



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

PETITION No. 35 OF 2016

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE....PETITIONER

VERSUS

MOHAMMED HUSSEIN MULLA NANJI TRUST.....1ST RESPONDENT

NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

(Application for review of judgment; application filed some 73 days after judgment was delivered; delay held to be inordinate; no grounds for review satisfied; application dismissed)

1. This is a ruling in respect of petitioner's Notice of Motion dated 3rd July 2017. The application is brought under Section 80 of the Civil Procedure Act and Order 45 rules 1 and 2 of the Civil Procedure Rules. The Petitioner seeks the following orders:

1. Spent.

2. Spent.

3. Spent.

4. That this honourable court be pleased to review the judgement of Justice D. O. Ohungo delivered on the 20th April 2017 and/or set aside the said judgment.

5. That the status quo before the judgment was delivered be maintained.

6. That this honourable court be pleased to make all such further orders and/or directions as it may deem fit.

7. That cost of this application be provided for.

2. The application is supported by an affidavit sworn by Elijah Sikona, the chairman of the petitioner. He deposes that there is an error apparent on the face of the record in the judgment dated 20th April 2017 and that the 1st petitioner (sic) has engaged in the use of public property as private property. There are several other statements in the affidavit but which are a general restatement of the petitioner's case at the hearing of the petition.

3. The application is opposed by the 1st respondent through Grounds of Opposition filed on 26th July 2017 as well as a replying affidavit sworn by Lawson Ondieki and filed in court on 26th July 2017. The 1st respondent's position is that the application is an attempt by the petitioner to re-argue its case; that the petitioner is relying on the same facts it had relied on at the hearing to seek review; that there are no valid grounds for review and that the application is an abuse of courts process. The second respondent left it to the court to make a determination and did not take any position on the application while the 3rd respondent did not participate at all in the hearing of the application.

4. The application was argued by way of written submissions. The petitioner filed its submissions on 23rd August 2017 while the 1st respondent filed its submissions on 18th October 2017. I have considered the application, the affidavits filed and the submissions. The application is expressed on its face as brought under Section 80 of the Civil Procedure Act and Order 45 rules 1 and 2 of the Civil Procedure

Rules, 2010. Rule 1 states:

1. (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.

5. The rule makes it clear that an application for review can be made on the basis of new and important matter on evidence; or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. The application must also be made without unreasonable delay. In the case of **Jameny Mudaki Asava v Brown Otengo Asava & another [2015] eKLR** the court of Appeal stated:

Order 45 of the Civil Procedure Rules is unequivocal on the basis upon which a court can review its orders. The conditions are a) there must be a discovery of a new and important matter which after the exercise of due diligence was not within the knowledge of the applicant at the time the decree was passed, or the order was made; or b) there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and c) the application must have been made without delay.

The court added as follows further on in the same decision:

At this juncture, we consider it opportune to repeat the sentiments expressed by this Court in Origo & Another vs Mungala [2005] 2 KLR 307 ,

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.”

6. The applicant herein has not cited discovery of new matter. It has not even alleged that it is moving the court under the ground of “some other sufficient reason”. The only reason cited and even so only indirectly at paragraph 11 of the supporting affidavit, is that there exists an error apparent on the face of the record. The error is not specifically identified. Instead, looking at the application and even the grounds on the face of the Notice of Motion, one sees that the applicant is of the view that the court reached an erroneous conclusion after assessing the evidence. That cannot be a ground for review.

7. A litigant seeking review is duty bound to apply for it without unreasonable delay. What constitutes unreasonable delay varies from case to case. As was held by Munyao J. in **Jaber Mohsen Ali & another v Priscillah Boit & another E&L NO. 200 OF 2012[2014] eKLR**, even one day after judgment could be unreasonable delay. The court stated:

The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land.

8. Judgement herein was delivered on 20th April 2017. The application for review was filed on 4th July 2017, some 73 days after judgment was delivered. No explanation has been offered as to why the application was not filed earlier. There is good sense in the requirement that an application for review be filed without unreasonable delay. That is particularly so in a situation such as the present one where what is sought to be reviewed is the final judgment. Parties need to know their fate with certainty. If the successful litigant is to be deprived of a benefit that he has acquired from the litigation, common sense dictates that the sooner such an issue is settled the better. In the circumstances, I find and hold that the delay herein is unreasonable.

9. In view of the foregoing, I am not persuaded that the petitioner has made out a case for an order of review. That being the case, there would be no basis to grant prayer 5 of the application. In the end, Notice of Motion dated 3rd July 2017 is dismissed with costs.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 15th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the Petitioner/applicant

Mr. Nyamwange for the 1st respondent

No appearance for the 2nd and 3rd respondents

Court Assistant: Gichaba