they have been done now. They have added that these documents were filed vide their bundle of documents so the Applicant was free to cross-examine the witnesses over the same. I have perused the pleadings and note that annexed to the affidavit in support of the current application were annexed in the Applicant’s further affidavit filed in court on 9th October 2019 in response to the originating summons. They cannot now be referred to as new evidence. In the judgment sought to be reviewed, indicated at paragraphs 28-31 of the judgement analysis made concerning the documents produced in evidence. At paragraph 40 I made a finding that although the



suit properties could have been registered in the name Mohamad Tolo Kassim but he was holding them in trust for the business partners as per the provisions of section 7 of the Partnership Act.

19. An application for review can only be allowed on very strong grounds as held in the case of *Evan Bwire v Andrew Nginda* Kisumu Civil Appeal No. 103 of 2000 that:

“an application for review will only be allowed on very strong grounds, particularly if its effect will amount to re-opening the application or case a fresh.”

In the case *Rachel Wambui & 2 others v Louis Kambo* [2019] eKLR Muchelule J. and Ali-Aroni (LJ) unanimously held that,

“it is trite law that in order to obtain a review the applicant has to show to the satisfaction of the Court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not have been produced at the time when the order to be reviewed was made...”

20. The documents referred to in the application were not new as they had been produced during the trial and considered by the court. In the circumstances, if the Applicants were not satisfied with my finding, the avenue open to them was appealing against the judgement. The Applicant indeed filed an appeal as shown in the file record that on October 29, 2021, a notice of appeal was filed. Review is open to parties only where a right of appeal has not been taken up. Once the notice of appeal was filed, the Applicant lost the right of moving this court through review. It is my considered opinion and I so hold that this application amounts to abuse of the court process for contravening order 45 (2) of the [Civil Procedure Rules](#). The court did not find the case of Guo Dong supra cited by the Applicant to be relevant to the issues at hand or curing the abuse stated herein.
21. In conclusion, I find that the application has failed to meet the threshold set for review and setting aside of a judgment. The same is dismissed for want of merit. The costs of this application awarded to the Respondent.

DATED, SIGNED & DELIVERED AT BUSIA THIS 7TH DAY OF JULY, 2022.

A. OMOLLO

JUDGE

