



Njuguna & 2 others v General & 4 others (Petition 409 of 2014)
[2024] KEHC 2551 (KLR) (Constitutional and Human Rights) (14 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2551 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 409 OF 2014

LN MUGAMBI, J

MARCH 14, 2024

BETWEEN

JUDY WAIRIMU NJUGUNA 1ST PETITIONER

JEDIDAH WAMBUI NJUGUNA 2ND PETITIONER

VENESSA JOAN WAMBUI 3RD PETITIONER

AND

ATTORNEY GENERAL 1ST RESPONDENT

MINISTRY OF LANDS AND SETTLEMENT 2ND RESPONDENT

MINSITRY OF ROADS AND INFRASTRUCTURE 3RD RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY 4TH RESPONDENT

NATIONAL LAND COMMISSION 5TH RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 15th August 2018 supported by an affidavit dated 16th August 2018, the petitioners seek the following orders:
 - i. Spent.
 - ii. The petitioners appoint a valuer to conduct a valuation of Land Reference Number Muguga/Gitaru/1141 at the time of the acquisition taking into account the need to compensate the petitioners for the demolition of Vantage Elementary School situated on the land.



- iii. In the alternative to (ii) above, the court appoints a valuer from the list produced by the petitioners herein to conduct a valuation of Land Reference Number Muguga/ Gitaru/1141 at the time of its acquisition taking into account the need to compensate the petitioners for the demolition of Vantage Elementary School situated on the suit property.
- iv. The valuation report prepared by the valuer to be appointed, be submitted to the court and all the parties to the petition, within 30 days of this order being made or such other period to be determined by the Court.
- v. The respondents pay the petitioners the value of Land Reference Number Muguga/ Gitaru/1141 as contained in the valuation report within 30 days of the valuation report being served upon them.
- vi. The petitioners be granted leave to commence contempt of court proceedings against the respondents if the respondents fail to comply with the orders of the court.
- vii. The costs of this Application be provided for.

Background of Case

2. The instant matter was commenced on 15th August 2014 vide a petition brought against the respondents. The litigation revolved around the respondents' act of compulsorily acquiring Land Reference Number Muguga/ Gitaru/1141 where the 1st petitioner's business, Vantage Elementary School was situated before it was demolished.
3. The petition was heard and determined on 27th May 2016 by Hon. Justice Isaac Lenaola in favour of the petitioners. Consequently, the Court issued the following orders:
 - a. It is hereby declared that the process leading up to the award of Ksh.21,937,937 to the petitioners for the compulsory acquisition of LR. No. Muguga/ Gitaru/1141 was irregular.
 - b. Let a valuer to be agreed upon by the parties give a valuation of the land at the time of acquisition taking into account the need to compensate them for the demolition of Vantage Elementary School situated on that land. The valuer's fees shall be jointly paid by the parties hereto.
 - c. The valuation Report shall be submitted to the 5th respondent, the National Land Commission for appropriate action within 60 days of this judgment.
 - d. The petitioner shall have costs of the petition.

The Petitioners' Case

4. The 1st petitioner asserts that following the respondents' failure to comply with the Court Orders dated 27th May 2016, the Court further underscored its Orders in a Ruling delivered on 20th December 2017 as follows:
 - a. A valuer be appointed by the parties within 60 days to give a valuation of the land at the time of the acquisition taking into account the need to compensate the Petitioners for the demolition of Vantage Elementary School situated on the land in question as per Order 2 of the judgment dated 26th May 2016.



- b. In the alternative and without prejudice to (a) above, in the event that the said valuation has been done in conformity with the said judgment, then a copy of the same be supplied to the Petitioners' advocates within 14 days from the date of the order.
 - c. Within 30 days of the valuation in terms of paragraph (a), or within 14 days in the event the valuation has been done in terms of paragraph (b) above, the 5th Respondent complies with Order 3 of the judgment dated 27th May 2016.
5. It is asserted that following issuance of this Orders, the petitioners' advocates, Hamilton, Harrison and Matthews vide a letter dated 6th February 2018 wrote to the respondents inquiring who could be appointed as the Valuer in the matter. A follow up letter was later done on 6th March 2018. She avers that none of the correspondence was responded to by the respondents.
 6. She further asserts that the petitioners were not consulted during the process of selecting the valuer. Furthermore, that the valuer that was appointed by the Institution of Surveyors of Kenya did not issue them with the valuation report even after numerous follow ups. It was as well stated that the valuation carried out was not done in accordance with the Court Order.
 7. It is the petitioners' case therefore that the respondents' lack of cooperation has effectively curtailed enforcement of this Court's Orders. For this reason, the petitioners urge the Court to allow their application.

The Respondents' Case

1st, 2nd, 3rd and 5th Respondents' Case

8. These respondents' responses are not in the Court file or CTS.

4th Respondent's Case

9. In response, the 4th respondent through its Assistant Director, Milca Muendo filed an undated replying affidavit. She asserts that contrary to the petitioners' claim, they complied with the issued Court Orders. She notes that a valuer was appointed with the participation of all the parties.
10. The valuer selected by the Institution of Surveyors of Kenya was Paul E. N. Ngugi. Upon completing the process, a valuation report was issued to the Institution of Surveyors of Kenya who then submitted the report to the National Land Commission, the 5th respondent herein. This report was also issued to the petitioner.
11. She takes issue with the petitioners' application for the reason that the petitioners seek to appoint a valuer without participation of the other parties which will be in breach of this Court's Orders.

Petitioner's Submissions

12. Hamilton Harrison and Matthews Advocates for the petitioner filed submissions dated 1st March 2019 and further submissions dated 29th September 2020.
13. Counsel submitted that this Court's jurisdiction to recall its judgment and vary its orders, is intended to give it purpose as held in *Lakhamshi Brothers Ltd vs Raja and Sons* (1966) EA 313. According to Counsel this Court ought to exercise its discretion in this case due to the respondents' blatant disobedience of its Orders.



14. He likewise cited the cases of *Taylor and another vs Lawrence and another* (2003) QB 528 and *Regina vs Bow Street Metropolitan Stipendry Magistrate and others ex -parte Pincochet Ugarte* (No.2) (200) 1 AC. 119.
15. Counsel further submitted that this Court can appoint a valuer to aid the just and expeditious disposal of the suit in keeping with the objectives of Sections 1A and 1B of the *Civil Procedure Act* as held by the Court of Appeal in *Nyaga Cottolengo Francis vs Pius Mwaniki Karani*(2017) eKLR.

1st, 2nd and 3rd Respondent's Submissions

16. State Counsel, L. Wawira filed submissions dated 20th September 2020. Counsel pointed out that whereas the petitioners argued that they did not receive the valuation report, they did acknowledge that they were aware that the Institution of Surveyors of Kenya had appointed a valuer to carry out the valuation on the subject property.
17. Counsel asserted that it was clear that the petitioners were only aggrieved that the valuation was not conducted in accordance with the instruction of the Court Order that 'it be done considering the need to compensate the petitioners for the demolition of their School'.
18. In view of this, Counsel submitted that the petitioners' allegation that the respondents did not comply, is unfounded as it is apparent that the requisite steps were undertaken to comply with this Court's Order. To this end, Counsel submitted that the Institution of Surveyors of Kenya being the regulatory body is best placed to appoint an independent valuer in this matter.

4th Respondent's Submissions

19. On 17th February 2020, the 4th respondent through Lawrence Maruti filed submissions in support of their case and further submissions by Prof. Albert Mumma and Company dated 18th August 2020. Counsel in the first set of submissions sought to discuss whether the respondents had complied with the Court Orders.
20. Counsel submitted that the respondents had indeed complied with the Court Orders by appointing a valuer from the Institution of Surveyors of Kenya as highlighted in their replying affidavit. Nonetheless, Counsel submitted that the National Land Commission under Article 67 of *the Constitution* is vested with the mandate to compulsorily acquire land for public purposes as appreciated in *Henry Wainanina Wakiboro and another vs National Land Commission and 2 others* (2018) eKLR.
21. In the second set of submissions, Counsel highlighted two issues for discussion, first whether there is a legal basis for this Court to intervene in appointing a different valuer and whether the petitioner is entitled to the orders sought.
22. Counsel submitted that this Court's jurisdiction to vary its judgment has been wrongly invoked. Furthermore, that the application is misleading and full of falsehoods. This is because the very orders sought to be varied were complied with by the respondents. Consequently, it is stated that the application has been overtaken by events hence this Court should not act in vain. Counsel argued similarly that while the petitioners are aggrieved that the valuation was not done in accordance with the Court Order, they did not demonstrate how this was so.



23. He relied on *Anita Cbeleagat O'donovan & 2 others vs Fredrick Kwame Kumah & 2 others* (2015) eKLR where the court held that:

“Further, it has been established that the property has already been sold, transferred and registered in favour of the 1st and 2nd defendants. To issue orders for injunction would be after the matter has been overtaken by events. Orders may not be made which cannot be enforced or which may be ineffective for practical purposes.”

24. Equally relied upon were *National Land Commission vs Afrison Export Import Limited & 10 others* (2019) eKLR, *SDV Transami Kenya Limited and 19 Others v Attorney General & 2 Others & another* (2016) eKLR and *Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited* (2014) eKLR.

25. Accordingly, Counsel argued that the petitioners had not sufficiently demonstrated why they deserve the orders and so the application should be dismissed so as to allow the parties comply with the remaining Court Orders.

5th Respondent's Submissions

26. The 5th respondent's submissions were neither in the Court nor in the online Court Portal (CTS).

Analysis and Determination

27. The petitioner is essentially inviting this Court to vary its Orders of 27th May 2016 which were re-affirmed with some slight modification on 20th December 2017. Consequently, the issues that arise for determination are as follows:

- i. Whether this Court can vary or review its orders as sought by the petitioners in this application.
- ii. Whether the respondents' failed to comply with the Court Orders.

28. Varying and/review of the orders of the Court is not expressly provided for in the *Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013*. In absence of rules covering a given situation before the court, the court has powers to exercise inherent jurisdiction to ensure that justice is done in a matter. *Black's Law Dictionary*, Tenth Edition defines 'inherent jurisdiction' as follows:

Inherent jurisdiction- The legal authority vested in a Court to hear any matter that comes before it unless a Statute or rule limits that authority.

29. The Court of Appeal in *Karl Webner Claasen vs Commissioner of Lands & 4 others* (2019) eKLR dealt with a similar situations as follows:

“...in the absence of express provisions in the *Practice Procedure Rules*, an application for substitution may be based on the applicable *Civil Procedure Rules*. However, we add that Rule 3(8) of the *Practice and Procedure Rules* gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of *the Constitution*.”



30. Given the above observations by the Court of Appeal, this Court finds guidance in Section 80 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya and Order 45 of the [Civil Procedure Rules](#) which relate to review of orders. These provisions provide as follows:

“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.”

2. Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#) provides as follows:-

“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.”

31. The Court in [Jimi Wanjigi & another vs Inspector General of Police & 3 others](#) (2021) eKLR discussing the principles that should be considered before making a review noted as follows:

“37. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, [Parliamentary Service Commission -vs- Martin Nyaga Wambora & others](#) [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in [Mbogo and Another -vs- Shah](#) [1968] EA, upon establishing the following principles: -

(31) Consequently, drawing from the case law above, particularly [Mbogo and Another v Shah](#), we lay down the following as guiding principles for



application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

32. Moreover, regard should be had to the fact that the application seeks to invoke this Court’s discretionary power. In exercise of such power, the Court in *Coast Water Services Board v Rehema Charo Kabindi & Kache Chare Mramba (Legal Representatives of the Estate of Fredrick Charo Kadenge (Deceased) & another* (2020) eKLR observed as follows:

“...The doctrine of judicial discretion as Desmith defines it,

“is the legal concept of discretion which implies power to make a choice between alternative courses of action. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty. To say that somebody has a discretion presupposes that there is no uniquely right answer to his problem.” (See SA Desmith and J M Evans *Judicial Review of Administrative Action* 4th Edition (1980)278.

In the same area of Law Keith Hawkins in the use of legal discretion, perspective from Law and Social Science (1992, 11,11) he observed as follows:

“discretionary decisions are those where the Judge has an area of autonomy free from strict legal rules, in which the Judge can exercise his or her Judgment in relation to the particular circumstances of the case. Discretion is the space between legal rules in which legal actors may exercise a choice in speaking of autonomy and choice, it must be acknowledged that the exercise of discretion is usually limited by guidelines or principles or by reference to a list of relevant



factors to be considered. While discretion permeates both the Common Law and many, if not most, statutory instruments discretionary powers are never absolute and must also be exercised within, a broader legal and social context.”

33. The instant application is brought ostensibly on what the Petitioners alleges to be lack of co-operation in the appointment of a valuer to undertake the valuation of Petitioner’s property pursuant to the orders of the Court which were in originally issued on 25/5/2016 and reaffirmed on 20/12/2017. Given the reasons that may necessitate a review, it is obvious that the Petitioner is not seeking a variation of the orders on the ground of a mistake or an apparent error on the face of record. Equally, the application is not premised on discovery of a new or important matter of evidence that could not be reasonably procured at the time that decision was made. The Petitioner’s application may fall under ‘any other sufficient cause.’
34. It must however be appreciated that other than satisfying any of the three elements, the applicant must also satisfy the condition that such an application has been brought without unreasonable delay.
35. The Petitioner alleges non-cooperation by the Respondents in agreeing on the valuer as the sole reason for the lack of implementation of the orders of the court hence the reason she seeks to vary the orders. These orders were issued for the first time on 25/5/2016 and they clearly specified that the submission of the valuation report to the 5th Respondent was to be done within 60 days of the Judgement. It means that on or about the 25/7/2016, the orders ought to have been fully executed. It is apparent that the Petitioner did not seek the intervention on or before the expiry of this period which eventually lapsed without the orders being implemented. The Petitioner instead filed an application way past that period dated on 18/7/2018 seeking that a valuer agreeable to by the parties to conduct the valuation of land reference number Muguga/Gitaru/1141 in line with the judgment delivered on 27/5/2016 be appointed.
36. The application was allowed orders were given in a ruling delivered by Justice Mativo on 20/12/2017. Once more a timeline was specified in the order, this time the Judge stated that ‘A valuer be agreed by the parties within 60 days.’ Apparently, it would appear that valuer was not appointed as directed. The lifespan of that order was up to in or around 20/2/2018. The Petitioner waited for the entire period to completely come to end without seeking Court’s intervention in the matter. Even after the period ended, she did not seek immediate intervention. It was not until the 15th of August 2018; six months later, that she drew the instant application which she dated but never filed. It was only presented to Court on 8th January, 2019 when it was received and stamped.
37. In my view, the Petitioner has not demonstrated that the application for review was without unreasonable delay. She has not even bothered to explain the reasons for not seeking the court’s intervention within timelines specified. One of the cardinal principles of equity is that delay defeats equity and in the circumstances of this case, the Petitioner is guilty of laches which disqualifies her from invoking the review jurisdiction of the Court.
38. The Petitioner unreasonably delayed in asserting the right to be involved in the selection of the Valuer in accordance with the Court order and it is my finding that by conduct, she acquiesced in that regard. She waited to be prompted by the Respondents instead of taking the initiative considering that those orders were in fact procured by her. Having acquiesced by not seeking the Court’s timely intervention in the selection of the valuer within the timelines given by the Court, the Petitioner belated attempt to vary the orders is thus rejected.
39. The upshot is that this application fails and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH, 2024.



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L N MUGAMBI
JUDGE

