Munyi v Munyi (Environment and Land Case 142 of 2016)
[2025] KEELC 6500 (KLR) (1 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6500 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT AND LAND CASE 142 OF 2016

JM MUTUNGI, J

OCTOBER 1, 2025

BETWEEN

ISAACK MURIUKI MUNYI ..... PLAINTIFF

AND

PATRICK WAWERU MUNYI ..... DEFENDANT

RULING

1. Before me for determination is a Notice of Motion dated 4th December 2024 brought under Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules and Articles 50 and 159 of *the Constitution*. The Defendant/Applicant seeks, inter alia, a stay and review or setting aside of the orders issued on 27th November 2024, and to be accorded an opportunity to be heard.

2. The application is supported by the grounds on its face and by an affidavit sworn by Gladys Kemunto Magara, counsel for the Defendant/Applicant, who explained that she was absent on the hearing date of 20th November 2024 due to engagement in another matter at Wang'uru Court. She stated that although she had instructed another advocate to hold her brief, the said counsel failed to attend. She averred that no prejudice would be occasioned to the Respondent.

3. The Plaintiff/Respondent opposed the application through his Replying Affidavit, sworn on 20th February 2025. He averred that the date of 20th November 2024 had been taken by consent with the explicit purpose of adopting the National Irrigation Authority (NIA) report as an order of the Court. He noted that the Defendant/Applicant had previously been indulged and afforded time to obtain the report and argued that the NIA report was authoritative as to occupation and ownership as it was the body mandated to deal with issues of riceholdings. He contended that no sufficient grounds had been disclosed to justify review and that the application was only meant to frustrate him with unnecessary costs.

4. The Court directed that the application be disposed of through written submissions. The Defendant/Applicant filed submissions dated 27th March 2025, while the Plaintiff/Respondent relied wholly on the Replying Affidavit that he had filed.

5. The Defendant/Applicant filed his submissions dated 27th March 2025. Counsel argued that she had presented sufficient grounds to warrant review. She explained that her absence was occasioned by a matter concerning a minor that she had attended at Wang'uru Court during the Children's Service month. She stated that she had sought representation by another counsel who failed to appear. Counsel urged the Court to apply the principles of setting aside to avoid punishing a litigant for counsel's mistake. Counsel further submitted that the application was filed without delay, and that the overriding objectives of the Court required that the Applicant be allowed to respond to the NIA report.

6. I have considered the application, the response, and the Applicant's written submissions. The Court identifies a singular issue for determination; whether the Defendant/Applicant has demonstrated sufficient grounds to warrant review, variation, or setting aside of the orders of 27th November 2024.

7. Section 80 of the *Civil Procedure Act* on the other hand provides for Review, it states: -

Any person who considers himself aggrieved-

> by a decree or order from which an appeal is allowed by this Act, but from which no appeal; has been preferred; or
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> 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 thereon as it thinks fit.

8. Order 45 of the Civil Procedure Rules provides for review of Court decrees or orders where no Appeals have been preferred. Order 45 Rule 1 and 2 provides:-

> Any person considering himself aggrieved-
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> by a Decree or Order from which an Appeal is allowed, but from which no appeal has been preferred; or
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> By a Decree or Order from which no appeal is hereby allowed,
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> 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 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.
>
> A party who is not appealing from the 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 the Respondent, he can present to the Appellate Court the case on which he applies for review.

9. Having regard to Order 45 Rule 1, the conditions upon which the Court can grant review of orders/decree may be summarised as follows:-

   i. Discovery of new and important matter or evidence.

   ii. Some mistake or error apparent on the face of the record.

iii. Any other sufficient reason, and

iv. The application must be made without unreasonable delay.

10. These conditions have been elaborated in numerous Court decisions. In the Supreme Court decision of Wachira Karani Vs Bildad Wachira (2016) eKLR, the Court explained that sufficient cause (or reason) is a question of facts and the Court of Appeal decision in Francis Njoroge –vs- Stephen Maina Kamore (2018) eKLR the Court emphasized the need to establish either of the first three conditions and in any case that the application needed to have been made timeously before an order of review issues. Consequently, therefore, Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. A party who seeks an order of review must clearly identify the ground(s) that he/she relies upon and must demonstrate how it bears on the order/decision that he seeks to be reviewed and/or set aside.

11. The Applicant in the instant matter has not relied on discovery of new evidence or an error or mistake apparent on the face of the record. The only ground advanced is counsel's absence on 20th November 2024. While such absence is regrettable, the hearing date had been taken by consent and was expressly intended for adoption of the NIA report. The Applicant had earlier been indulged to enable him obtain a copy of the NIA report. The Counsel's Affidavit in support of the application does not identify any issue the Applicant had with the report. The report filed by NIA was detailed, factual and supported with annextures. The singular explanation the Applicant's Counsel offered was that she failed to attend Court because she was engaged before the PM's Court at Wang'uru and the Counsel she had briefed to attend on her behalf failed to attend Court. The Affidavit by Counsel however did not in any manner show that the adoption of the NIA report would be prejudicial to the Applicant and/or that the report was faulty. The report was prepared on the Courts directions and unless it was demonstrated that there was some valid reason why it should not be adopted the Court was obliged to adopt the same. In the instant matter and in the absence of any explanation for the Applicants absence on the 20th November 2024, the Court was entitled to proceed with the matter exparte considering that the mention date was taken in the presence of all the parties. The orders the Court made in the circumstances were regular and there had to be a good reason to have the same set aside. Justice operates both ways for the Plaintiff and the Defendant. In the instant case the Plaintiff deserved to access justice in an expedient manner and in the absence of a sufficient cause that would justify the setting aside of the order, the Court would not intervene to set aside the order that was validly and regularly obtained.

12. In the case of Shah v Mbogo & Another [1967] EA 116, the Court held that the discretion to set aside is intended to prevent injustice from an excusable mistake but not to assist a party who deliberately obstructs or delays justice. On the facts here, the Applicant's Counsel's absence does not constitute "sufficient reason" under Order 45 and it has not been demonstrated that any injustice would be visited on the Applicant unless the order is set aside.

13. The Applicant has invoked Article 50(1) of *the Constitution* on the right to a fair hearing. While this right is fundamental, it must be balanced against Article 159(2)(b), which provides that justice shall not be delayed.

14. In the present matter, the Applicant knew the date scheduled and its purpose but failed to secure representation. To reopen the matter would prejudice the Respondent and occasion delay. I am not persuaded any injustice has been occasioned to the Applicant as it is evident he had been afforded hearing before the NIA Dispute Committee.

15. Therefore, I find that the Applicant has not demonstrated any sufficient cause to warrant review or setting aside of the orders of 27th November 2024. The application lacks merit and is accordingly

dismissed. I make no order for costs and direct that each party shall bear their own costs of the application.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 1ST DAY OF OCTOBER 2025.

J. M. MUTUNGI

ELC - JUDGE