



REPUBLIC OF KENYA



KENYA LAW
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**Awadh v Mwanganda & 12 others (Environment & Land Case
197 of 2008) [2024] KEELC 309 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 309 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 197 OF 2008**

**NA MATHEKA, J
JANUARY 30, 2024**

BETWEEN

SAID MBARAK AWADH PLAINTIFF

AND

VICTOR GOGO MWANGANDA 1ST DEFENDANT
MARTIN GOGO MWANGANDA 2ND DEFENDANT
SIMON MWANGANDA 3RD DEFENDANT
TATU NGALA 4TH DEFENDANT
ELVIS NDOILO MWENI 5TH DEFENDANT
MLONGO GAMBA 6TH DEFENDANT
MUYE GAMBA 7TH DEFENDANT
TOMY GAMBO MWAGANDA 8TH DEFENDANT
MARIA KAHONZI GAMBA 9TH DEFENDANT
CHIEF LAND REGISTRAR 10TH DEFENDANT
COUNTY LAND REGISTRAR - KILIFI 11TH DEFENDANT
DIRECTOR OF SURVEYS KENYA 12TH DEFENDANT
COUNTY SURVEYOR - KILIFI 13TH DEFENDANT



RULING

1. The application is dated 4th June 2023 and is brought under Order 10 Rule 11, Order 22 Rule 6 Order 51 Rule 1 and 2 of the Civil Procedure Rules and Section 3A of Civil Procedure Act seeking the following orders;
 1. That this Honorable Court be pleased to issue this application be certified as urgent and service be dispensed with first instance.
 2. That the Honorable Court be pleased to do stay of execution of the Judgment entered on the 21st February 2023.
 3. That this Honorable Court be pleased to set aside the Judgment entered on the 21st February 2023
 4. That this Honorable Court be pleased to Consolidate this matter and ELC Cause No 22 of 2018 which has the same parties and the same subject matter.
 5. That this Honorable Court be pleased to issue a site visit on the suit premises so that the Court to establish the nature and size of the suit premises.
 6. That this Honorable Court be pleased to issue an order this application to be served to the Plaintiff and this application hearing to take effect (21) days.
 7. That this Honorable Court be pleased to the Plaintiff to cater for defamation costs and other related damages such as the massive brain and psychological trauma which led to loss of beloved parent and brothers.
 8. That the cost of this application be provided for.
2. It is based on the grounds that the applicant happened to be the 8th Defendant and the holder of the limited grant of the letters of administration ad litem. That the suit premises belonged to a white settler the deceased Mrs. Norton who decided to share the 40 acres which is adjacent to Sun N Sand Hotel. That the applicant's male parent the deceased Gambo Mwangambo Ndago happened to be among the beneficiaries of the white settler farm who until his last day he confirmed that he had never entered and/or involved in any sales agreement with any person over the issue of his subdivided portion. That since the introduction of this matter their deceased father suffered stress before he met his death. That the Plaintiff informed the court on the ELC No 22 of 2018 he purchased land from Kahindi Baya Mwaro and Gilbert Mwanganda which is adjacent to their deceased parent estate. That the Plaintiff sued the unregistered persons who are not the registered owners of the suit premises neither have any connection with it.
3. This court has considered the application and the submissions therein. The applicant states that he is the administrator of the 8th defendant's estate but he has not applied to be substituted. Be that as it may, he asks the Court to set aside the Judgment entered on the 21st February 2023. to Consolidate this matter and ELC Cause No 22 of 2018 which has the same parties and the same subject matter and to visit the site of the suit premises so that the Court to establish the nature and size of the suit premises. I find that the Applicant is in essence asking the court to review and set aside its judgment. In



the case of *Kwame Kariuki & Another vs. Mohamed Hassan Ali & 4 Others* (2014) eKLR, the Court observed that;

It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal.”

4. In the case of *Mwihoko Housing Company Limited vs Equity Building Society* (2007) 2 KLR 171 is relevant. It was held, that;

A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza Vs Angelo Mpanju Kaiza* 2009, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

5. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:

- (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.

- (2) A party who is not appealing from a 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 respondent, he can present to the appellate court the case on which he applies for the review.”



6. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states 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.”

7. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 211 of 1996, *National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held that;

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 evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law”.

8. From the above provisions of the law, authorities cited and facts of this case I find that the applicant has failed to show any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. There is no new matter and/or evidence that has come to the knowledge of the Applicant. The court in its judgement is clear that it considered all the evidence before coming to the determination. The only option left for the Applicant if dissatisfied was to enjoin himself in the suit and file an appeal. Judgement was entered on the 21st February 2023 and this application filed on the 4th July 2023. The Applicant is also guilty of inordinate delay which is inexcusable. I find this application is not merited and I dismiss it with no orders as to costs.
9. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF JANUARY 2024.

N.A. MATHEKA

JUDGE

