



Odwar & 2 others (Suing for Themselves and on Behalf of the 92 Allottees from Thesalia and Jaber Informal Settlement Scheme) v Ministry of Lands & Physical Planning & 2 others (Environment & Land Case E050 of 2021) [2024] KEELC 1131 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1131 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E050 OF 2021
E ASATI, J
FEBRUARY 22, 2024**

BETWEEN

**DALMAS OTIENO NYAGE ODWAR 1ST PLAINTIFF
JANES ODHIAMBO NYINGORE 2ND PLAINTIFF
SOLOMON MUSA 3RD PLAINTIFF
SUING FOR THEMSELVES AND ON BEHALF OF THE 92 ALLOTTEES FROM
THESALIA AND JABER INFORMAL SETTLEMENT SCHEME**

AND

**MINISTRY OF LANDS & PHYSICAL PLANNING 1ST DEFENDANT
MINISTRY OF INTERIOR & CO-ORDINATION OF NATIONAL
GOVERNMENT 2ND DEFENDANT
NATIONAL LAND COMMISSION 3RD DEFENDANT**

RULING

1. The application before court for determination is the Notice of Motion dated 4th December, 2023 brought by the Plaintiffs pursuant to the provisions of Section 1A, 1B, 3, 3A, 45 and 51 of the Civil Procedure Rules, 2010.

The application seeks for orders that the court be pleased to recall, review and set aside its judgement and orders issued on the 26th October, 2023 and that the court be pleased to review its decision delivered on 26th October, 2023 and to specifically find that its decision in respect of Peter Oseno Ojwang and Janes Odhiambo Nyingore apply in pari-materia to all the applicants.



2. The grounds upon which the application was made are that sufficient cause in terms of public interest has already been shown to warrant orders sought in the circumstances. That there is discovery of new and important evidence which could not be ascertained earlier by the applicants despite due diligence. That there exists a mistake/error apparent on the face of the record in not capturing the fact that delay in production of letter of offer and title deeds in favour to the applicant was basically as a consequence of 1st Respondent who are constitutionally and statutorily tasked with that responsibility and it is unjust for the applicants to suffer the consequences. That the judgement issued on the 26th October, 2023 has the potential to open a flood gate of other cases involving all the affected applicants given that the findings in respect of Peter Oseno Ojwang and Janes Odhiambo Nyingore apply in pari-materia to all the applicants hence it is in the public interest that review be granted to promote public interest and enhance public confidence as held by the court of Appeal in Benjoh Amalgamated Limited & Another –vs- Kenya Commercial Bank Limited [2014]eKLR. That review of the decision dated 26th January, 2023 is necessary in bringing certainty, finality and orderliness, through final and valid decision that will safeguard security, economy and peace of mind especially given that the applicants are poor, landless citizens who have suffered at the instance of the state for years.
3. The application was supported by the contents of the Supporting Affidavit of DALMAS OTIENO NYAGE ODWAR sworn on 4th December 2023 and the annexures thereto.
4. The application was not opposed. Affidavit of service sworn by Silvia Nyambeki on 11/12/2023 shows that the Respondents were served with the application dated 4th December, 2023 and a court order of 5th December, 2023 on 11th December, 2023. A copy of the email communication shows that the service was effected on December 11th at 11:55a.m. The Defendants did not respond to the application at all.
5. The application seeks for order of review of the judgement. Review and setting aside of judgements, decrees and orders is provided for in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules 2010. Section 80 provides that: -

“ 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 review of the judgement to the court which passed the decree or made the Order, and the court may make such order thereon as it thinks fit

Order 45 Rule 1 (1) provides

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



From the above-quoted provisions of the law, it is clear that the grounds upon which an application for review of a judgement, order or decree can be made are:

- a) discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or order made
 - b) on account of some mistake or error apparent on the face of the record
 - c) any other sufficient reason
 - d) the application must be brought without unreasonable delay.
6. In the present case, the application is premised on the grounds, firstly that there is discovery of new and important evidence. The new and important evidence is title deeds and letters of offer as deposed in paragraphs 8, 9 and 10 of the Supporting Affidavit. It is not denied that at the time of filing and delivery of the judgement sought to be reviewed, the letters of offer and title deeds now sought to be relied upon, were not part of the record. It was not mentioned during the hearing of the case or at all that there were titles that were expected to be supplied to any of the applicant. No evidence has been placed before court that the evidence (title deed and letters of offer) now sought to be introduced to court were given to the applicants after the judgement. The letters of offer attached to the Supporting Affidavit are dated and certified in the year 2013. The copies of title deeds also attached are dated the year 2018. There is no evidence that these were only discovered by the applicants after the judgement. The applicant has an obligation to prove that he exercised due diligence.
7. The second ground of the application is that there is error apparent on the face of the record. According to the applicants, the judgement has an error apparent on the face of the record namely; that the judgement did not capture the fact that delay in production of letters of offer and title deeds in favour of the applicants was basically as a consequence of the 1st Respondent who is constitutionally and statutorily tasked with the responsibility and it is unjust for the applicants to suffer the same. In paragraph 9 of the Supporting Affidavit, the applicant deposes that on the aspect of errors apparent on the face of the record in as much as the filed plaint and witness statements mentioned ninety-two letters of offer and receipts of payment it is constructive to note that only forty-six letters of offer were eventually filed as they all along believed that the 1st Respondent would supply the rest.
8. My understanding of error apparent on the face of the record is that there is an error on the decision sought to be reviewed. No error or mistake at all has been pointed out on the judgement and decree sought to be reviewed. What the applicants are pointing out as error apparent on the face of the record are omissions on the part of the applicants to place before the court during the hearing certain matters of evidence. The applicants are seeking that the court reopens the case for production of further evidence. The applicants did not explain during the trial that there were more titles deeds, letters of offer and receipts that they ought to receive but which they had not received from the Respondents.
9. The court finds that none of the grounds for review of judgement as set out in Order 45 of the [Civil Procedure Rules](#) 2010 have been proved.
10. The application is hereby dismissed. No orders as to costs.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 22ND DAY OF FEBRUARY, 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**



In the presence of:

Maureen: Court Assistant.

Nyambeki advocate for the Plaintiffs/Applicants.

No appearance for the Defendants/Respondents.

