



**Mathenge v Githinji (Environment & Land Case 52 of 2017)
[2024] KEELC 908 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 908 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 52 OF 2017**

JG KEMEI, J

FEBRUARY 20, 2024

BETWEEN

MARTIN WAINAINA MATHENGE PLAINTIFF

AND

NGANGA THAARA GITHINJI DEFENDANT

RULING

1. This Ruling is in respect of the Plaintiff's Notice of Motion Application dated 23/10/2023 seeking in the main review of the Orders issued by this Court on 17/10/2023 dismissing the suit (*sic*) for want of prosecution/non-attendance.
2. The Motion is supported by the Affidavit of Kevin Seda, the Plaintiff's Counsel. He averred that he successfully logged in the virtual Court on the hearing date, 17/10/2023, at 8am but later lost connectivity shortly after 9.00am. That later on the same day he enquired about the matter at the Court registry and was informed that the Application dated the 23/10/2023 had been dismissed for want of prosecution/non-attendance with no orders as to costs.
3. The Application is unopposed despite service upon the Defendant's Counsel as evidenced by the Return of Service sworn on 30/10/2023 by one Edward Njuguna.
4. Be that as it may, the Plaintiff prosecuted the Application by way of brief submissions dated 31/10/2023 filed on his behalf by the firm of Orwa Seda & Co. Advocates.
5. It was submitted that the Court's powers of review are donated by Section 80 *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. That in the instant case, there was an apparent error on the face of the record when the Court proceeded to dismiss the Application dated 21/7/2023 instead of allowing the Application dated 23/10/2023 (*sic*). That the Court failed to appreciate that the Applicant and his family live on the suit premises having so entered following a valid contract with the Defendant's father. That the Counsel's failure to attend Court was inadvertent due to poor internet connectivity and the



instant Application was timeously filed. Reliance was placed on Sections 3 and 3A [Civil Procedure Act](#) and Article 159 [Constitution](#) of Kenya.

6. The main issue for determination is whether the Plaintiff has established a case for the Court to review the Orders issued on 17/10/2023.

7. The underpinning legal provision for seeking review is found in Section 80 [Civil Procedure Act](#) which states 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 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.”

8. The above provision is further augmented by Order 45 rule 1 [Civil Procedure Rules](#) that;

“Application for review of decree or order [Order 45, 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 a review of Judgment to the Court which passed the decree or made the order without unreasonable delay.”

9. Discussing the scope of review, the Supreme Court of India in the case of [Ajit Kumar Rath vs. State of Orisa & Others](#), 9 Supreme Court Cases 596 at Page 608. had this to say:-

“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 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” means a reason sufficiently analogous to those specified in the rule”.

10. The Court of Appeal in the case of [Stephen Wanyoike Kinuthia \(suing on behalf of John Kinuthia Marega \(deceased\) Vs. Kariuki Marega & Another](#) (2018) eKLR stated categorically that where an



Applicant in an Application for review sought to rely on the ground that there was discovery of new and important evidence, one had to strictly prove the same. The Court of Appeal emphasized that an Application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.

11. The Applicant in his submissions states that there was an apparent error on the face of the record when the Court proceeded to dismiss the Application dated 21/7/2023 instead of allowing the Application dated 23/10/2023. The Applicant seems to mix up his own Motions because what was coming up for hearing on 17/10/2023 is the Application dated 21/7/2023. Even going by his submissions, the Court could not allow an Application dated 23/10/2023, a week before that Application was actually drafted. The Court record is clear that the Motion dated 21/7/2023 was dismissed for want of prosecution/non-attendance. Therefore, the duo grounds for review of discovery of new evidence and apparent error on the face of the record are inapplicable herein.
12. It is trite that a Court can review its orders for any other sufficient reason as provided for under Order 45 *Civil Procedure Rules* above. The Court of Appeal in *Sbanzu Investments Ltd vs. Commissioner of Lands* [1993] eKLR in allowing an appeal against the High Court Ruling declining review for any other sufficient ground, cited with approval the High Court holding in *Wangechi Kimita & Another Vs Mutahi Wakabiru* CA No 80 of 1985 (unreported) that;

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the Court by Section 80 for the *Civil Procedure Act*. The Court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.

The current position would, then, appear to be that the Court has unfettered discretion to review its own decrees or orders for any sufficient reason.”
13. The Applicant relied on Sections 3 and 3A of the *Civil Procedure Act* which provides for inherent powers of this Court that nothing shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. I am also guided by Articles 48 and 159 *Constitution* of Kenya on access to justice. It is not improbable for the virtual Court platform just like any other internet enabled forum or digital devices to experience downtime in internet connectivity. Absent contrary objection and to ensure ends of justice are met, the Court finds the Plaintiff’s explanation for failing to log into the online Court proceedings plausible and allows the Application.
14. Accordingly, the Application succeeds and it is allowed to the extent that the orders of this Court issued on 17/10/2023 are vacated and the Application dated 21/7/2023 is reinstated for hearing on merit. Costs of this Application to abide the outcome of the suit.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 20TH DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff – Absent but served

Defendant – Absent but served



