Kisoso v Kimamet & another (Suing as legal representatives of Kiporot Ole Totona alias Singo Arap Totona (Deceased) & 3 others (Environment & Land Case 267 of 2017) [2024] KEELC 848 (KLR) (21 February 2024) (Ruling)

Neutral citation: [2024] KEELC 848 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 267 OF 2017

FM NJOROGE, J

FEBRUARY 21, 2024

(FORMERLY NAKURU HCCC NO. 20 OF 2006)

BETWEEN

PRISCILLA JERUTO KISOSO ..... PLAINTIFF

AND

LETEMA TOTONA KIMAMET & FREDRICK TOYONGO TOTONA (SUING AS LEGAL REPRESENTATIVES OF KIPOROT OLE TOTONA ALIAS SINGO ARAP TOTONA (DECEASED) ..... 1ST DEFENDANT

TUNGO TOTONA ..... 2ND DEFENDANT

LEDEMA TOTONA ..... 3RD DEFENDANT

RONALD TOTONA ..... 4TH DEFENDANT

RULING

1. The defendant's application is dated 6/02/2023. Therein, they seek the following orders:
    a. That this matter be certified urgent and heard ex parte in the first instance,
    b. That the honourable court be pleased to review the judgment delivered on 19th January 2023 on the account of the judgment and/or orders made on the 1st day of April, 2022 *vide* the Court of Appeal at Nakuru Civil Appeal No. 117 of 2017 *Tungo Totona and 2 others versus Priscillah Jeruto Kisoso* reinstating the defendants/applicants counterclaim.
    c. That upon review the matter be heard de novo with all the parties in the counterclaim on board.

d. That in the meantime and pending the hearing and determination of the application herein, that there be a stay of execution of the orders issued on the 19th January 2022 and specifically that there be a stay of the order to subdivide the land parcel No. Lembusi/Chemogoch/10, that the plaintiff by herself, her servants, agents, employees or whosoever shall not enter the land parcel No. Lembusi/Chemogoch/10 or any other part thereof and shall not sell, shall not transfer, shall not dispose, shall not charge, shall not sub divide, shall not survey out, shall not farm, shall not graze their animals and shall not lease out, shall not gift out and/or in any manner interfere with the land parcel above and/or have any dealings with the suit land parcel Lembusi/Chemogoch/10.

e. That the Honourable court do give any other necessary and appropriate directions as the honourable court deems it fit and just to grant.

f. That cost of the application be in the cause.

2. The application is premised on various grounds set out at its foot and in the supporting affidavit and the supplementary affidavit of Letema Totona Kimamet thereto attached. In brief they are that after the judgment in the matter was delivered the applicants discovered that the judgment in Nakuru CA No 117 of 2017 – *Tungo Totona & 2 others vs Priscilla Jeruto Kisoso* had been delivered and that owing to it the substratum of the present matter changed totally; that by that judgment some orders of this court (dated 21/3/16) were set aside and the defendant's counterclaim against the plaintiff, the Kenya Commercial Bank and 3 others were reinstated; that the said defendants to the counterclaim had been removed by order of this court and in the circumstances the defendant was innocent in respect of their absence at the hearing of the case; that the litigation in this matter ought not to have proceeded until the Court of Appeal pronounced itself on the appeal; that however by the time the Court of Appeal rendered its judgment the plaintiff's case had been long closed; that owing to the foregoing it is meet that the case proceeds de novo.

Response by Plaintiff.

3. The plaintiff filed her replying affidavit on 27/2/2023. She deponed as follows: that the application is made in bad faith; that in 2017, despite the applicant informing this court that there was a pending appeal, there was no stay of proceedings and the applicant has never filed an application for such stay and the matter therefore proceeded to hearing; that on 21/5/16 Munyao J allowed the applicant's defence and counterclaim out of time but the applicant failed to serve them; that the applicant even applied for summons against the persons who had been sought to be made parties to the counterclaim; that the discovery of the Court of Appeal judgment was not one that could not have been made without diligence during the preliminary trial of the suit herein; that that the applicant was aware of the pendency of the Court of Appeal judgment all through and he cannot now Be heard to rely on it after judgment for his application; that the application is an abuse of the court process for being litigation by installments; that in any event, by the Court of Appeal judgment the applicant was supposed to have served summons to enter appearance and the counterclaim within 10 days of 1/4/2022 which they never did and so the avenue provided by the Court of Appeal judgment, without any application for extension of time to comply with it, is now overtaken by events; that nevertheless the proposed counterclaim contained no prayer that would have enabled this court arrive at a different finding in its judgment; that no specific prayer had been sought against the co-defendants whose name had been struck out of the suit; that nothing stops the applicant from filing a separate suit against the would be defendants in the counterclaim and seeking specific prayers against them.

4. The application was disposed of by way of written submissions of both parties which I have considered while preparing the present ruling.

Analysis and Disposition.

5. What this court is dealing with here is a review application. Review is governed by section 80 of the *CPA* and Order 45 rule 1 of the *Civil Procedure Rules*.

6. Section 80 of the *CPA* provides as follows:

> " 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

7. Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows:

> (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,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.
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> (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.

8. Have the applicants made a good case for review and setting aside of the judgment issued by this court on 19/1/2023? It all depends on the grounds they have provided. Principal among these is that the Court of Appeal judgment had far reaching ramifications on the present case in that it effectively ordered a *de novo* hearing of the matter which direction was not observed. They aver that they were not aware of the Court of Appeal judgment at least until a few days before the filing of the application. The applicant's application simply revolves around the issue of that which should have occurred in the ideal situation in the present suit after they succeeded in their appeal had the directives in the appellate judgment been complied with. Their position is that the directions in the Court of Appeal judgment were not complied with and the suit eventually proceeded without some parties.

9. The present application is expressed to be brought under order 45 rules 1(a) and (3) (2) of the *Civil Procedure Rules*, and Section 80 of the *Civil Procedure Act*. The applicants not having been very specifically reliant on 45 Rules 1(b) which provides for the ground upon which review orders may be granted, I am inclined to consider whether the present application has met any of the grounds set out

under that provision. The parameters within which a review application is weighed or can be granted are as follows:

a. Whether there is discovery of 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 the order made; or

b. Whether there is some mistake or error apparent on the face of the record; or

c. Whether there is any other sufficient reason; and finally

d. Whether the application has been brought timeously.

10. The principal ground relied on is that there was discovery of the judgment of the Court of Appeal earlier mentioned. The applicants state that the judgment was not shared with the lawyers vide the office electronic mail address provided in the Court of Appeal filings, and that the applicants became aware of it only on 23/1/2023 upon reaching out to the Court of Appeal. The applicants attached to their application a copy of an electronic mail letter dated 26/1/2023 addressed to aruseiadvocates@yahoo.com forwarding the electronic mail letter dated 1/4/2022, vide which the judgment was apparently dispatched to various addresses. The address aruseiadvocates@yahoo.com is conspicuously missing from among the addresses in the mail sent on 1/4/2022. The body of the letter asks the recipients to forward the judgment to the advocates on record. There is no mail attached to show that that was done. The next annexture is a letter dated 23/1/2023 from Arusei & Co advocates addressed to the Deputy Registrar of the Court of Appeal Nakuru raising a complaint that the Court of Appeal judgment was not forwarded to them *vide* the electronic mail address that they had provided in the court filings. As seen herein above an analysis of the affidavit evidence of the respondent to the present application does not dispute that the said judgment was not transmitted to the applicants' advocates. The respondent does not also state whether the said judgment was ever transmitted to her or to her advocates on record. In this regard I will accord the applicants a benefit of doubt and believe their version that the judgment was not transmitted to them or to their counsel. In so far as it has ramifications on the direction the proceedings in this case could have taken had it been discovered in time, it therefore falls within the category of "new and important matter or evidence" within the meaning of Order 45 Rule 1 (b).

11. The above notwithstanding the question arises as to whether with sufficient diligence the applicants or their counsel could have known of the existence of the said judgment so as to be able to comply with its directives. In this regard it is to be noted that an appeal being a different proceeding in a court different from the one trying the original case, the proceedings and delivery of decisions from that court are generally at its discretion. For reasons I cannot comprehend, I do not find any indication from the respondent in her affidavit evidence indicating that notice of the delivery of judgment was sent to or received by either her counsel or the applicants' counsel. Receipt of such notice, or even of the judgment by the respondent's counsel would have, in the absence of any other means, been an appropriate yardstick by which to gauge the diligence of the applicants or their counsel, yet all the parties were in the same boat, subject to having their fortunes changed arbitrarily by such judgment once issued, depending on what the appellate court ruled. In the absence of proof of such receipt of notice or even of the judgment itself, this court is not seized of material upon which it can conclude that there was lack of exercise of sufficient diligence on the part of the applicants or their counsel which omission caused them not to know of the existence of the said judgment.

12. I do not find any reliance on the ground of "mistake on the face of the record" and I will therefore not address it here as it is futile.

13. However, there is the provision under Order 45 that a decree or order may be set aside for any other sufficient reason. It has been said time and again that such reason need not be analogous to the two reasons expressly stated in Order 45. In the case of *Pancras T Swai v Kenya Breweries Ltd* 2014 eKLR it was observed as follows:

> " It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *factus officio* and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 *Civil Procedure Rules*) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason." The appellant did not bring his application within any of the limps nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In *Sarder Mohamed v Charan Singh Nand Sing and Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited v Commissioner for Lands* (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata & Another vs. Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that
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> > "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.""

14. The Court of Appeal followed the afore stated position in the in *Fred Wafula Ngichabe & 2 otyhers v Evans Wafula Wepukhulu & 7 others* 2017 eKLR.

15. In the present case, a very curious situation has emerged where neither the parties nor the trial court appear to have been aware that a judgment of the court of appeal that had serious ramifications on the conduct of the trial had been delivered.

16. I will retrace in brief the history of this matter: the applicant's travails leading them up the appellate path commenced with the Hon. Justice Sila J making orders, at the respondent's counsel's instance, striking out all defendants in the counterclaim in the suit except the respondent under Order 5 rule 27 of the *Civil Procedure Rules* and directing that the matter do proceed with the plaintiff as the sole defendant in the Counterclaim.

17. The defendants filed an application, to review that order and obtain an extension of time, to enable them serve all defendants in the counterclaim which was granted on very stringent conditions. i.e.,

surrender of the suit property to the Plaintiff or payment of Kshs 1000,000/- deposit as security plus Kshs 25,000/- as throw away costs before the counterclaim against the other defendants was reinstated.

18. The defendants filed an appeal against the said determination and the Court of Appeal allowed the same saying as follows:

> " There ought to be proportionality in the dispensing of justice and this can be achieved by judges exercising their discretionary powers judiciously."

19. The Court of Appeal found that injustice had been occasioned to the Defendant and it set aside Hon Sila J's ruling in its entirety and substituted thereof an order that the appellant's Counterclaim be reinstated. It further ordered that the same be served upon the defendants named therein within 10 days of that order, and that the suit do proceed for hearing before a Judge other than Sila J. That was on 1/4/2022. However, by then the hearing of the matter before this court had long since taken off before Ohungo J., Hon Sila J having rather presciently recused himself from the matter on 25/9/2027 following the posting of a second judge to the station.

20. Hearing began before Hon Ohungo J. on 17/12/2019 when DW1's evidence was heard; DW2 gave evidence on 14/1/2020 while DW3 testified on 23/6/2021; DW4 gave evidence on 8/2/2022. DW1 was recalled on 21/4/2022 and on 20/6/2022 the defence case was closed on 27/9/2022 voluntarily upon application by the Defendant's Counsel.

21. It is the argument of the applicants that the appellate judgment had far-reaching ramifications on the present case; that it had ordered that the suit be heard *de novo*. The applicants aver that the overriding objectives of Sections 1A and 1 B of the *Civil Procedure Act* should be invoked to ensure that there occurs a just determination of the land dispute before court; citing *Isabella Wanjiku Karanja v Gichia B Mungai & 4 others* 2018 eKLR and the case of *Films Rover International Ltd vs Cannon Films Sale Ltd*, 1963 3ALL ER 772, they urge that courts of law should always opt for the lower rather than the higher risk of injustice and in the present case the lower risk lies in having a *de novo* hearing with all the parties on board including the defendants in the counterclaim. The applicants urge in their submissions that this court ought to overlook the technicalities of procedure and deal with the matter as per the dictates of section 3 of the *Environment and Land Court Act*.

22. In so far as the Court of Appeal was unaware that Sila J had already recused himself from the matter (and left the station), the question that may arise is whether applicants are correct in their interpretation of the appellate decision to mean that the matter should proceed *de novo*, even when a different Judge, Ohungo J had begun hearing it, albeit before appellate directions were issued. The applicants cite the case of *Wachira Karani v Bildad Wachira* 2016 eKLR for the proposition that fundamental to the court's duty to do justice lies the duty to allow the parties a proper opportunity to present their cases upon their merits. They further aver that this court was under a statutory duty to do justice to the parties in accordance with the Court of Appeal judgment that the matter do begin *de novo* and all the parties that the appellate court had reinstated be served to come to court. The cases of *Harrison Wanjohi Wambugu v Felista Wairimu Chege & Another* 2013 eKLR and *Abdirahman Abdi Aka Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd & 6 others* 2011 eKLR were cited in support of the proposition. In the latter case the applicants emphasized on the following passage:

> " The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice. It is however, not a principle the court may invoke without giving the parties an opportunity of being heard on the matter. In the matter before us the parties were given an opportunity to express their views. Mr. A.B. Shah, was however, reluctant to express a view on the matter because he did not think he

needed to do so in absence of an application for extension of time to serve a notice of appeal. That was despite the fact that the court urged him more than once to do so. In situations as the one before us what a court is obliged to do is to give a party an opportunity to be heard. If for whatever reason the party concerned does not avail himself of that opportunity he should not complain that he was denied a hearing.

In the days long gone the court never hesitated to strike out a notice of appeal or even an appeal if it was shown that it had been lodged out of time regardless of the length of delay. The enactment of sections 3A and 3B of the *Appellate Jurisdiction Act*, Cap 9 Laws of Kenya, and later, Article 159(2)(d) of the *Constitution* of Kenya, 2010, changed the position. The former provisions introduced the overriding objective in civil litigation in which the court is mandated to consider aspects like the delay likely to be occasioned, the cost and prejudice to the parties should the court strike out the offending document. In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of *Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion."

23. The defendants/applicants aver that in order for justice to be done in this case the judgment needs be reviewed, and the case be re-opened and heard *de novo*; that this court ought to rise to a higher calling to do justice as per Hon Justice Ringera's dictum in *Microsoft Corporation v Mitsumi Computer Garage Ltd & Another* 2001 eKLR. They accuse the plaintiff of being behind the debacle owing to her applications to strike out the parties in the counterclaim, opposing the review of those orders of striking out and thus compelling the filing of the appeal; in their thinking the plaintiff wants to benefit from her own wrongdoing; they cited the case of *Joel Mwangangi Kithure v Priscah Mukorimburi* 2022 eKLR and Mwatech Enterprises Ltd v Equatorial Commercial Bank Ltd 2021 eKLR to urge that she ought not be allowed to do that. The applicants aver that they ought to be granted an opportunity to be heard, especially on their counterclaim, lest they suffer irreparable loss; that on a balance of convenience the court ought to allow a *de novo* hearing.

24. I think that arising from the foregoing analysis of events, the additional question at the heart of this application is simply what should happen when there is an appeal pending and there is no stay of proceedings obtained either at the appellate level or at the trial court level. The respondent herself has faulted the applicant for failing to obtain a stay, but this is evidently an incorrect stance when considered in the light of the fact that the respondent also stood to lose in the event the orders such as those which were given on appeal issued after the hearing of this case had taken off. It is those orders that are the greatest threat to the judgment she has secured against the applicants. In this court's view, it behoved all the parties to apply good sense and be wary of urging the trial court to proceed with the hearing while the appeal upstairs was still pending. It also in the circumstances behoved them both to apply for a stay of proceedings so that any judgment obtained may not be eventually reviewed in an application such as the present, in which case valuable time would have been lost both on their part and on the part of the trial court.

25. As for the court being aware of the pendency of the appeal, I note that there is a notice of appeal in the court record but then mere presence of such a notice in the present court file does not necessarily imply that the parties are intent on carrying on with the appeal and the court cannot be blamed for proceeding to try the matter while the appeal was pending. To be fair to the parties also, the need arises

to mention the fatiguing vicissitudes beleaguering this litigation after the notice of appeal was filed, including how to deal with the applications seeking recusal of Sila J; how to maneuver the plaintiff's application seeking to bar the interment on the suit land of the defendant's family patriarch when he passed on midway through the proceedings; the seeking of a grant in another court to enable the surviving defendants file a motion to revive the suit and substitute the deceased in this suit (which motion was also opposed by the plaintiff). There also occurred the need to amend pleadings. It is possible that all this took a toll on the parties and their counsel in the matter. Examining the record between the time of the filing of the notice of appeal and the delivery of the impugned judgment in this case, I have not found any filing even remotely referring to the pending appeal, and it must be the case that the parties became over-engrossed in the trial process before this court to the exclusion of the appeal.

26. Therefore, the ground that the entire case requires to be heard and determined on its full merits in the presence of all parties including the defendants to the counterclaim who had been struck out by Sila J affords a plausible ground for the review and setting aside of the impugned judgment.

27. As regards timeous lodging of the review application, I note that the electronic mail that made the applicant's counsel aware that judgment had been delivered in the appeal is dated 26/1/2023 and the present application was filed on 6/2/2023, a difference of only about 10 days which in this court's view does not amount to inordinate delay.

28. In the upshot I find that the application dated 6/2/2023 has merit and the same is allowed in terms of prayers no. 2 and 3 thereof. For clarity I issue the following express orders:

    a. The judgment of this court delivered on 19th January 2023 is hereby set aside on account of the discovery of the judgment and/or orders made on the 1st day of April, 2022 vide Court of Appeal at Nakuru Civil Appeal No. 117 of 2017 *Tungo Totona and 2 others versus Priscillah Cheruto Kisoso* reinstating the defendants/applicants counterclaim;

    b. The present suit shall be heard de novo with all the parties in the counterclaim on board;

    c. The costs of the present application shall be in the cause;

    d. This matter shall be mentioned before the ELC court at Nakuru on 27/3/2024 for further directions.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 21ST DAY OF FEBRUARY, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.