



**Ochudho v Achacha (Environment and Land Appeal
E001 of 2021) [2024] KEELC 82 (KLR) (23 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 82 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT AND LAND APPEAL E001 OF 2021
GMA ONGONDO, J
JANUARY 23, 2024**

BETWEEN

SOLOMON OMOLO OCHUODHO APPELLANT

AND

MOSES ODHIAMBO ACHACHA RESPONDENT

RULING

1. This ruling is in respect of an application by way of Notice of motion dated 26th January 2023 brought under, inter alia, Section 3A of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 by the appellant/applicant, Solomon Omolo Ochudho through DRO Ngala and Partners Advocates seeking the following orders;
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Spent
 - e. The Honourable court be pleased to review and or vary the judgment and the decree passed and or delivered on 22nd September 2022.
 - f. That the costs be provided for.
2. The application is founded upon grounds 1 to 6 on the face of it and an affidavit of fourteen paragraphs sworn on even date by Ibrahim Benedict Omollo, the duly appointed legal representative of the estate of the original appellant, Solomon Omollo Ochudho (Deceased) alongside the annexed documents marked as IOO-1 to IOO-5 which include; judgment of the trial court, judgment of this court and land sale agreement dated 6th September 1983 (IOO-1A, IOO-1B and IOO-3 respectively). Briefly, the



- applicant's lamentation is that judgment (IOO-1B) was entered herein on 22nd June 2022 in favour of the respondent. That the respondent immediately moved in and occupied the suit land number Kanyaluo/Kamenya/1130 and currently in the process of erecting permanent structures on the same.
3. Further, the applicant laments that both the original suit, Oyugis Senior Principal Magistrate's Court Environment and Land Case number 14 of 2020 and the present appeal proceeded and were determined based on evidence which has now been discovered to have been obtained through forgeries, misrepresentation and fraud. That assistant chief, Robert Abongo Oyare and one Nashon Gudu Andele who were purported witnesses to IOO-3, have since denied ever being witnesses thereof. Thus, the orders sought in the application be granted in the interest of justice.
 4. The respondent through the firm of G.S Okoth and Company Advocates, opposed the application save for prayer No. 2 of the application by grounds of opposition dated 15th February 2023, which include;
 - a. The application discloses no reasonable cause of action and is belatedly made and that Section 7 of the *Limitation of Actions Act*, was applied in the matter
 - b. The application for review is misdirected, misconceived and absolutely inapplicable in that review only arises as stipulated under Order 45 Rule 1 (supra).
 5. Wherefore, the respondent prays to this honourable court to dismiss the application with costs.
 6. Hearing of the application was by way of written submissions.
 7. In the applicant's submissions dated 6th November 2023, his counsel referred to the orders sought in the application, the grounds of the application and framed a single issue for determination namely whether the court should grant prayer 5 of the application. Counsel submitted, inter alia, that the appellant passed on and he is currently represented by Ibrahim Benedict Omolo pursuant to a court order. That assistant chief Robert Abongo Oyare and Nashon Gudu Andele who purportedly witnessed IOO-3 denied having done so or at all. Counsel relied on the statement of Nashon Gudu Andele attached to the DCI report dated 16th October 2023 being new evidence not previously available and that the application has been mounted without delay. Also, counsel relied on the case of *Alpha Fine Foods Ltd- vs-Horeca kenya Ltd & 4 others* (2021) eKLR, among others, to fortify the submissions.
 8. By the submissions dated 14th March 2023, learned counsel for the respondent stated that the applicant failed to produce any evidence to prove his allegations that IOO-3 was fake yet he could have called the assistant chief thus, failed to exercise due diligence thereof. That the delay of about six months to commence the instant application was inordinate and without any explanation. That the application be dismissed with cost. To reinforce the submissions, counsel relied on *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (Deceased) v Kariuki Marega and another* [2018] eKLR and *Ferrotech Industries Ltd v Mwadziwe Ali Hare* [2021] eKLR, among others.
 9. Further, learned counsel for the respondent filed submissions dated 14th November 2023 wholly reiterating their submissions dated 15th March 2023 annexed thereto. Reference was made to Order 45 Rule 1 and Section 80 (both supra) and that since prayer 4 of the application was allowed, the DCI report does not qualify as evidence in light of Section 3 of the *Evidence Act* Chapter 80 Laws of Kenya. That therefore, this court is functus officio in the matter.
 10. In the foregone, has the applicant established his case for grant of orders 5 and 6 sought in the application?



11. Section 3A (supra) provides for inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Furthermore, in the case of *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR, the Supreme Court of the Republic of Kenya held that the court may invoke its inherent powers, if circumstances so demand, to do justice to all.
12. It is important to note that Section 80 of the *Civil Procedure Act* (Chapter 21 Laws of Kenya) anchors review. Order 45 (supra) provides for the procedure and conditions to be attained in an application for review.
13. The respondent did not contest that the applicant has not preferred an appeal from this court's judgment rendered on 22nd September, 2022. Therefore, he has not lost the right to apply for review of the judgment as held in *Otieno, Ragot & Company Advocates v National Bank of Kenya Ltd* [2020] eKLR and *African Airlines International Ltd v Eastern & Southern Africa Trade Bank Ltd* [2003] 1 EA (CAK).
14. It is established law that the court has the jurisdiction to review its judgments by dint of powers conferred by Section 80 as read with Order 45 (supra). That it is justifiable for this court to re-open and hear fresh the matter in which the issues in context must be re-looked at afresh; see *Manchester Outfitters (suing Division Ltd) now known as King Wollen Mills Ltd & another v Standard Chartered Financial Services Ltd and 2 others* [2019] eKLR.
15. The applicant stated that the trial court and this court relied on IOO-3 which has been discovered to have been obtained fraudulently. That an interim report by a letter Reference number DCI/RN/SEC/4/4/D/VOL.II/239 dated 13th June 2023 prepared by an officer, Robi Stella for SCCIO Rachuonyo North Sub County, recommended a charge of forgery contrary to section 35 as read with section 349 of the Penal Code against the respondent. That the same recommendation is made in the said officer's final report by a letter reference number DCI/RN/SEC/4/4/D/VOL.II/301 dated 17th August 2023.
16. Besides, I bear in mind that the instant application relates to a civil claim as opposed to a criminal case as indicated in the said reports. Indeed, the standards of proof in such cases are not the same.
17. It is established law that in an application for review, there must be discovery of new and important matter by exercise of due diligence and on a fact not within the knowledge of the applicant or could not be produced by that applicant at the time. That the application must be clear and specific upon the basis made and that not every new fact would qualify for review; see *Kaiza v Kaiza* [2009] KLR 499.
18. In light of the pleadings and evidence of Ibrahim Benedict Omolo (DW1) who stated in cross-examination that the suit land was not sold and that IOO-3 was fake, he was conscious of the alleged fraud and could produce evidence in proof of the same before the trial court. Indeed, he had the opportunity to call witnesses and strictly prove his allegation as held in *Stephen Kinuthia case* (supra). He failed to exercise due diligence in the circumstances.
19. Moreover, it is important to observe that judgment was delivered in this appeal on 22nd September 2022 but the application was mounted on 31st January 2023. The delay is inordinate and the applicant failed to give reasons for the same as noted in a long range of authoritative pronouncements which include; *Ferrotech Industries Ltd case* (supra), *Raphael Musila Mutiso & 3 others v Joseph Ndava Ntbuka and another* [2019] eKLR and *Naomi Wangechi Gitonga & 3 others v Independent Electoral and Boundaries Commission & 17 others* [2018] eKLR.



20. To that end, it is the finding of this court that there is no sufficient reason to justify a review of this court's judgment.
21. Accordingly, the application dated 26th January, 2023, be and is hereby dismissed.
22. By dint of the proviso to Section 27 (1) of the *Civil Procedure Act* Chapter 21 Laws of Kenya, the applicant to bear the costs of this application.
23. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 23RD DAY OF JANUARY 2024.

G.M.A ONGONDO

JUDGE

PRESENT

- a. Mr Ngala learned for the appellant/applicant-virtually
- b. Appellant/applicant
- c. Luanga, court assistan

