



Wainaina & 2 others v National Land Commission & another (Environment & Land Case 94 of 2018) [2024] KEELC 3972 (KLR) (29 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 94 OF 2018**

**JG KEMEI, J
APRIL 29, 2024**

BETWEEN

**DOMINIC MBUGUA WAINAINA 1ST PLAINTIFF
JULIUS KIIRU MWAURA 2ND PLAINTIFF
VERONICA MBUTU NJUNGE (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF WILLIAM NGUGI) 3RD PLAINTIFF**

AND

**NATIONAL LAND COMMISSION 1ST DEFENDANT
KENYA RURAL ROADS AUTHORITY 2ND DEFENDANT**

RULING

1. The 1st Defendant/Applicant moved the Court vide the Notice of Motion dated 31/10/2023 seeking Orders That;
 - a. The Judgement delivered by Justice Gacheru on June 15, 2020 be reviewed.
 - b. The decree issued and signed in March 31, 2022 be reviewed.
 - c. The Certificate of order against the government dated May 16, 2022 for the sum of Kshs. 38,914,300/= be reviewed.
 - d. The costs of this Application be in the cause.
2. The Application is based on the grounds on the face of it that Judgment was entered herein against the Applicant in favor of the Plaintiffs/Respondents by Justice Gacheru on 15/6/2020. That consequently a decree was issued on 31/3/2022 for the sum of Kshs. 38,914.300/= upon the Plaintiffs applying for an order of *mandamus* against the Applicant's secretary to pay the aforesaid decretal sum. That the Applicant has not been furnished with funds and thus cannot pay the sum as ordered.



3. The Motion is supported by the Affidavit of Brian Ikol, the Applicant's Legal Director. Rehashing the background of the case, the deponent averred that the Commission never participated in the trial proceedings and that it was Kenya Rural Roads Authority (KeRRA) that acquired the subject land in the dispute. That no evidence was presented in Court to show that the suit land was acquired as per the laid down law on compulsory acquisition. That the Hon Court was acting on incomplete information regarding the said acquisition when it reached the impugned Jdt.
4. The Application is opposed by the Plaintiffs only.
5. The Plaintiffs filed their Grounds of Opposition and Replying Affidavit both dated 27/11/2023.
6. In the Grounds of Opposition it was contended that the Application is incurably defective and incompetent for want of a formal decree; the Hon Court is *functus officio*; the Applicant has already instituted an appeal at the Court of Appeal; the Application amounts to reopening the case for fresh hearing; the Application is an attempt to appeal the Court's Judgment; the Application is an afterthought and has been filed inordinately late and does not meet the conditions for review of Judgement.
7. In their Replying Affidavit and with the authority of the 2nd and 3rd Plaintiffs, the 1st Plaintiff averred that this Court delivered a Judgment in their favor and the Applicant has deliberately refused to comply with it. That they filed judicial review proceedings namely Thika ELC Misc App. No. E050 of 2022 for an order of *mandamus* to compel the Applicant to satisfy the Judgment herein. That the Applicant has preferred an appeal as per the notice of appeal dated 31/10/2023 and therefore cannot pursue both an appeal and review at the same time. He urged the Court to dismiss the Application with costs.
8. The Application was canvassed by way of written submissions.
9. The Applicant through the Learned Counsel Cecilia Masinde filed submissions dated 22/11/2023. She drew a singular issue for determination to wit; whether the Application for review should be allowed. Citing section 80 [Civil Procedure Act](#) and Order 45 Rule 1 [Civil Procedure Rules](#), the Applicant submitted that it did not participate in the proceedings and therefore failed to tender crucial evidence that would have been relevant in determining this suit. That the Applicant has met the statutory requirements to warrant Review because it has not appealed against the Judgment; it was unable to produce crucial evidence during the hearing and the order made by Justice Gacheru do not reflect the process of compulsory acquisition under the [Land Act](#).
10. That the main reason for failing to attend the hearing was that the Applicant had numerous concurrent suits going on with a shortage of advocates to attend to them. Reliance was placed on the cases of [Republic v Public Procurement Administrative Review Board & 2 Others](#) [2018] eKLR on the Court's discretionary powers to review its own Judgment.
11. On the other hand, the Plaintiffs filed their submissions dated 27/11/2023 through the firm of Kimathi Wanjohi Muli Advocates. Three issues were drawn for determination namely; whether the instant Application is defective for failure to attach a formal decree; whether the Applicant has met the conditions for review and who bears the costs of the Application. The first two issues were answered in the negative. The Plaintiffs submitted that failure to attach a formal decree is fatal in light of cases of [Hosea Nyandika Mosagwe & 2 Others v County Government of Nyamira](#) [2022] eKLR and [Suleiman Murunga v Nilestar Holdings Limited & Anor.](#) [2015] eKLR.
12. In addition, it was submitted that a party cannot pursue an appeal and at the same time review as in the instant case. That the Court is *functus officio* and in any event, the Applicant has not satisfied the conditions to grant an order for Review. That no discovery of new evidence has been presented before



Court that could not be availed during the hearing. In the end the Plaintiffs reiterated that costs follow event and, in this case, the Application should be dismissed with costs to them.

13. The main issue for determination is whether the Application is merited.
14. As rightly submitted by the parties, the legal provision governing this Court's power to review a decision are found in Section 80 of the *Civil Procedure Act* and amplified by Order 45 Rules 1 & 2 of the *Civil Procedure Rules* that;

“

“ 80. Review

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.

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.

(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.”

15. It is trite that Review is the creation of the statute as opposed to the Court's inherent powers. The power of review must be conferred by law or by necessary implication. For an Applicant to succeed in such an Application, he must therefore demonstrate the following; 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; On account of some mistake or error apparent on the face of the record or for any other sufficient reason and whatever the ground there is a requirement that the Application has to be made without unreasonable delay.



16. In the persuasive decision of Mativo J (as he then was) in *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others* [2021] eKLR in analyzing the preconditions for a Court to exercise Review of its decision reiterated that mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/tribunal earlier. The Court cited with approval the Indian Supreme Court case of *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 that;

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

17. In the instant case, the Applicant has submitted that it failed to attend the trial of the case due to work exigencies and therefore missed an opportunity to present evidence that would otherwise alter the outcome of the case. The Applicant has not adduced the said evidence or proof the allegations of work exigencies. It is not plausible that a shortage of Counsel would demonstrate due diligence on its part to lead to discovery of new evidence to warrant review under Order 45 *Civil Procedure Rules*.

18. I have reflected on the Respondent’s contention that the Applicant has proffered an appeal at the Court of Appeal with respect to the decision of this Court in Thika ELC Misc App. No. E050 of 2022. This cause is premised on the judgement of the Court delivered in this case. Were the review to succeed then the appeal will have been rendered nugatory. That said it is trite that a party cannot pursue an appeal and a review of a decision at the same time. A party must elect either but not both at any one time. In this case the Applicant’s action of filing an appeal and a review at the same time amounts to an abuse of the process of the Court. In my view it would appear that the Applicant is second guessing or chancing on which Court will give a favourable relief. Such actions must be discouraged so as to maintain the integrity and dignity of the Court.

19. Moreover, I have perused the Application for review and find that it was filed after a period of 3 years and the Applicant has not given a satisfactory reason to justify the delay in so filing. The Application therefore is filed inordinately.

20. The Court has considered the grounds of review which in my view are seeking to challenge the Judgment. The grounds of review therefore cited are grounds of appeal and not review. I find that the Court is now *subjudice* and the orders of review are not available to the Applicant.

21. The upshot of the above is that the Application is bereft of merit it is for dismissal with costs to the Respondents/Plaintiffs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 29TH DAY OF APRIL, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE



Delivered online in the presence of;

1st, 2nd and 3rd Plaintiffs – Absent but served

1st and 2nd Defendants – Absent but served

Court Assistant – Phyllis & Lilian

