



**Lemein v Nabaala; Mutiri & 10 others (Interested Parties) (Environmental and Land Originating Summons E001 of 2021) [2024] KEELC 808 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 808 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2021  
CG MBOGO, J  
FEBRUARY 22, 2024**

**BETWEEN**

**JOSEPH KARIA LEMEIN ..... PLAINTIFF**

**AND**

**JOHN RIANOI NABAALA ..... DEFENDANT**

**AND**

**NGUNJIRI MUTIRI & 10 OTHERS ..... INTERESTED PARTY**

**RULING**

1. Before this court for determination is the Notice of Motion Application dated 10<sup>th</sup> October, 2023 filed by the defendant/ applicant and is expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 51 and 53 Rule 1(3) and Order 45 Rule 1(a), (b) of the *Civil Procedure Rules* seeking the following orders: -
  1. Spent.
  2. That the honourable court be pleased to review, vary, alter and/or set aside its ruling on orders issued on 4.10.2023.
  3. That the costs of this application be in the cause.
2. The application is premised on the grounds inter alia that the defendant's/applicant failure to obey court orders was not deliberate. Further, that it was as a result of his counsel previously on record failure to give proper advice and that he is apologetic for not honouring the court orders.
3. The application was supported by the affidavit of the defendant/ applicant sworn on even date. The defendant/applicant deposed that he should not be punished for the mistakes and failure of counsel



- to advise him properly and accordingly. He went on to depose that he has already complied with the court, and had the access road opened.
4. The defendant/applicant further deposed that the said orders will be prejudicial to him as he will be punished for no fault of his own. He deposed that the application has been made in good faith and there are sufficient grounds for the court to review its earlier orders as prayed.
  5. The application was opposed by the replying affidavit of the plaintiff/respondent sworn on 23<sup>rd</sup> November, 2023. The plaintiff/respondent deposed that the defendant/applicant has not sought stay of execution of the orders issued on 4<sup>th</sup> October, 2023 citing him for contempt.
  6. He further deposed that the defendant/applicant's claim that he was misadvised is unsubstantiated as there is no material to support the allegation. Further, that the defendant/applicant has not provided evidence of discovery of new information, or any error on the face of record to warrant the orders of review.
  7. The plaintiff/respondent deposed that the defendant/applicant being an adult of sound mind and deposition as contained in his supporting affidavit, is capable of making decision and cannot blame the same on his legal personnel.
  8. The plaintiff/respondent maintained that the road is still not open and the defendant/applicant is engaging in unending circles which is unnecessary.
  9. The defendant/applicant filed a further replying affidavit sworn on 18<sup>th</sup> December, 2023. The defendant/applicant deposed that he did not allege being misadvised by his Advocates. Instead, he deposed that there was lack of communication, which information would have been conveyed to him, he would have obeyed.
  10. The defendant/applicant further deposed that he has since had the road opened, and that the grading and clearing of the vegetation on the road is not in his purview as an individual. Further, that he has already purged contempt by having the said road opened pending the hearing and determination of the main suit.
  11. He deposed that the review of the orders sought is a pardon on his part for the reason given in his application.
  12. The plaintiff/respondent filed his written submissions dated 21<sup>st</sup> December, 2023. The defendant/applicant filed his written submissions dated 13<sup>th</sup> February, 2024.
  13. I have considered the application, the replies thereof and the written submissions filed by both parties and the issue for determination is whether the defendant/applicant has sufficient grounds to warrant review of the orders of this court issued on 4<sup>th</sup> October, 2023.
  14. Section 80 of the [Civil Procedure Act](#) provides 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”



15. Order 45 Rule 1 of the *Civil Procedure Rules*, provides as follows: -

“Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

16. In *Republic versus Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

17. In the instant case, the defendant/applicant was cited for contempt of the orders of the court vide a ruling delivered on 4<sup>th</sup> October, 2023. The defendant/applicant thereafter proceeded to file the instant application seeking that this court reviews, varies, alters or set aside its ruling on the grounds that he has purged contempt by having the access road opened.
18. The question then is, do the grounds envisaged by the defendant/applicant sufficient to warrant review orders? The starting point is that a review may be granted whenever the court considers that there is discovery of new information which would not have been obtained at the time of the hearing, also, that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. In addition, the court may grant a review where it has been shown sufficient cause to warrant such orders.
19. In this case, the defendant/applicant has not made any argument on the above three listed elements. Instead, he placed blame on his advocate previously on record for failure to advise him accordingly.
20. Secondly, he abandoned this line of argument and insisted that there was miscommunication between him and his advocate previously on record and as a result, the disobedience was not deliberate.
21. The defendant/applicant in my view is yet to comply with the orders of the court issued on 4<sup>th</sup> October, 2023 despite the same being express. It is not possible to obtain the orders sought as the defendant/applicant has not made out any case within the provisions of Order 45 (1) of the *Civil Procedure Rules*.
22. In the absence of any application of stay of execution, the only way out is for the defendant/applicant to strictly comply with the said orders.



23. Arising from the above, the Notice of Motion Application dated 10<sup>th</sup> October, 2023 lacks merit and it is dismissed with costs to the plaintiff/respondent.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL on this 22<sup>ND</sup> day of FEBRUARY, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**22/02/2024.**

**In the presence of:**

Mr. Abdirahman Ali – C/A

**and in the absence of:-**

The counsel for the plaintiff/respondent

The counsel for the defendant/applicant

The counsel for interested parties

