THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 294 OF 2012

FATUMA YUSUF AROI.....PLAINTIFF

VERSUS

JUMA LALI & 5 OTHERS .....DEFENDANTS

AND

SAID BREK .....AFFECTED PARTY/APPLICANT

RULING

(Plaintiff filing suit against defendants for orders to have them restrained from interfering with a mosque and madrassa; judgment entered in favour of the plaintiff after a full hearing; application for review now filed by a person who states that he is aggrieved by the judgment and wants it set aside; applicant arguing inter alia that he ought to have been made a party and that the decision of the court condemned him unheard; applicant making assertion that the suit property was a Wakf and that he has an interest in some flats developed on the suit property; application supported by 6th defendant who swore an affidavit; principles upon which the court is guided in an application for review; no new evidence tendered since the Wakf exhibited by the applicant is the same that was exhibited by the defendants at the hearing of the suit and was disregarded by the Court; issue of flats not having been adjudicated within this suit and cannot therefore be a ground for review; application dismissed)

1. The application before me is that dated 30 July 2020 and filed on 3 August 2020 by one Said Brek who has described himself as an "aggrieved party." What Mr. Brek is aggrieved with is the judgment of this court which was delivered on 15 July 2020 and he has brought this application pursuant inter alia to the provisions of Order 45 of the Civil Procedure Rules, 2010, seeking the following orders (slightly paraphrased):-

a) Spent (certification of urgency).

b) That pending the hearing and determination of this application there be stay of execution of the judgment in Mombasa ELC Case No. 294 of 2012 delivered on 16th July 2020 so that the plaintiff does not evict any of the defendants from any part of plot No. 539/III/MN or from interfering with any part of the said property.

c) That the court be pleased to review and/or set aside its judgment delivered on 16th July 2020 and direct that this matter be reopened and reheard afresh.

d) That the costs of this application be in the cause.

2. To put matters into context, this suit was commenced through a plaint which was filed on 17 December 2012. The plaintiff is the administratrix of the estate of her late father Yusuf Avumai Aroi (deceased). She pleaded in the plaint that the deceased was the owner of four plots excised from the Plot No. 539/III/MN situated in Mtwapa (the suit property). She pleaded that the 1st and 2nd defendants were her employees as madrassa teachers, while the 3rd to 6th defendants were residents of Mtwapa with no connection over the ownership of the suit property. She pleaded that the deceased had constructed a mosque and madrassa on the suit property which was run by herself and a committee. She averred that on 8 December 2012, she and her committee decided to close down the madrassa from 9 December 2012 to 5 January 2013 and stuck copies of a notice to that effect at the door. She pleaded that the 1st and 2nd defendants decided to tear the notice and proceeded to break the locks thus violating her ownership rights. She further pleaded that on 12 December 2012, the 1st and 2nd defendants, along with the 4th to 6th defendants, held a meeting and purported to hold elections, and declared themselves the owners and managers of the suit property. She pleaded that the defendants threatened her not to come close to the suit property. She feared that unless restrained, they would continue with their unlawful acts. In the suit, the plaintiff sought the following orders :-

(a) A declaration that the defendants do not have any right whatsoever over the madrassa and mosque existing on the Plot No. 539/III/MN.

(b) A permanent injunction restraining the defendants personally or through their employees, servants, and /or agents from interfering with the management or running of the mosque and madrassa existing on the suit property.

3. Together with the suit, the plaintiff filed an application for injunction, seeking to have the defendants restrained from occupying any building or portions of the madrassa and mosque in the suit property. That application was compromised with the court making an order for the plaintiff and defendants to form a joint committee for managing the mosque, and for the madrassa to continue in the normal manner on a calendar set by the joint committee, until the suit is heard and determined.

4. In their defence, the defendants claimed that the late Yusuf Aroi donated the suit property as a Wakf to muslims residing in the area and that the mosque was constructed by the public for the benefit of all muslims. They contended that it is the plaintiff who wants to forcefully take over the running of the madrassa and wants to appoint a new committee under the mistaken belief that the madrassa belonged to her late father. They claimed to have been running the place from the time the properties were donated as Wakf. It will thus be seen that the contentious issue was whether the suit property belonged to the deceased or whether he had donated it as Wakf property.

5. The suit was heard by my predecessor Omollo J, and at the hearing thereof, the defendants did produce a document dated 20 May 1996, which they claimed to be the Wakf. On the other hand, the plaintiff adduced evidence to show that the deceased had denied authoring the purported Wakf and denounced it during his lifetime. The court after analyzing the evidence was not persuaded of the genuineness of the purported Wakf and judgment was entered in favour of the plaintiff as prayed in the plaint.

6. I have already mentioned that in this application, the "aggrieved party" is seeking a review of the judgment. The application is based on the grounds that the late Yusuf Aroi had made a gift *inter vivos* of the suit property in favor of the Muslims living in the area and that it is inconceivable that his heirs can now recall the gift after his demise; that on the plot are a mosque, madrassa and three flats constructed through contributions made by the public, he having contributed the lion's share, as his family constructed the flats. It is averred that if the plaintiff repossesses the said property, her family will have unjustly enriched themselves; that whenever fraud is brought to the attention of the court, the court should not hesitate to undo the judgment; that the public interest involved calls for the judgment to be revisited; that the aggrieved party was not aware of the existence of the suit yet he holds relevant documents with regard to the construction of the flats standing on the suit property which evidence was not adduced in court; that failure by the plaintiff to join the aggrieved party as defendant amounted to the plaintiff violating his right to natural justice; that the aggrieved party was not aware of the proceedings and only became aware after delivery of the judgment; that the aggrieved party was never given an opportunity to be heard.

7. The application is supported by the affidavit of Farid Abdalla Brek Said and Said Abdalla Brek. In his affidavit, Mr. Farid has deposed that he is a son of Mr. Abdalla Said Brek (the aggrieved party). He deposed that in the year 1996, the late Mr. Aroi decided to give the property as a Wakf for use by the muslims residing in the vicinity, and a mosque and madrassa were constructed thereon, with money contributed by the general public. He claimed that the personnel running the mosque and madrassa could not be guaranteed their salaries, and therefore in the year 2010, Mr. Aroi agreed with Said Brek, that Mr. Brek could construct some three flats on the unoccupied portion of the suit property for purposes of generating income. He stated that his father (Mr. Brek) gave him the responsibility of overseeing the construction and that he spent approximately Kshs. 10 to 12 million in the undertaking. He deposed that upon completion, he is the one who has been collecting the rent, which is currently Kshs. 40,000/=. He deposed that the personnel in the mosque and madrassa are paid Kshs. 115,000/= and he tops up the shortfall from his pocket. He contended that the family of Mr. Aroi is aware of this arrangement yet he was not served with any proceedings and he was not aware of the suit. He claimed that his attention was brought to the suit by the 1 st defendant after judgment had been delivered. He alleged that the plaintiff obtained judgment fraudulently. He stated that before arriving at the judgment, the documents, particularly those relating to construction, were not produced. He annexed what he alleged to be the Wakf created by Mr. Aroi and cash vouchers claiming that one Mohammed Nassir purchased the portion where the flats stand and it was no longer the property of Mr. Aroi.

8. In his affidavit, Mr. Said Abdalla Brek agreed with the depositions made by Mr. Farid.

9. The plaintiff, vide a replying affidavit and a supplementary affidavit, opposed the application. She deposed that the applicant, Mr. Brek, is not a party to this suit and therefore has no *locus standi* in this matter. She further deposed that counsel appearing for the aggrieved party is not properly on record for want of leave. She deposed that the amount of money used to built the flats and multipurpose hall was not in issue in this suit and the same cannot be used as a basis for reviewing the judgment. She added that the family of the aggrieved party were only donors to the construction without any interest in the ownership of the property. She raised issue that Mr. Farid is a stranger. She repeated that the suit herein did not involve construction of flats and thus the applicant and Mr. Farid were not a necessary party.

10. The 6th defendant, Mohammed Bakari swore an affidavit to support the application. He deposed that the late Yusuf Aroi began construction of the mosque, *madrassa* and nursery school, but unfortunately his funds got depleted, and he was unable to complete the buildings. He deposed that donors from the Muslim community agreed to fund the completion of the said buildings on condition that the late Yusuf Aroi offers the land upon which the said structures were to be built as a Wakf to the Muslim community. Mr. Bakari deposed that there is a letter between the late Yusuf Aroi and the District Education Officer confirming that the land where the madrassa, mosque and nursery school is built on, is Wakf property. He annexed a copy of the said letter. He deposed that the donation of the Muslim community has been used to cater for the expenses incurred at the Masjid Ansaar Sunna (the mosque in issue). He deposed that after the completion of the building, the mosque and madrassa, the late Yusuf Aroi was having financial difficulties and he sold the undeveloped portion of the suit property for Kshs. 200,000/= to one Mohammed Nassir. He further deposed that this money was not enough to settle the expenses of the mosque and madrassa, and that is when Abdalla Brek constructed three flats to offset the expenses of the mosque and madrassa. He deposed that he is the caretaker of the flats, mosque, madrassa and the nursery school.

11. I gave directions on the filing of written submissions, which was done, and counsel also had opportunity to highlight their submissions. I have taken note of these submissions. In his submissions, Mr. Gikandi, learned counsel for the aggrieved party/applicant inter alia referred

me to the decision in *Patel vs. East Africa Cargo Handling Services Ltd (1974) EA 75* where Duffus J provided a dictum on the setting aside of ex parte judgments. Counsel submitted that the aggrieved party fully funded the flats on a portion of the disputed property. He asserted that the late Aroi offered a portion of the land as a Wakf to allow completion of the construction of the mosque, madrassa and nursery school, through donations offered by the muslim community. He addressed me on the contention that part of the land was sold to Mohammed Nassir. He also referred me to the Wakf Commission Act, Cap 9, on the elements of a valid Wakf, and submitted that the Wakf document annexed by the applicants creates a prima facie case and a strong ground to allow for review. Counsel referred me to *Succession Case No. 193 of 2015; In the Estate of Bakari Madi Chosi* where the court addressed itself on the determination of a Wakf document. He argued that the aggrieved party ought to have been included in the suit and allowed a chance to be heard. Counsel relied on the decision in *Nyongesa & 4 Others vs. Egerton University College (1990) eKLR* and submitted that failure to follow the rules of natural justice renders any judgment null and void for all intents and purposes. He argued that the plaintiff was intentional in not including the applicant as a defendant while knowing fully well that her success will automatically dispossess the applicant of his opportunity to manage the flats which he single handedly constructed. He thought that this was fraudulent and that the doctrine of *ex turpi causa* should apply.

12. On her part, Ms. Hamid, learned counsel for the plaintiff/respondent, inter alia submitted that that the application is defective for want of compliance with Order 9 of the Civil Procedure Rules. She also raised issue about the application being supported by the affidavit of Mr. Farid who is not the aggrieved party. Counsel submitted that the affected party is simply forum shopping for a course of action, as in the interim, he frustrates and deprives the plaintiff the fruits of the judgment. She submitted that the applicant has no locus as he is not a party to the suit. Counsel referred me to the decision in *Zepher Holdings Limited vs. Mimosa Plantations Limited and Jeremiah Matagaro & Another* as cited in the case of *Mohamed Suleiman Shee & another vs. Suleiman Omari Chala & 2 others (2018) eKLR*, where the court stated that a party first ought to seek leave of court to be enjoined in the suit before moving on a spree for other far reaching orders. Counsel also cited the case of *Lilian Wairimu Ngatho & Another vs. Moki Savings Cooperative Society Limited & Another (2014) eKLR* to argue that a party can only be enjoined during the pendency of the suit but not after the case had been concluded. Counsel submitted that the defendants and the affected party are friends and he should have known of the suit, and come to court earlier if he wanted to. Counsel submitted that the affected party and his family were donors to the construction of the mosque and madrassa without any interest on the ownership of the suit property, hence this cannot be subject to a review. She cited the case of *Lilian Wairimu Ngatho (Supra)* where the court stated that the purpose of joining a party as a defendant is to claim some relief from the said party. On the cash vouchers said to evidence sale of part of the suit land to build flats, counsel submitted that one cannot pay the purchase price to a property using petty cash vouchers. Counsel submitted that the said Mohammed Nassir has not claimed to have purchased a portion of the suit property. Counsel submitted that in any event, the affected party has no direct claim as he was not privy to any alleged agreement between the late Aroi and Mohammed Nassir. Counsel submitted that the application offends the doctrine of privity of contract as shown in the case of *Agricultural Finance Corporation vs. Lengetia Ltd (1985) KLR 765*. Counsel submitted that no new evidence has been adduced to warrant an application for review, as the Wakf deed annexed by the applicant was already adjudicated upon in the judgment, where the judge dismissed it. In reference to the letter annexed by the applicant, counsel submitted that this does not pass the test of discovery of new and important evidence as the 6th defendant has not shown that he could not obtain it during the pendency of the suit. Counsel further submitted that the application will amount to the judge sitting in an appeal of his own judgment which is not permissible in law. On this point, she relied on the court of Appeal decision in *Pancras T Swai vs. Kenya Breweries Limited (2014) eKLR.*

13. I have considered all the above and take the following view of the matter.

14. This being an application for review, Order 45 Rule 1 applies. It is drawn as follows: -

> *"(1) Any person considering himself aggrieved—*
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> *(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."*

15. It will be seen from the above, that an application for review can be made by "any person." It follows that it is not a must that the application be made strictly by the parties who have hitherto been in the case. There have been arguments made by the respondent that the applicant lacks locus to file an application for review since he was not a party to the suit, but as I have shown above, an application for review can be made by "any person" who considers himself aggrieved by the order in issue. I do not see any problem with the locus of the applicant. There was also argument that Mr. Gikandi is improperly on record as he first did not seek leave, this application having come after judgment. I do not consider that point to be valid as Mr. Gikandi is not changing any counsel that has been on record. The application can thus properly be considered as an application for review

16. For an application for review to be competent, the court must be persuaded of the following as noted in Order 45 (1) above:-

> *i. Discovery of new and important matter or evidence which after 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;*
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> *ii. Mistake or error on the face of the record;*
>
> *iii. Other sufficient reasons; and*
>
> *iv. That the application has not been made after unreasonable delay.*

17. Starting with the element of delay, I can see that judgment in this matter was delivered on 16 July 2020 and this application was filed on 30 July 2020. I do not consider the delay to be unreasonable. Onto the other conditions, it is certainly the contention of the applicant that there is new and important evidence that was not considered by the court. My understanding of the position of the applicant is that he has new evidence of the Wakf, new evidence regarding construction of some flats on the disputed premises, and new evidence to demonstrate a portion of the land was sold to one Mohammed Nassir where the flats are developed. There is also introduced, through the affidavit of the 6th defendant, a letter said to be a confirmation that the property was set apart as a Wakf. The letter is allegedly written by Yusuf Aroi to one Mr. Abdalla Kugula, the District Education Officer, Kilifi.

18. Starting with the purported Wakf, what was annexed by the applicant as the Wakf of the late Mr. Aroi is no different from what the defendants produced in court in support of their case. This cannot therefore constitute any new evidence. That Wakf was considered by the court and a decision made on it. This court cannot revisit the decision of the court regarding the Wakf, and the avenue to challenge any findings on it will have to be through the appellate process. On the letter allegedly written by Mr. Aroi, this was introduced by the 6th defendant. The 6th defendant was a party to this suit. First, he is not the one applying for review and I do not see why he is barging into the application by the aggrieved party. But even then, he has not demonstrated that this letter, which is undated, could not be availed by him when the case was being heard. It therefore does not fit the bill of being evidence which "was not within his knowledge or could not be produced by him at the time that the decree was passed" as required by Order 45 Rule 1 (1). It must be understood that it is not the intention of the law for parties to conduct their cases piecemeal. One cannot wait for a decision then come rushing to court to say, *"oh, I had some evidence here which I did not adduce; please set aside this judgment and allow me to adduce it now, then proceed to do another judgment."* If that were permissible then there would never be an end to litigation. One would continuously come to court to seek the setting aside of a judgment that does not favour him on the basis that he forgot to adduce some evidence, or that on reflection, there is some important evidence that he ought to have adduced but did not. Litigation is done only once, and that is the policy sought to be protected by Order 45 demanding the demonstration that this evidence could not be availed at the time that the order was made. There is absolutely no explanation offered by the 6th defendant as to why he did not adduce this letter in defence. Nothing has been said about its unavailability at the time of trial. I cannot now accept that it is new evidence that was not capable of being produced by the 6th defendant at the time the matter proceeded.

19. The other documents introduced by the applicant are documents relating to construction of flats and the alleged purchase, by one Mohammed Nassir, of the portion where the flats are built. The other claim by the applicant is that he ought to have been a necessary party because of his deep involvement and stake in the flats. The flats were not in issue in this case. I have already set out the prayers in the plaint at the beginning of this ruling. What the plaintiff sought was a declaration that the defendants do not have any right over the madrassa and mosque existing on the suit land and a permanent injunction to restrain the defendants from interfering with the management and running of the mosque and madrassa. There was no issue in this case regarding the flats, assuming that indeed they are on the suit land. No claim was presented regarding the flats and the court did not pronounce itself on the same. The applicant cannot therefore seek to set the judgment herein aside for purposes of determining ownership or management of the flats. That would be a completely separate cause of action. If he feels that there is a dispute over the flats, nothing prevents him from coming to court for the same to be determined. In the same breadth, I must say that I am not persuaded that the applicant was a necessary party to these proceedings. The cause of action did not involve the applicant but involved other persons. I do not see how the applicant can claim to be aggrieved over the determination of an issue that did not involve him.

20. Apart from this, I am also not persuaded that the applicant only came to know of this matter after judgment. I do not see how, if indeed he is a financier, he could not have known of the suit, yet the court did direct, that pending the hearing of the case, the mosque and madrassa be run by a joint committee. If he was funding the mosque, then he must have funded this joint committee and you cannot separate the joint committee from the case herein for its creation was through this suit. If at all the applicant thought that he had an issue to raise, he had opportunity to do so while the case was pending, for in my view, there is no way he could not have known of it.

21. Whichever way I look at it, there is no good reason tendered as to why this judgment should be set aside based on the allegations of the applicant. The applicant has clearly not met the test to entitle him to a review of the judgment herein. I thus proceed to dismiss this application with costs to the plaintiff. The plaintiff is at liberty to execute the judgment unless otherwise barred by law or any order of court.

22. Orders accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

IN THE PRESENCE OF:

MR GIKANDI FOR THE APPLICANT

MR HAMZA FOR THE RESPONDENT

COURT ASSISTANT; WILSON RABONG'O