



REPUBLIC OF KENYA



KENYA LAW

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**Mwaura (Suing as the Legal Administrator of the Estate of John Mwaura
Kinuthia Deceased) & another v Diamond Trust Bank Ltd & another
(Civil Case 14 of 2019) [2025] KEHC 8418 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 8418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL CASE 14 OF 2019
DO CHEPKWONY, J
MAY 21, 2025**

BETWEEN

**BENSON KINUTHIA MWAURA (SUING AS THE LEGAL ADMINISTRATOR
OF THE ESTATE OF JOHN MWAURA KINUTHIA DECEASED) 1ST PLAINTIFF**

FELISTA NJOKI MWAURA 2ND PLAINTIFF

AND

DIAMOND TRUST BANK LTD 1ST DEFENDANT

STEPHEN KARANJA KANG'ETHE T/A DALALI TRADERS . 2ND DEFENDANT

RULING

1. This is a ruling in respect of the Notice of Motion application dated 13th December, 2023 seeking the following orders:
 - a. Spent.
 - b. That this Honourable Court be pleased to review the orders given on 24th May, 2019 dismissing the Plaintiff's application dated 29th June, 2017 and the same to be set aside.
 - c. Spent.
 - d. That pending hearing and determination of this suit this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendants whether by themselves, their proxies, employees, servants, agents or otherwise whomsoever from doing any of the following acts that it so day from advertising for sale, dissipating, alienating, disposing of or otherwise howsoever completing by conveyance or transfer or any sale concluded by auction or private treaty , taking possession, appointing receivers or exercising any power conferred by Section 90 (3) of the Land Act leasing, letting, charging or otherwise howsoever interfering with the



Plaintiff's ownership/beneficial ownership and possession of and title of all that piece of land known as L.R No. Githunguri/Kanjai/608.

- e. Spent.
 - f. Spent.
 - g. That the costs of this application be provided for.
2. The Application is predicated on the grounds as set out on its face and in the Supporting Affidavit of Felista Njoki Mwaura sworn on the instant date. According to the Applicants, there is new evidence to wit Document examiner's report which shows that the Guarantor's signature on the charge and the spousal consent was forged because at the time, he was seriously sick and admitted in hospital hence could not have signed the documents.
 3. The Applicants has also stated hold that given that public sale was meant to be held on 21st July, 2017 and since then, 6 years have lapsed, the 1st and 2nd Defendants ought to file fresh Redemption Notices of ninety (90) days and forty-five (45) days respectively. They contend that the Defendants did not have current valuation reports for the suit property and neither was the Land Control Board consent obtained. The Applicants hold that the 1st Defendant has not provided a loan statement since 2017 to show that the primary borrowers being the 3rd, 4th and 5th Defendants have been repaying the loan. It is the Applicant's prayer that the court grants the orders sought.
 4. The 1st Respondent opposed the Application through the Replying Affidavit of its Legal Officer, Faith Ndonga, sworn on 8th May, 2024. According to the 1st Respondent, the Applicants filed an application dated 29th June, 2017 seeking injunctive orders, which application was dismissed vide a ruling delivered on 24th May, 2019. Being aggrieved by this ruling, the Applicants lodged an appeal to the Court of Appeal being Nairobi Civil Appeal No. 588 of 2019 which is still pending and thus the Applicants are precluded from filing the present application for review.
 5. The 1st Respondent has stated that the Applicants have raised similar issues which the court already addressed in the Riling of 24th May, 2019 and thus there are no new facts for its consideration. The 1st Respondent goes on to state that the Applicants are guilty of laches having waited for three (3) years to bring the present application for review. It contends that there is no law which requires banks to reissue fresh notices where the court found that the ones issued were properly and regularly issued.
 6. According to the 1st Respondent, what the Applicants are seeking is for this Court to sit on its own appeal as the issues they have raised herein are res- judicata. The 1st Respondent holds that the Applicants are only frustrating its efforts to exercise its Statutory Power of sale and it will be in the interest of justice that the application be dismissed.
 7. On 24th January, 2024, the court directed parties to canvass the application by way of written submissions and they complied.

Analysis and Determination

8. The court has read through the Notice of motion application, the Supporting Affidavit, the Replying Affidavit and the Applicant's submissions, finds that the main issue for determination is whether the Applicants' application for review has met the required legal threshold to warrant grant of orders being sought.



9. The law on Review is enshrined under Section 80 of the *Civil Procedure Act* which provides that:-
- “ Any person who considers himself aggrieved-
- a) By a decree or order in which an appeal allowed by this Act, but from which no appeal has
 - 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.”
10. For an application for review to succeed, a party must satisfy the grounds set out under Order 45 of the Civil Procedure Rules, 2010 that:-
- a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
 - b. There was a mistake or error apparent on the face of the record; or
 - c. There were other sufficient reasons; and
 - d. The application must have been made without undue delay.
11. From these provisions, the courts power to allow for a review of its Judgment, order or decree is discretionary and based on three grounds being:-
- a. Where there is a discovery of new and important matter of evidence.
 - b. Where there is an error apparent on the face of the record.
 - c. Where there is sufficient reason demonstrated. The application also be made without undue delay.
12. The Applicants have mainly pleaded that there has been discovery of new evidence being a Document Examiners Report which shows the Guarantors signature on the charge and Spousal Consent was forged.
13. I have carefully read through the Ruling of the Court delivered 24th May, 2019 and note that the court substantively addressed the issues of injunctive relief with respect to the suit property, the issue of signature of the spouse in the Spousal Consent having been forged and the issue of Statutory Notices not having been sent to the Applicants.
14. Also, it is important to note that on the ground of discovery of new material or evidence, it must be that which was not available at the time of the initial decision and not the happening of some subsequent event or development. Clearly, the Applicant has not demonstrated any of the three conditions required for an order of review to be granted as there is no evidence of discovery of new material since the issues raised have already been determined in the previous ruling, there is no error on the face of the record and there is no sufficient reason to warrant the review of the court.



15. Further, it is not in dispute that the Applicants already lodged an appeal at the Court of Appeal, hence cannot come back for a review when the appeal is pending hearing. In the case of Serephen Nyasani Menge v Rispah Onsase [2018]eKLR, the Court stated:-

“In my view a proper reading of Section 80 of the Act and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the Applicant exhausted the process of review up to appeal and now wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The Applicant wants to have a second bite of the cherry. She cannot be permitted to do so.”

This Court is therefore functus officio in terms of the instant application.

16. Furthermore, it is worth-noting that the impugned ruling was delivered on 24th May, 2019 and the application for determination filed on 13th December, 2023, which is about four (4) years later. I find the Applicants have not provided any explanation or sufficient reason for this delay and hence the 1st Respondent cannot be faulted for believing that this is a tactic to further delay their realization of justice in this case.
17. In view of the aforementioned reasons this Court finds that the Notice of Motion application dated 13th December, 2023 was already dead on arrival and proceeds to dismiss the same with costs to the Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF MAY, 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kisanga counsel for Defendant/Respondent

Court Assistant - Martin

