Macharia v Ayusa & another (Environment & Land Case 882 of 2015) [2024] KEELC 854 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 854 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 882 OF 2015

JO MBOYA, J

FEBRUARY 22, 2024

BETWEEN

JOHN MWANGI MACHARIA ..... PLAINTIFF

AND

RICHARD ODIEK AYUSA ..... 1ST DEFENDANT

NAIROBI CITY COUNCIL ..... 2ND DEFENDANT

RULING

Introduction and Background

1. The 1st Defendant herein has approached the Honourable court vide Notice of Motion Application dated the 19th January 2024 brought pursuant to Sections 1A, 3, 3A and 80 of the *Civil Procedure Act*; and Order 10 Rule 11 of the Civil Procedure Rules, 2010 and in respect of which same has sought for the following reliefs;

    i. .....Spent.

    ii. That this Honorable court do Review and set aside its orders issued on the 23rd November 2023.

    iii. That the Honorable court do grant an opportunity to the 1st Defendant/Applicant to present its Evidence in court in relation to the subject matter herein to enable the Honorable court to determine the suit on merit.

    iv. That costs of this Application be provided for.

2. The instant Application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of the 1st Defendant/

Applicant sworn on even date and to which the Applicant [Deponent] has annexed two [2] documents thereto.

3. Upon being served with the Application under reference, the Plaintiff filed Grounds of opposition dated the 6th February 2024; as well as a Replying affidavit sworn on even date.

4. On the other hand, the 2nd Respondent herein neither filed Grounds of opposition nor Replying affidavit. Moreover, the Application beforehand came up for hearing on the 30th January 2024; whereupon the advocates for the respective Parties covenanted to file and exchange written submissions. Consequently and in this regard, the court proceeded to and circumscribed for the filing and exchange of written submissions.

5. Suffice it to point out that the 1st Defendant/Applicant duly filed written submissions dated the 9th February 2024, whereas the Plaintiff/Respondent filed written submissions dated the 6th February 2024. For coherence, the Plaintiff's/Respondent's submissions predated the submissions by and on behalf of the 1st Defendant/Applicant.

6. Nevertheless, it is imperative to underscore that both sets of written submissions are on record.

Parties' Submissions:

a. Applicant's Submissions:

7. The Applicant herein filed written submissions dated the 9th February 2024; and in respect of which same has highlighted and canvassed threes [3] salient issues for consideration by the Honourable court.

8. Firstly, Learned counsel for the Applicant has submitted that the dispute beforehand touches on and concerns land, which is contended to emotive and thus disputes pertaining to same [Land] ought to be heard and determined on merits, after all the concerned Parties have tendered their evidence before the court.

9. Premised on the contention that land is emotive and thus sensitive, Learned counsel for the Applicant has implored the Honourable court to find and hold that the Applicant herein deserves to be granted an opportunity to tender and bring forth evidence in support of his case.

10. Secondly, Learned counsel for the Applicant has submitted that the Plaintiff/Respondent herein shall not suffer any prejudice and/or hardship, whatsoever, if the court were to review and set aside the orders of the court made on the 23rd November 2023 or at all.

11. Thirdly, Learned counsel for the Applicant has submitted that the Applicant herein was unable to attend court and participate in the scheduled hearing on the 23rd November 2023, because same was indisposed. Furthermore, Learned counsel has contended that arising from the indisposition of the Applicant, same was granted three days off duty and hence the reason why the Applicant could not attend and participate in the scheduled hearing.

12. Finally, Learned counsel for the Applicant has contended that the Honorable court is seized of the requisite discretion to grant the reliefs sought at the foot of the current Application. Further and in any event, Learned counsel has added that the grant of reliefs sought would go a long way in fostering substantive justice in the manner articulated vide the provisions of Article 159(2) of *the Constitution* 2010.

13. Arising from the foregoing, Learned counsel for the Applicant has implored the court to find and hold that the Applicant has placed before the court sufficient material to warrant the grant of the orders sought at the foot of the Application beforehand.

b. Plaintiff's/Respondent's Submissions:

14. The Plaintiff/Respondent filed written submissions dated the 6th February 2024; and in respect of which same has raised, highlighted and canvassed four [4] pertinent issues for consideration by the Honourable court.

15. First and foremost, Learned counsel for the Plaintiff/Respondent has submitted that the issues raised at the foot of the current Application replicate the issues that were canvassed and ventilated before the court on the 23rd November 2023, when the application for adjournment was sought by and on behalf of the 1st Defendant/Applicant.

16. Additionally, Learned counsel has contended that insofar as the same issues had been ventilated before the court and thereafter ruled upon by the court, same cannot now be re-agitated at the foot of the current Application.

17. In any event, Learned counsel for the Plaintiff/Respondent has submitted that the issues being raised at the foot of the current Application are therefore barred by the Doctrine of Res-Judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

18. In support of the contention that the Application is barred the Doctrine of Res-Judicata, Learned counsel for the Respondent has cited and relied on the decision in the case of Nicholas Njeru vs Attorney General & 8 Others (2013)eKLR; and Kennedy Mukua Ongiri vs John Nyasende Mosioma & Florence Nyamoita (2021)eKLR, respectively.

19. Secondly, Learned counsel for the Plaintiff/Respondent has also submitted that the Application beforehand has been pursuant to incorrect provisions of the law and in this regard, Learned counsel for the Respondent has contended that the Application is therefore fatally incompetent and thus deserving of being struck out.

20. Thirdly, Learned counsel for the Respondent has also submitted that even though the Application beforehand is also stated to brought pursuant to the provisions of Section 80 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, however, the Applicant herein has neither established nor disclosed the ground [s] upon which the review is being sought.

21. In any event, Learned counsel has added that in the absence of a definite ground being invoked to warrant review, the entire Application before the court is therefore misconceived and hence legally untenable.

22. Lastly, Learned counsel for the Plaintiff/Respondent has also submitted that even though the 1st Defendant/Applicant adverts to issues of indemnity and compensation, in the event the court passes a Judgment against same, the Applicant herein is stated not to have impleaded any indemnity or at all. In this regard, Learned counsel for the Respondent has invited the court to take cognizance of the provisions of Order 1 Rule 24 of the Civil Procedure Rules, 2010.

23. Furthermore, Learned counsel for the Respondent has similarly cited and relied upon the holding in the case of Meka Sisal Development Ltd vs The Attorney General & 2 Others (2011)eKLR.

24. Consequently and in view of the foregoing, Learned counsel for the Respondent has submitted that the Application beforehand is not only misconceived, but same is frivolous and hence same ought to be dismissed with costs.

C. 2nd Defendant's/Respondent's Submissions:

25. The 2nd Defendant/Respondent herein neither filed Grounds of opposition nor Replying affidavit to the Application beforehand.

26. Furthermore, when the matter came up for mention on the 14th February 2024, Learned counsel for the 2nd Defendant/Respondent intimated to the Honourable court that same will not be filing any written submissions or at all.

27. Consequently and in view of the foregoing, the subject Application shall be disposed of on the basis of the written submissions filed by and on behalf of the 1st Defendant/Applicant and the Plaintiff/Respondent, respectively.

Issues for Determination:

28. Having reviewed the Application beforehand and the Response thereto; and upon consideration of the written submissions filed on behalf of the respective Parties, the following issues do emerge and are therefore worthy of determination;

    i. Whether the Application for review has captured and/or disclosed the requisite grounds upon which review is being sought; and if not, whether the failure to disclose the requisite grounds invalidates the Application be]forehand.

    ii. Whether the orders which were granted on the 23rd November 2023 are amenable to review either in the manner sought or otherwise.

    iii. Whether the Applicant herein is deserving of the discretion of the court, taking into account the circumstances preceding the issuance of the impugned orders made on the 23rd November 2023.

Analysis and Determination:

Issue Number 1. Whether the Application for review has captured and/or disclosed the requisite grounds upon which review is being sought; and if not, whether the failure to disclose the requisite grounds invalidates the Application be]forehand.

29. It is common ground that the Application beforehand principally seeks for an order of review and setting aside of the orders of the court made/rendered on the 23rd November 2023. For coherence, the orders that were made on the 23rd November 2023 were two-fold.

30. Firstly, it is worthy to recall that on the 23rd November 2023, Learned counsel for the Applicant mounted an Application for adjournment on behalf of the Applicant on the basis that the Applicant had been injured sometime on or about the 24th September 2023; and was thereafter admitted at RAM Hospital in Kisii.

31. Secondly, upon the determination of the Application for adjournment, which was dismissed by the court, learned counsel for the Applicant proceeded to and applied to close the 1st Defendant's case. Furthermore, learned counsel for the Applicant stated that the Applicant shall thus be relying on the statement of defense, as well as the bundle of documents that were filed.

32. Suffice it to point out that the court thereafter proceeded to and indeed marked the 1st Defendant'/ Applicant's case as closed. Notably, the order marking the 1st Defendant's/Applicant's case as closed, was made at the instance and request of learned counsel for the Applicant.

33. It is the foregoing orders, which now forms the basis of the current Application for review and which the Applicant implores the court to vary, rescind and/or set aside; and thereafter allow the Applicant to tender evidence before the court.

34. To the extent that the Applicant herein is seeking review, there is no gainsaying that the Applicant was obligated to discern and thereafter implead the appropriate ground[s] upon which the application for review is premised and/or anchored.

35. In any event, it is not lost on this court that any litigant, the Applicant not excepted, who desires to pursue an application for review, is called upon to capture and disclose in the body of the Application anyone or more of the grounds articulated vide Order 45 Rule 1 of the Civil Procedure Rules, 2010.

36. Moreover, it is common ground that the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010; which underpins Application for review espouses three [3] salient grounds which can be invoked and relied upon. For good measure, the grounds are inter-alia, the discovery of new and important evidence, which the Applicant could not place before the court despite due diligence; and Error and/ or Mistake apparent on the face of record or such other "sufficient cause".

37. Be that as it may, I beg to highlight that the Application that has been mounted by and on behalf of the Applicant herein, has neither captured nor impleaded any of the known grounds upon which review can be sought or at all.

38. In my humble view, it was incumbent upon the Applicant herein and his legal counsel to implead the requisite ground[s] underpinning the Application for review and thereafter to place before the Honorable court credible and plausible evidence towards proving the designated ground[s].

39. However, where an Applicant fails to capture and/or implead the requisite grounds underpinning an Application for review, such a Party cannot thereafter be allowed to implore the Honourable court to proceed and grant review, yet no lawful basis has been disclosed to warrant the plea for review or at all.

40. Additionally, it is important to reiterate that even where the requisite grounds underpinning review are captured and impleaded, the Applicant would thereafter be called upon to strictly prove the designated ground[s] prior to and or before partaking of a favorable order for review.

41. Premised on the foregoing observation, it is my finding and holding that the Application beforehand, [which does not espouse the known grounds envisaged under Order 45 Rule 1 of the Civil Procedure Rules], is ex-facie incompetent and thus deserving of being struck out.

42. To fortify the foregoing holding and in particular, that an Applicant must implead the grounds for review and thereafter strictly prove same, it suffices to adopt and reiterate the holding of the Court in the case of Stephen Gathua Kimani versus Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR, where the court held as hereunder;

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules in my view restrict the grounds for review. In my view, the above rule lays 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 un reasonable delay."

43. Furthermore, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others Supreme Court Cases 596 at Page 608; had occasion to consider the scope and circumstances under which review may be granted.

44. For coherence, the court observed and stated thus;

> " The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"

45. Additionally, the Court of Appeal in the case of Stephen Gathua Kimani versus Nancy Wanjira Waruingi t/a Providence Auctioneers [2019] eKLR, stated and held thus;

> " After analysing the enabling provisions, the learned judge rightly so, in our view, found that an application for review is restricted to certain parameters. These are as set out in Orders 45 Rule I of the Civil Procedure Rules, 2010 cited above."

46. In view of the foregoing exposition, it is my humble view that the subject Application, which neither espouses nor discloses any of the ground[s] envisaged under the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010 is, fatally defective and irredeemably incompetent.

Issue Number 2. Whether the orders which were granted on the 23rd November 2023 are amenable to Review either in the manner sought or otherwise.

47. Notwithstanding the finding and holding that the Application beforehand is incompetent and thus legally untenable, it is still appropriate to venture forward and consider whether the orders that were made on the 23rd November 2023, would lend themselves to review either in the manner sought or at all.

48. To start with, it is worth recalling that Learned counsel for the Applicant mounted an application for adjournment on the basis that the Applicant herein was indisposed and had hitherto been admitted at RAM Hospital in Kisii.

49. To buttress the application for adjournment, Learned counsel for the Applicant exhibited to the court a copy of a Treatment summary, which was issued on the 26th September 2023; and which on the face of it indicated that the Applicant had sustained minor injuries arising from a fall.

50. Furthermore, it was also evident from the face of the Treatment summary that the Applicant had indeed been treated and was due for discharge on the 27th September 2023.

51. Nevertheless, despite the fact that the Treatment summary related to events that transpired more than two [2] months before the return date, Learned counsel for the Applicant anchored his application for adjournment on the said Treatment summary.

52. On the other hand, when it was pointed out that the Treatment summary, which was being relied upon related to events long past, learned counsel for the Applicant made an abrupt about turn and contended that same will be availing further medical documentation.

53. Be that as it may, the Honorable court was not persuaded and thereafter proceeded to and declined the Application for adjournment. Instructively, the first limb of the order made on the 23rd November 2023, was an order declining an application for adjournment.

54. To my mind, once a court is confronted with an application for an adjournment and thereafter the court proceeds and determines the application for adjournment, one way or the other, the same court cannot be re-visited with an application to review, the order pertaining to the questioned of adjournment.

55. Additionally, I hold the view that upon rendering a ruling on the question as pertains to the merits or otherwise of the application for adjournment, the court becomes Functus officio and hence cannot be invited to deal with the same issue yet again.

56. In a nutshell, I hold the view that the current Application by and on behalf of the Applicant, though clothed as an application for review, is technically an invitation to this court to sit on appeal on own decision, which is inimical to the Rule of law.

57. On the other hand, if the Applicant herein was aggrieved with the order declining/ dismissing the request for adjournment, same ought to have mounted an appeal and not otherwise.

58. To underscore the foregoing position, it suffices to take cognizance of the holding by the Court of Appeal in the case of National Bank of Kenya Ltd vs Ndungu Njau (1997)eKLR, where the court stated and held thus;

> " In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

59. The second order that was made by the court on the 23rd November 2023, touched on and concerned the closing of the 1st Defendant's/Applicant's case. Nevertheless, it is worthy to recall that the order to close the 1st Defendant's case was made at the prompting and instance of learned counsel for the Applicant herein.

60. In the circumstances, there is no gainsaying that the order to close the 1st Defendant's case was induced and inspired by an application made for an on behalf of the 1st Defendant through his recognized agent by dint of Order 9 Rule 1 of the Civil Procedure Rules, 2010.

61. Arising from the foregoing, the question that does arise is; whether the Applicant herein can now turn back and approach the court to review an order that was made at his prompting and instance.

62. In my humble albeit considered view, the Applicant herein cannot be heard to contend that same is aggrieved, or better still, dissatisfied with an order that was made at his request and prompting.

63. On the other hand, I beg to state and observe that it would have been a different situation had learned counsel for the Applicant left the matter for the court to deal with in accordance with the provisions of Order 17 of the Civil Procedure Rules, 2010. In this regard, the closure of the 1st Defendant's case would have been made by the court suo moto, which is not the case herein.

64. In view of the foregoing, I hold the view that the two [2] limbs of the orders that were made by the court on the 23rd November 2023; which premise the Application for review do not lend themselves to review either in the manner sought or at all.

Issue Number 3: Whether the Applicant herein is deserving of the Discretion of the court, taking into account the circumstances preceding the issuance of the impugned orders made on the 23rd November 2023.

65. As pertain to the issue herein, it is important to underscore that an Application for review is dependent upon the exercise of discretion by the court. Consequently, any Applicant who approaches the court seeking for review, must no doubt, approach the court in good faith and make full/material disclosures.

66. However, as pertains the current Applicant, it is imperative to recall that on the 23rd November 2023 the Applicant herein chose to wave on the face of the court a Treatment sheet/summary which was generated on the 26th September 2023; and thereafter sought to mislead the court that the Applicant was indisposed as at the 23rd November 2023.

67. Suffice it to pint out that after due interrogation of the Treatment summary, which was adverted to by the Applicant herein, learned counsel for the Applicant indeed conceded that the particular Treatment summary did not espouse the correct medical status of the Applicant as at the time of the scheduled hearing.

68. In any event, upon hearing the application for adjournment which was premised on the impugned medical/ Treatment summary, the Honourable court made various observations as hereunder;

> 6. Having looked at the medical summery that was availed to court and on the admission of counsel for the 1st Defendant that the same does not relate to the current situation, I am not convinced that the request for adjournment is made in good faith.
>
> 7. Furthermore, I also wish to state and observe that a party who seeks to procure and undertake of the equitable discretion of the court ought to be candid with the court and same ought to rely on the document/evidence whose net effect is not to mislead/confuse the court in an endeavor to obtain discretion.
>
> 8. In respect of the current situation, I am afraid that the application for adjournment is not being made in good faith and hence no basis is being made as to establish the request for adjournment

69. From the excepts, which have been reproduced herein before, it is evident that the court was highlighting and pointing out an endeavor on the part of the Applicant to concoct documents with a view to defrauding and/or defeating the cause of Justice.

70. On the other hand, there is also no gainsaying that the court underlined that there was a discernable attempt to utilize/ deploy the impugned Medical/ Treatment summary to defeat a scheduled hearing.

71. To my mind, the observations by the court which are duly captured at the foot of the Ruling rendered on the 23rd November 2023; continues to hold sway to date. Simply put, the court has hitherto found that the Applicant herein was devoid of condour.

72. Notwithstanding the foregoing, the Applicant has now walked before the court another Treatment summary which is dated the 21st November 2023; and wherein it is indicated that the Applicant was given sick-of of three (3) days.

73. However, the documents, namely, Sick-off sheet is economical with details and same does not even disclose whether or not the Applicant was indisposed or at all. Further, it does disclose the nature or type of treatment, [if any], that was given to the 1ST Defendant, or at all.

74. Worse still, the documents is stated to have been issued on the 21st November 2023 and if at all, same was/genuine, then the document in question ought and should to have been availed/ presented to court on the 23rd November 2023.

75. To my mind, and taking into account the issues that were highlighted before the court on the 23rd November 2023, there is a high likelihood that the impugned sick-off sheet is tailor-made to propagate a narrative, which is however, [sic] doubtful.

76. Arising from the foregoing, this court holds the view that the Applicant herein has not treated the court with the requisite good faith and in any events, same has been less than candid.

77. To my mind, a Party who seeks Equity must approach the court at all times with clean hands and the moment a court of law and of Equity, discerns and endeavor to abuse the due process of the court; then the court must decline to exercise discretion in favor of the Culpable Party.

78. Before departing from this issue and in particular, the exposition of the Law that review is underpinned by exercise of discretion, it suffices to take cognizance of the holding of the Court of Appeal in the case of Otieno, Ragot & Company Advocates versus National Bank of Kenya Limited [2020] eKLR, where the court held as hereunder;

> " The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence. It is also in instructive to note that the respondent actually misled the High Court about when and how it realised it was mistaken."

79. To my mind, the excerpt by the Court of Appeal [supra] aptly captures the circumstances surrounding the instant matter. Consequently, I come to the conclusion that the Applicant herein is not deserving of the discretion of this Honorable court and hence even on this account, the application beforehand would fail.

Final Disposition:

80. Upon due consideration of the pertinent issues which were highlighted in the body of the Ruling herein, it is crystal clear that the Application for review, by and on behalf of the Applicant herein, is not only incompetent for non-compliance with the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010, but same is similarly devoid of merits.

81. Consequently and in the premises, the Application dated the 19th January 2024; be and is hereby dismissed with costs to the Plaintiff/Respondent only, insofar as the 2nd Defendant/Respondent did not file any Response thereto.

82. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

OGUTTU MBOYA,

JUDGE

In the presence of;

Benson - Court Assistant.

Mr. Osoro for the 1st Defendant/Applicant.

Mr. Kitulu for the Plaintiff/Respondent.

N/A for the 2nd Defendant/Respondent.