Nyingi v Ngunjiri & 2 others (Environment & Land Case 125 of 2018) [2024] KEELC 1092 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1092 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT & LAND CASE 125 OF 2018

JG KEMEI, J

FEBRUARY 29, 2024

BETWEEN

RAPHAEL DENNIS NYINGI ..... PLAINTIFF

AND

JULIA WANGARI NDUNGU NGUNJIRI ..... 1ST DEFENDANT

GARAM INVESTMENTS ..... 2ND DEFENDANT

BARCLAYS BANK OF KENYA ..... 3RD DEFENDANT

RULING

1. The 3rd Defendant/Applicant filed the instant Motion seeking in the main review of its Judgement dated September 7, 2023. It is based on grounds on the face of it *inter alia* that the Hon Court delivered the impugned Judgment cancelling the registration of the 1st Defendant's title reverting the title to the Plaintiff. That the 3rd Defendant failed to produce the statutory notice of 90 days during the hearing to demonstrate that the Plaintiff was duly served with it by Watts Enterprises Limited and it is therefore new evidence going into the root of the matter hence the Application.

2. The Application is supported by the Supporting Affidavit of even date of Samuel Njuguna the Applicant's Legal Recoveries Officer who rehashed the grounds of the motion and annexed copies of the Judgment, statutory power of sale dated 24/4/2008, letter from Watts Enterprises dated 30/5/2008, Applicant's Advocate's letter dated 9/11/2022 and 1st Defendant's letters dated 20/4/2023 & 10/2023 as SM 1 - 6.

3. Raphael Dennis Nyingi vide his Replying Affidavit sworn on 8/9/2023 averred that the Hon Court properly determined the suit based on the record and evidence before it and it is now suspect how a hand delivered 'statutory notice' drawn by the same counsel for the Applicant amounts to new evidence. He reiterated that he was never served with the alleged statutory notice and the Application

is an abuse of Court process aimed at denying him enjoyment of the fruits of his Judgment. He urged the Court to dismiss the Application with costs.

4. The germane issue for determination is whether the Applicant has satisfied the threshold to grant the orders sought.

5. The Application is filed pursuant to Sections 1A, 1B,3A and 80 *Civil Procedure Act* and Order 45 Rule 2 *Civil Procedure Rules*. The relevant provisions for Review are anchored in Section 80 *Civil Procedure Act* that:-

> " 80. Any person who considers himself aggrieved-
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> (a) 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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> (b) by a decree or order from which no appeal is allowed by this Act, May apply for a review of Judgement to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

6. Additionally Order 45 Rule 1 *Civil Procedure Rules* provides as follows: -

> " Application for review of decree or order [Order 45, rule 1.]
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> (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
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> (b) by a decree or order from which no appeal is hereby allowed,
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> and, 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."

7. The applicant contends that this Hon Court delivered Judgment on 7/9/2022 and core to its finding was the issue of non-service of the statutory notice upon the Plaintiff by the Applicant. That the Applicant now has evidence that the said statutory 90 days' notice was served by its agent, Watts Enterprises Limited. That the notice was not included in the Applicant's Bundle of documents during the hearing and the discovery is crucial to the merits of the suit hence the Application. That the delay in filing the Application was due to delay in obtaining the impugned Court Judgment from the Court registry. It is averred that the same was obtained on 12/5/2023.

8. The Plaintiff would hear none of that. He is categorical that he was never served and the said notice – SM2 marked 'hand delivery' is in fact drawn by the same counsel who acted for the Applicant during the hearing of the suit.

9. Has the Applicant satisfied the criteria for grant of the orders of review? The proviso to Order 45 Rule 1 (b) above requires an applicant to demonstrate that the discovery of new and important evidence could not, after the exercise of due diligence, be within his knowledge or produced by him at the time when the decree was passed or the order made, in this case at the time of hearing the suit. The intention of this proviso was aptly discussed by Chepkwony J in the case of *Assets Recovery Agency vs. Stephen*

Vicker Mangira & 3 Others; Aki Motors & Another (Interested Parties) [2020] eKLR and in dismissing a similar Application held;

> " The underlying object of this provision is neither to enable the Court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial ..."

10. Earlier on the Court of Appeal in the case of *Rose Kaiza vs. Angelo Mpanju Kaiza* Civil Appeal 225 of 2008[2009] eKLR, while dismissing an appeal against the trail Court Ruling declining Review of its Judgment stated:

> " An Application for review under Order 44 Rule 1(now Order 45 Rule 1) must be clear and specific on the basis upon which it is made. The motion before the Superior Court was based on discovery of new facts. However, it is not every new fact that will qualify for interference with the Judgment or decree sought to be reviewed."

11. The Appellate Court in the *Case of Kaiza* (*supra*) cited with approval *Commentary By Mulla* on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

> " Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

12. The upshot of the forgoing answers the issue for determination in the negative. The Application is for dismissal on this front alone. Further no plausible explanation has been given by the Applicant to explain the inordinate delay in filing the Application late in the day – almost one year after delivery of Judgment. I say so because a copy of the Judgment was available in the Court registry and normally uploaded on Kenya Law Report portal promptly.

13. However even if the Application was merited, the Court notes that the 1st Defendant preferred an appeal against the impugned Judgment vide her Notice of Appeal dated 12/9/2022. In seeking stay of execution of the Judgment pending appeal vide a motion dated 28/10/2022, counsel for all the parties including the Applicant herein recorded a consent on 16/11/2022 for the Plaintiff not to transfer the suit land to any third party which was adopted as Court order.

14. Relentless the applicant herein also filed the instant motion and also lodged its Notice of Appeal dated 20/9/2022 against the assailed Judgment. It is trite that a party cannot seek review and at the same time pursue an appeal against the same order/Judgment. The Court of Appeal in *Gerald Kithu Muchanje vs. Catherine Muthoni Ngare & Another* [2020] eKLR was emphatic that a litigant cannot have a second bite of the same cherry and he cannot be permitted to do so. That litigation must come to an end somehow and it cannot be conducted on the basis of trial and error.

15. A similar position was held by the Court of Appeal in the case of *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR where it was held that;

> "It is not permissible to pursue an appeal and an Application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of *Karani & 47 Others vs. Kijana & 2 Others* [1987] KLR 557 the Court held that:
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> > "... once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."

16. The totality of the above is that the Application is for dismissal with costs to the Plaintiff.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 29TH DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Ontiti hb Karanja for Plaintiff

Koech for 1st Defendant

Mugo hb Ms. Taank for 2nd and 3rd Defendants

Court Assistants – Phyllis/Oliver