



**Gatamah (Suing as the Administrator to the Estates of Joel Wambugu Gatamah & Elizabeth Mukuhi Gatamah) v Kabete Dam Limited & 4 others; Njoroge (Intended Interested Party) (Civil Case E063 of 2019) [2024] KEHC 8571 (KLR) (Commercial and Tax) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8571 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E063 OF 2019**

**AA VISRAM, J**

**JULY 15, 2024**

**BETWEEN**

**DENNIS WAITHIGO GATAMAH (SUING AS THE ADMINISTRATOR TO THE ESTATES OF JOEL WAMBUGU GATAMAH & ELIZABETH MUKUHI GATAMAH) ..... PLAINTIFF**

**AND**

**KABETE DAM LIMITED ..... 1<sup>ST</sup> DEFENDANT  
WINLOUKE PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT  
WIDNES HOLDINGS LIMITED ..... 3<sup>RD</sup> DEFENDANT  
PINNACLE PROJECTS LIMITED ..... 4<sup>TH</sup> DEFENDANT  
I & M BANK LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**WILLIAM NJOROGE ..... INTENDED INTERESTED PARTY**

**RULING**

1. I have considered the grounds on the face of the application dated 29<sup>th</sup> October, 2021, together with the supporting affidavit sworn on even date; the replying affidavit sworn in opposition to the same on 15<sup>th</sup> February, 2022; the submissions of the parties, and the applicable law.
2. The Applicant seeks a review of the injunctive orders issued by Muigai, J. on 15<sup>th</sup> April, 2019, preserving the suit property pending the present suit; and pending various succession matters, namely, succession matters referred to as numbers 739 of 2017 and 839 of 2017.



3. The Applicant submitted that the orders issued by the Judge are not specific as to which houses relate to this suit, and which ones relate to the other suits mentioned above. Counsel submitted that the order ought to relate to only three units on the property, namely, numbers 2, 12, and 13, because the said units are the subject matter of the present suit; and are adequate security in the circumstances.
4. In opposition to the application, the Respondent submitted that the Applicant had been duly served, and had been given an opportunity to respond to the application from which the orders arise, but had failed to do so.
5. Counsel pointed out that at the time of the application, it was not clear which houses were available for preservation. He submitted that the houses or units proposed by the Applicant for preservation are a mere shell; and accordingly, preservation orders relating to the same only, would prejudice the Respondent.
6. Having considered the above, the applicable law is found at Section 80 of the Civil Procedure Act and at Order 45 Rule 1.
7. Order 45 Rule 1 provides for the review of a decree or order in the following terms:-
  - (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 from whom 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 the judgment to the court which passed the decree or made the order without unreasonable delay.
8. There are three limbs which are discernible from part (b) above:-
  - a. Discovery of new and important matter or evidence.
  - b. Mistake or error apparent on the face of the record.
  - c. Any other sufficient reason.
9. From the above provisions it is clear to me that while Section 80 of the Civil Procedure Act gives the court the power to make orders for review, Order 45 sets out the specific conditions that must be met in a review.
10. In Republic –vs- Public Procurement Administrative Review Board & 2 Others the court held that:-

Section 80 gives the power of review and Order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.



11. In *National Bank of Kenya Limited vs. Ndungu Njau – Civil Appeal No. 211 of 1996* (unreported), the court stated the following:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. Misconstruing a statute or other provisions of law cannot be a ground for review”.

12. Based on the record before me, it is not in dispute that the Applicant was served with the application dated 4<sup>th</sup> April, 2019 (from which the orders emanate), but did not respond to the same. In particular, the sequence of events show that the orders were issued ex parte; the matter was thereafter mentioned for directions; and counsel for the Applicant failed to appear. Accordingly, the ex parte orders were confirmed by her Ladyship.

13. Based on the record, four entire years passed before the present application was filed seeking a review of those orders. No explanation has been provided for the delay, and the same is inordinate.

14. Further, I find that the Applicant has not demonstrated that there has been discovery of new and important matter or evidence, that could not have been produced at the time with the exercise of due diligence, or that there is an error apparent on the face of the record. Rather, the thrust of the argument for review, is, simply put, that the orders are punitive. Guided by *National Bank of Kenya (Supra)*. I do not think the same is a satisfactory ground.

15. Further, this court is not aware of the basis upon which a court of concurrent jurisdiction issued its orders. Nor am I aware of the facts relating to the suits in the various succession matters referred to above. I am therefore reluctant to review the orders issued by the Learned Judge in circumstances that are not clear; and do not, on the face of it, meet the criteria set out above.

16. I am further guided by the decision of the Court of Appeal in *Sbanzu Investments Limited v Commissioner for Lands (Civil Appeal No 100 of 1993)*, where the court stated that:-

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *civil procedure act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

17. Based on the above, I have also considered the other reasons outlined in the application and submitted by counsel as grounds for review. I am satisfied that the ‘other reasons’ advanced by the Applicant do not meet the threshold for review.

18. The upshot of the foregoing is that the application is dismissed with costs to the Respondent.

Dated and delivered virtually via Microsoft Teams this 15th day of July 2024

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**ALEEM VISRAM, FCIArb**

**JUDGE**



**In the presence of;**

..... **For the Plaintiff**

..... **For the 1<sup>st</sup> Defendant**

..... **For the 2<sup>nd</sup> Defendant**

..... **For the 3<sup>rd</sup> Defendant**

..... **For the 4<sup>th</sup> Defendant**

..... **For the 5<sup>th</sup> Defendant**

..... **For the Intended Interested Party**

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