



Kariuki v Progressive Credit Limited & 2 others (Environment & Land Case 326 of 2017) [2022] KEELC 14519 (KLR) (3 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14519 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 326 OF 2017
JG KEMEI, J
NOVEMBER 3, 2022**

BETWEEN

ZIPPORAH WANJIKU KARIUKI APPLICANT

AND

PROGRESSIVE CREDIT LIMITED 1ST RESPONDENT

CARNELIAN ENTERPRISE AUCTIONEERS 2ND RESPONDENT

GEORGE NJUGUNA NJOROGE 3RD RESPONDENT

(Being an application for review of the instant court's judgment dated September 21, 2021.)

RULING

1. The plaintiff/applicant filed the notice of motion dated the March 16, 2022 seeking the following orders;
 - a. Spent.
 - b. This honorable court be pleased to review and set aside its judgment dated September 21, 2021 and the consequential orders, and allow this application as prayed.
 - c. Spent.
 - d. Pending the hearing and determination of the main suit, a temporary injunction be and is hereby issued restraining the 1st and 2nd defendants, its servants and/or agents from advertising for sale, selling, entering into, accessing, alienating, transferring, interfering and/or in any manner whatsoever altering or dealing with the plaintiff's property known as LR No Muguga/Gitaru/3112.



- e. A permanent and/or mandatory injunction be and is hereby issued restraining the defendant, its servants and/or agents from advertising for sale, selling, entering into, accessing, alienating or dealing with the plaintiff's property known as LR No Muguga/Gitaru/3112 pending the hearing and determination of this suit.
 - f. Spent.
 - g. This honorable court do make such orders and issue any other relief it may deem just to grant in the interest of justice.
 - h. The costs of this application be provided for.
2. The application is based on the grounds on the face of it and a detailed supporting affidavit of even date Zipporah Wanjiku Kariuki, the applicant. She deposed that she is the legal proprietor of LR No Muguga/Gitaru/3112 (the suit land) which was fraudulently charged by the 1st and 2nd respondents and obtained by the 3rd respondent, George Njuguna Njoroge as shown by copy of his title deed; ZWK1. That she was served with a redemption notice dated November 25, 2021 – ZWK2, by the 2nd respondent giving her 45 days to repay the outstanding loan and interest and in default, the suit land be put up for sale by public auction. She further averred that she has learnt her counsel, Macharia Gakaria is not licensed to practice law according to a letter from Law Society of Kenya dated January 31, 2022; ZWK3. That on the hearing day of this suit she was instructed to address the court without prior preparation and pointed out alterations on her witness statements in respect to change of month in the date of November 13, 2015 to read June 13, 2015 as shown in ZWK4.
 3. The applicant assailed the title deeds produced by the 3rd respondent during the hearing; failure to produce a copy of official search of the suit land and valuation report thereof; denied knowledge of the alleged date to attend Land Control Board; back dating of her green card records; non-disbursement of the charged loan as claimed and gross undervaluation of the suit land as shown by the receipt for stamp duty ZWK10 for Kshs 5,040/=. She further faulted the evidence adduced in the trial court and failure to serve her with the correct loan amount balances on demand.
 4. The application is opposed. The 1st respondent filed its reply affidavit sworn by its legal officer, Collins Mbatia on March 23, 2022. He averred that the application is fatally defective as the judgement sought to be reviewed has not been annexed in the application and it does not meet the threshold for review. That the applicant has already initiated an appeal process as per CM1 - the notice of appeal dated October 7, 2021 and accused her of inordinate delay in filing the application. That the allegations against Mr Gakaria are unsubstantiated and defamatory as Law Society of Kenya cannot have details of his business name, Macharia Gakaria & Associates. Copies of a letter by Mr Macharia and Law Society of Kenya engine search extract confirming his practice are annexed as CM2 and CM3 respectively. That the application does not disclose any ground for review but in sum impugns the respondents' evidence tendered in court. That the applicant has not adduced any new evidence as pleaded in the motion thus the application amounts to an appealing the guise of review. He urged the court to dismiss the application with costs and added that the 3rd respondent's alleged spouse has filed Milimani ELC Case No E096 of 2022 as shown by copies of pleadings; CM4.
 5. In a rejoinder the applicant filed a further affidavit dated April 22, 2022. She maintained that the active status of Mr Gakaria to practice is post judgment but was not allowed to practice during the hearing of her case. Admitting her notice of appeal, she averred that such filing does not stop her from pursuing her prayer for review. That the error on the face of the record refers to the two title deeds on the two security documents for two non-existing loans as shown by ZWK5, ZWK7 & ZWK11. In addition,



that, she swore that she has now learnt that the 1st respondent was the 3rd respondent's agent and if she proceeds in appeal, this crucial evidence will not be on record.

6. The application was argued orally on June 8, 2022. She submitted that Mr Gakaria Macharia was not qualified to represent her and the loans alleged to have been advanced to the 2nd and 3rd respondents are non-existent owing to the fact that the two title deeds were never charged to the 1st respondent. That the title for Dagoretti/Kinoo that allegedly was charged for Kshs 3 M did not belong to the 3rd respondent but Antony Karanja Muiruri. That the second title Muguga Jet Scheme 4168 was charged in 2014 for Kshs 1.5M and discharged in February 2016 when it was closed for sub-division. She denied attending any Land Control Board meeting and insisted that she only borrowed Kshs 500,000/- from the 3rd respondent and she fully repaid it to the tune of Kshs 1.1M.
7. On behalf of the 1st and 2nd respondents, Learned Counsel Ms Kamau was emphatic that the application falls short of the threshold for granting review. That no new evidence has been tendered before court and the applicant is only attacking the respondents' evidence adduced in the trial court which ought to have done during cross-examination. She defended Mr Gakaria's competency to act for the applicant and reiterated that the applicant has not proven any ground to warrant review of the impugned judgment. She urged the court to consider the cases of *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR while the applicant relied on the case of *Geoffrey Kinuthia Mwangi & others v Progressive Credit Ltd* [2017] eKLR.
8. The main issue for determination is whether applicant's application is merited.
9. The legal provision governing this court's power to review a decision are found in section 80 of the *Civil Procedure Act* and amplified by order 45 rules 1 & 2 of the *Civil Procedure Rules* that;

"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.

Application for review of decree or order [order 45, rule 1.]

(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.”

10. It is trite that review is a creation of the statute as opposed to the court’s inherent powers. The power of review must be conferred by law or by necessary implication. For an applicant to succeed in such an application, he must therefore demonstrate the following; 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; on account of some mistake or error apparent on the face of the record or for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

11. In the persuasive decision of Mativo J (as he then was) in *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR in analyzing the preconditions for a court to exercise review of its decision reiterated that 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. The court cited with approval the Indian Supreme Court case of *Ajit Kumar Rath vs State of Orisa & others*, 9 Supreme Court Cases 596 at page 608 that;

“The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

12. In the instant case, the applicant concedes already filing an appeal as demonstrated by the notice of appeal dated October 7, 2021 and filed on even date. That notwithstanding she proceeded to file the instant Application on grounds of discovery of new and important evidence that was not within her knowledge at the time of the hearing and an apparent error on the face of the record. A plain reading of section 80 (a) *Civil Procedure Act* and order 45 rule 1 (a) above reveals that review is available in respect to a decree or order from which an appeal is allowed but from which no appeal has been preferred. So that a party cannot prefer an appeal and apply for review of a judgment at the same time and on that ground the application is incompetent and falls under an abuse of court process. In the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR in determining a similar application, it was held that litigation cannot be conducted on the basis of trial and error.

13. The accepted legal position is that a party to litigation may not pursue an appeal and a review of the same court decision simultaneously. In the case of *Karani & 47 others v Kijana & 2 others* [1987] KLR 557 the court held that once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.



14. The Court of Appeal in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others* [2020] eKLR expressed itself on the matter as follows:-

"In concluding this limb of the Judgment, it has to be stressed that the legal policy of order 45 is to prevent a party, against whom Judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the *Civil Procedure Rules* and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the Court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal."

15. The same court in the case of *Orieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR faced with a similar scenario was emphatic that;

"Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the Application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: Kamalakshi Amma v A Karthayani [2001] AIHC 2264). The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*..."

16. Recently the Supreme Court in *University of Eldoret & another v Hosea Sitienei & 3 others* [2020] eKLR held;

"(33) It is evident that following the decision of the Court of Appeal, the applicants were faced with two options – to, either file for review of the decision to the same Court or pursue an appeal before this court within either of the applicable jurisdictional contours. The applicants, as advised by their advocates, chose the former. We agree with the applicants' advocates that they could not concurrently pursue both options as that would be an outright abuse of judicial process. However, following from our decision in *Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others* [2015] eKLR, where a litigant has more than one option to pursue, he/ she must settle on one of them. The decision on which course to pursue is taken in advance and once it is taken, the other option is no longer available or placed in abeyance to be reverted to at a later stage in the event the initial option does not succeed. This means that when choosing, the litigant is expected to choose the best available option since she may not have any further recourse."

17. Even if the prayer for review was properly invoked, it would still fail for the following reasons; the applicant averred that she was improperly served with the notification of sale and redemption notice but failed to explain how she could not obtain the said documents at the time of hearing. Further



she assailed the title deed for Dagoretti/Kinoo as belonging to Antony Karanja as opposed to the 3rd respondent whilst the second title for Muguga Jet Scheme 4168 was charged for Kshs 1.5m in 2014 and discharged in February 2016 but was indicated in the security documents as Muguga/Gitaru. That the Muguga/Gitaru title was used to secure Kshs 3.1M in June 2015 which, without her knowledge, was canceled to read Jet Scheme. Whereas these arguments are valid, it has not been established it was not brought during cross - examination of the 1st respondent's witness.

18. In dismissing the applicant's suit for want of proof, the court relied on the plaintiff's exhibits produced in court which included a loan agreement dated November 12, 2015 between the applicant and 3rd respondent. The terms of the said agreement were clear on the consequences of default in repayment in view of the agreement that the applicant had acquired consent to transfer the title deed to the 3rd respondent. According to the copy of her own green card, it was evident that the 3rd respondent acquired the impugned title on November 13, 2015, one day after the signing of the loan agreement. The totality of these gaps were addressed by the court in its judgment and any challenge to them, is best suited on appeal as opposed to review.
19. The applicant also impugned her former counsel's legal capacity to represent her vide ZWK3, a letter dated January 31, 2022. That letter as rightly pointed out by the respondents is in respect of 'Gakaria Macharia' being the name of the applicant's counsel firm name as can be gleaned from the pleadings filed before the suit was determined. The counsel's name from his letterhead is indicated as GN Gakaria and the applicant has not adduced any evidence to show that the counsel was not allowed to practice at the time of filing suit and its ultimate hearing & determination on March 18, 2021.
20. In the end the application is bereft of merit and the same is dismissed with costs to the 1st and 2nd respondents.
21. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 3RD DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

JG KEMEI

JUDGE

Delivered online in the presence of

Plaintiff / applicant – present in person

Ogendo for 1st defendant

2n & 3rd defendants - Absent

Court assistants – Phyllis Mwangi / Oliver

