



REPUBLIC OF KENYA



**Waitiki & 4 others v Mungai & 3 others (Environment & Land Case  
12 of 2009) [2024] KEELC 3597 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3597 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 12 OF 2009**

**A NYUKURI, J**

**APRIL 29, 2024**

**BETWEEN**

**ALICE NJOKI WAITIKI ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH NG'ANG'A WAITIKI ..... 2<sup>ND</sup> PLAINTIFF  
JAMES KAHIA KAGIMBI ..... 3<sup>RD</sup> PLAINTIFF  
FRACIA WANGARI KAHIA ..... 4<sup>TH</sup> PLAINTIFF  
GEOFFREY NG'ANG'A MBATIA ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**MOSES NG'ANG'A MUNGAI ..... 1<sup>ST</sup> DEFENDANT  
OKOA DEVELOPMENT CO. LTD ..... 2<sup>ND</sup> DEFENDANT  
GIDRAPH NGUGI GITUNDU ..... 3<sup>RD</sup> DEFENDANT  
DANSON MWORIA NJIHIA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. Vide a notice of motion dated 10<sup>th</sup> May, 2023, the 1<sup>st</sup> defendant/applicant sought the following orders;
  - a. This Honourable Court be pleased to review its decision and set aside the dismissal orders issued on 2<sup>nd</sup> February, 2023 on our application dated 25<sup>th</sup> November, 2022 and the same be set forth for hearing.
  - b. That the costs of this application be in cause.



2. The application is anchored on the affidavit sworn by the 1<sup>st</sup> defendant/applicant on 10<sup>th</sup> May, 2023. The applicant's case is that he is the registered owner of all those parcels known as Mavoko Town/Block 2/9246 and 9247 (hereinafter known as the 'Suit Properties') and that the court entered judgment on 21<sup>st</sup> September 2018 in favour of the plaintiffs.
3. He stated that he had not been aware that judgment had been delivered on 21<sup>st</sup> September 2018 and that being aggrieved with the said judgment, he filed an application for stay of execution dated 25<sup>th</sup> November, 2022 and also sought for partial review thereof to the extent that he be allowed to participate in the choice of surveyor to subdivide the suit properties and further determine the location of the plots claimed by the plaintiffs and 3<sup>rd</sup> & 4<sup>th</sup> defendants in the suit properties.
4. He further stated that the court needs to know that parcel Nos. Mavoko Town/Block 2/9246 and 9247 are occupied by persons who purchased them who have constructed permanent houses thereon. He prayed that the 2<sup>nd</sup> defendant does provide him with the list of other persons who own plots on the suit properties, location of their properties and the approximate value where possible. He stated that he is deeply concerned by the judgment stating that ten plots be curved out of the suit property as it will definitely cause conflict if it infringes on other people's properties. Further that he was not present and that his application was dismissed for non attendance of his counsel who had been unwell and admitted in hospital. He attached a copy of the judgment.
5. The application is opposed. The 4<sup>th</sup> defendant, Danson Mworja Njihia filed a replying affidavit dated 19<sup>th</sup> May, 2023 and stated that the purported supporting affidavit sworn by one Moses Ng'ang'a Muigai is sworn by a stranger because he is not party to the suit and prayed that the same be expunged from the record.
6. He stated that the application is brought in bad faith as the dismissal orders it seeks to review and/or set aside orders were made on 2<sup>nd</sup> February, 2023 and that it had taken the applicant more than 3 months to make the said application, a delay which is inexcusable in the circumstances of the case. Further that the application will not achieve any meaningful purpose as the suit property is not registered in the applicant's name but in the name of the 4<sup>th</sup> defendant together with other co-owners pursuant to a court process in Milimani CMCC No. 11556 of 2003. Further that the title in their names should not be interfered with.
7. He stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have all along been informed of the existence of the suit before court which was finalized in 2018 yet they contemptuously failed to participate in the same and should not be allowed to re-open the proceedings five years down the line as litigation must come to an end.
8. He stated that a new title deed has already been issued and the same cannot be interfered with and the application should be dismissed with costs as it is in the wrong forum.
9. The application proceeded by way of written submissions, and on record are submissions filed by the applicants on 19<sup>th</sup> October 2023.

#### **1<sup>st</sup> & 2<sup>nd</sup> defendant's submissions**

10. On whether the court should set aside the dismissal orders due to the absence of counsel, counsel for the applicants cited Sections 1A, 1B & 3A of the [Civil Procedure Act](#) and submitted that courts have inherent powers to give orders which are necessary to meet the ends of justice. Counsel relied on Article 159 (2) of the [Constitution](#) for the proposition that justice ought to be administered without undue regard to procedural technicalities. He buttressed his arguments by citing the cases of *Shah v Mbogo*



[1967] EA 116 and *Patel C E.A Cargo Handling Services Ltd* [1974] EA 75 which the court has duly considered.

11. Counsel further submitted that the defendant/applicant is entitled to the relief sought as they have shown sufficient cause why the judgment ought to be set aside. On the issue of whether there is sufficient cause, counsel referred the case of *Wachira Karani v Bildad Wachira* [2016] eKLR for the proposition that sufficient cause means adequate or enough in as much as may be necessary to answer the purpose intended. It means that that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of the case.
12. Counsel prayed that the dismissal of the orders issued on 2<sup>nd</sup> February, 2023 be set aside and the application dated 25<sup>th</sup> November, 2022 be reinstated as prayed.

### **Analysis and determination**

13. I have considered the application, response, together with submissions and in my considered view, the only issue for determination is whether the applicants have met the threshold for review of the decision of 2<sup>nd</sup> February 2023.
14. The law governing review of an order of the court is provided for in section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. 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 judgment 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* elaborates the grounds on which a decision of the court can be reviewed as follows:

“(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.”

16. It is therefore clear that to merit an order of review, an applicant must show that they have discovered new and important evidence that could not have been availed at the hearing even with application of due diligence; that there is an error apparent on the face of the record or that there is sufficient cause.



17. It is not in dispute that this court has jurisdiction to review its own decisions in certain instances. In *Benjob Amalgamated Limited & another v Kenya Commercial Bank Ltd* [2014] eKLR this Court held:-

It is our finding that this court not being the final court has residual jurisdiction to review its decisions to which there is no appeal to correct errors of law that have occasioned real injustice or failure or miscarriage of justice thus eroding public confidence in the administration of justice. This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice. The finality principle is urged on the basis of public interest as a public policy issue and is premised on the need for stability and consistency in law while the justice principle is urged on the basis of justice to the parties.

18. In *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR the Supreme Court summarized the principles for an application for review as follows:-

Consequently, drawing from the case law above, particularly *Mbogo & another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
  - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
  - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
  - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
  - v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
  - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
    - a. as a result a wrong decision was arrived at; or
    - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”
19. In the instant case, the reason given for seeking review is that the applicants counsel had been taken ill, for a long time and hospitalised. In my view that reason does not amount to discovery of new evidence or an error on the face of the record as the applicant has not faulted the court on its decision as being an error that stares one in the face. Is it a sufficient reason? The record shows that on 21<sup>st</sup> September 2018 this court entered judgment for the plaintiffs in terms of the prayers sought in the re- amended plaint and ordered the plaintiff to engage a licensed surveyor to subdivide the parcel of land known as Mavoko Town Block 2/9246 and carve out portions of land measuring 40 feet by 80 feet adjoining each other. The court also ordered that the ten portions of land to be created in terms of the above orders to be registered in the names of the plaintiffs as follows;
- i. 1<sup>st</sup> plaintiff- three portions



- ii. 2<sup>nd</sup> plaintiff- three portions
- iii. 3<sup>rd</sup> plaintiff- one portion
- iv. 4<sup>th</sup> plaintiff- two portions
- v. 5<sup>th</sup> plaintiff- one portion

The court ordered the deputy registrar to execute all necessary documents required to excise the above plots from Mavoko Town Block 2/9246 and transfer to the plaintiff's name. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were ordered to pay costs.

20. Subsequently on 30<sup>th</sup> November 2022, the applicants herein filed the application dated 28<sup>th</sup> March 2022 seeking stay and review of judgment so that the 1<sup>st</sup> defendant can participate in the choice of the surveyor and determination of location of plots claimed by the plaintiffs. That application was presented in court under certificate of urgency on 2<sup>nd</sup> December 2022. The court did not certify the application as urgent but fixed the same for interpartes hearing on 2<sup>nd</sup> February 2023. On the hearing date, there was no appearance for the applicants and neither had the application been served as ordered by court and therefore the application was dismissed for want of prosecution. This led to the filing of the instant application on 10<sup>th</sup> May 2023, which is more than three months from the date of dismissal. Although the applicants mentioned that their advocate had been indisposed for long and was admitted in hospital, no evidence was presented to support that allegation. The applicants have not informed court why they delayed for three months to file the application if non attendance was due to the ill health of their counsel. A case belongs to a litigant and not their advocate, and before blaming the advocate, the litigant ought to demonstrate efforts taken to mitigate factors caused by their counsel. In this case, the applicants did not demonstrate reasons for delay.
21. The respondent stated that the title No. 2/92447 was in his name and two other persons already as demonstrated by the attached title deed registered on 25<sup>th</sup> April 2019. That being the position and noting that the applicants participated in the suit by filing defence leading to the decision of 21<sup>st</sup> September 2018, their application for review having been filed four years later in 2022 and the suit property being in the name of the respondent, and the delay in seeking to set aside the orders of 2<sup>nd</sup> February 2023, it is my view that the orders sought are not merited, and would not serve any purpose. I therefore find that the application dated 10<sup>th</sup> May, 2023 lacks merit and the same is hereby dismissed with no order as to costs.
22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 29<sup>TH</sup> DAY OF APRIL 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of:

No appearance for the plaintiffs

No appearance for the defendants

Court assistant – Abdisalam

