



**Muviwa & another v Musyoka & 5 others (Environmental and Land Originating Summons E006 of 2022) [2024] KEELC 4306 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4306 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2022**

**LG KIMANI, J**

**MAY 23, 2024**

**BETWEEN**

**MALOMBE MUVIWA ..... 1<sup>ST</sup> APPLICANT**

**MAITHYA MUVIWA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARTHA MUSYOKA ..... 1<sup>ST</sup> RESPONDENT**

**PETER NDAMBU ..... 2<sup>ND</sup> RESPONDENT**

**MUTINDA MUNYAO ..... 3<sup>RD</sup> RESPONDENT**

**NDELEVA MUSYOKA ..... 4<sup>TH</sup> RESPONDENT**

**DAVID MBUVI ..... 5<sup>TH</sup> RESPONDENT**

**KIMANZI KILIKU ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Applicants filed the Notice of Motion dated 16<sup>th</sup> February 2024, seeking the following ORDERS:
  1. Spent.
  2. This Honourable Court be pleased to set aside and/or review the order of the Honourable Lady Justice L.G Kimani dated and issued on 23<sup>rd</sup> February 2023.
  3. The costs of this application be provided for.
2. The grounds in support of the application are that the Applicants herein had earlier filed an application dated 26<sup>th</sup> October 2022 which was dismissed by this court vide ruling dated 23<sup>rd</sup> February 2023.



3. The Applicants state that new evidence has materialized and that the respondents are now trespassing onto the Applicant's portion of the suit property and destroying their properties to the Applicant's detriment.
4. In the supporting affidavit thereto sworn by the 1<sup>st</sup> Applicant, he states that the 3<sup>rd</sup> respondent herein trespassed onto the 2<sup>nd</sup> Applicant's private compound and cut down trees, destroying his gate and fence. The 2<sup>nd</sup> applicant thereafter filed a criminal case against the 3<sup>rd</sup> respondent.
5. The 1<sup>st</sup> Applicant further deposed that the respondents have gone to the land registrar for cancellation of the title for the suit property registration number Mutonguni/kauwi/2150, which title has now been cancelled and a new one issued in the name of Muviwa Kiliku(Deceased). He attached a copy of the Green card of the suit property.

### **The 2nd Respondent's Replying Affidavit**

6. Peter Ndambu, the 2<sup>nd</sup> respondent swore a replying affidavit in response to the application on his behalf and behalf of all the other respondents and deposed that the alleged new issue that has arisen is merely a boundary dispute between the 2<sup>nd</sup> applicant and the 3<sup>rd</sup> respondent, which has been addressed by the police after a complaint was lodged with them.
7. He denied any allegations of trespass and stated that as per the orders of the Minister, the County Surveyor implemented the Minister's decision and each family now has its respective titles to the portions they have been occupying and working on.
8. The 2<sup>nd</sup> respondent states that there is no new or important matter or evidence disclosed that has arisen and which was not within the knowledge of the applicants after the ruling sought to be reviewed was made.
9. He deems the application as an appeal by the applicants through the back door and as an abuse of the court process and therefore ought to be dismissed with costs.

### **Applicant's submissions**

10. Counsel for the Applicants submitted that the application is merited for the reason that the 3<sup>rd</sup> respondent and his nephew have trespassed onto the suit property and damaged their property, resulting in a criminal case against them which is new evidence.
11. Citing section 80 of the [Civil Procedure Act](#) on review as well as Order 45 of the [Civil Procedure Rules](#), they submitted that at the time of filing the suit, the Applicants did not have this information, which has necessitated this application for review.
12. The Respondents did not file their written submissions despite being granted 14 days to do the same on 30<sup>th</sup> April 2024.

### **Analysis and Determination**

13. The statutory provisions that govern the grant of orders of review and setting aside are Section 80 of the [Civil Procedure Act](#) CAP 21 and Order 45 of the [Civil Procedure Rules, 2010](#). Section 80 of the Act 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 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.”

14. Order 45 Rules 1 of the [Civil Procedure Rules](#) provides that:

“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.”

15. The requirements for review are therefore the discovery of a new and important matter that could not have been known at the time the decree or order was issued, a mistake or error apparent on the face of the record, or any other sufficient reason as submitted by the Applicants. In this case, it is because the Applicants state that the 3<sup>rd</sup> respondent has committed trespass onto the suit property and they wish the court to review its earlier decision dismissing the Applicants’ application for injunction.

16. The elements necessary for orders of review have been widely elaborated by the Courts. As the Court of Appeal held in [National Bank of Kenya Limited v Ndungu Njau](#) [1997] eKLR that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.”

17. From the averments made by the parties, it appears that the Appeal to the Minister over the suit property that was initially pending has been heard and determined and the final decision has been implemented as per the green card marked “MM-3” annexed to the 1<sup>st</sup> Applicant’s supporting affidavit. The entry made on 4.7.2023 indicates that sub-division has been done on the suit land parcel 2150 into new numbers 5701, 5702, 5703, 5704, 5705, 5706 and 5707 and number 2150 is to remain in the name of Muviwa Kiliku as per the Minister’s decision.

18. It is not clear in whose names the sub-divisions are to be registered. It appears that the Applicants are challenging the decision to have land parcel 2150 remain in the name of Muviwa Kiliku’s, which means in essence they are challenging the decision in the Minister’s appeal through an interlocutory application. This, in the court’s view, is not plausible.



19. Mativo J's decision (as he then was) in the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR elaborated the principles of review to the effect that:

“My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda* where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh. The principles which can be culled out from the above-noted authorities are:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by along the process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. 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.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima facie visible and does not require any detail examination. In the present case, the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”



20. In the present case, when the applicants filed the application dated 26<sup>th</sup> October 2022 which led to the ruling subject matter of the current application, they were aware of the intended subdivision of the suit land. They stated in the supporting affidavit of Malombe Muviwa sworn on 26<sup>th</sup> October 2022 that they had received a letter from the District Land Surveyor stating that he was going to subdivide the suit property. It is this subdivision that led to the entry in the parcel's green card dated 14<sup>th</sup> July 2023 where the land was subdivided into several parcels registered in the name of the Muviwa Kiliku (deceased). The question of subdivision of the land cannot thus be said to be a new matter that was not within the knowledge of the applicants when the initial application was heard and determined. The said subdivision cannot be used as a reason for review of the court's orders.
21. The court further finds that there has been an unreasonable delay in filing the current application for the reason that the ruling sought to be reviewed was made on 23<sup>rd</sup> February 2023, the subdivision of the land was done on 14<sup>th</sup> July 2023. The alleged acts of trespass were committed on 12<sup>th</sup> November 2023 as shown on the charge sheet attached to the application. No explanation has been given for the delay.
22. Further, having ruled on the interlocutory application on 23<sup>rd</sup> February 2023, the court record does not show sufficient effort made by the applicant to prosecute the substantive suit and have it heard and determined on merit.
23. It is further noted that according to the register of the suit parcels of land, the applicants are not the registered owners of the land. The green card shows that the subdivisions of land parcel number Mutonguni/kauwi/2150 are registered in the name of Muviwa Kiliku (deceased) and the applicants have not been shown to be administrators of the estate of the deceased. In the Court's view, there is no sufficient reason warranting orders of setting aside/review as the issue of trespass cannot thus be proven.
24. For the foregoing reasons, the Court finds that the application dated 16<sup>th</sup> February 2024 lacks merit and the same is hereby dismissed with costs to the Respondents.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 23<sup>RD</sup> DAY OF MAY, 2024.**

**HON. L. G. KIMANI, JUDGE**

**ENVIRONMENT AND LAND COURT**

The ruling read in open court and virtually in the presence of-

Musyoki Court Assistant

Ms. Muatha for the Applicant

Ms. Kiama for the Respondents

