



REPUBLIC OF KENYA



KENYA LAW
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**Muchiri & 4 others v Mugane & 2 others (Environment & Land Case
E001 of 2021) [2024] KEELC 3918 (KLR) (15 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3918 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E001 OF 2021**

**A OMBWAYO, J
MAY 15, 2024**

BETWEEN

**DUNCAN GITHAIGA MUCHIRI 1ST APPLICANT
BENSON WAMBUGU MUCHIRI 2ND APPLICANT
REUBEN MACHARIA MUCHIRI 3RD APPLICANT
JOSEPH NDIRANGU MUCHIRI 4TH APPLICANT
PETER KARIUKI MUCHIRI 5TH APPLICANT**

AND

**CHARLES NJUGUNA MUGANE 1ST RESPONDENT
MARGARET NGENDO GATUNE 2ND RESPONDENT
BISHOP JAMES GICHURU 3RD RESPONDENT**

RULING

1. The applicant are seeking a review of the order dated 25th day of January, 2024. The grounds for review are that the ruling of the court issued herein on the 25th day of January 2024 suggests that the Appellant did not oppose the respondents application for stay dated the 31st day of October 2023 whereas the applicant filed its opposition on the 24th day of November 2023 and served upon the Respondent on 27th day of November 2023.
2. That there is inadvertent oversight on the part of the court to consider the Applicant's opposition/ relying affidavit which is an error apparent on the face of the record which deprived the Applicant's its right to be heard. Had the court considered the Applicants submissions which comprehensively addressed the issues all issues raised in the said application by the respondents; it may have arrived at a different decision.



3. There is sufficient reason therefore for this court to review the said judgment and re-look at the Applicant's opposition already filed. The Applicant herein is apprehensive that the Respondents might at any time now proceed to execute the ruling/ order delivered by the trial court on 25th day of January 2024. That this honorable court is indeed espoused with wide and unfettered discretion to grant interim orders of stay and review its ruling/ order dated 25/01/2024 to ensure that both parties are heard on merit. In the premises it is only fair, just and in the wider interest of justice that the instant application be allowed as prayed for. The application has been brought in good faith and without undue delay.
4. The application is supported by the affidavit of Duncan Githaiga Muchiri Ndeke that reiterates the grounds of the application. order 47 that premises.
5. I do agree with the applicant that the court did not consider the replying affidavit of the applicant filed on 24th November 2023 sworn on 22nd November 2023 which was in reply to the application dated 31st October 2023. In the said replying affidavit the applicants stated that the respondents had not contested that the applicant were in exclusive possession of the property and that the responded did not show the nature of irreparable loss likely to be suffered. The applicant has shown in the affidavit that they were ready to preserve the subject matter. Moreover, that the application was filed after undue delay. The application is opposed by the respondent.
6. Section 80 of the [Civil Procedure Act](#) Cap 21 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.”
7. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows: -
 - (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.”
8. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;



- (a) 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 or;
- (b) on account of some mistake or error apparent on the face of the record, or
- (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

9. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held: -

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 limbs therein stated or “for any sufficient reason.....”

10. *Sarder Mohamed v. Charan Singh Nand Sing and Another* (1959) EA 793 where the High Court 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.

11. 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.

12. In *Tokesi Mambili and others vs Simion Litsanga* the Court held as follows: -

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

13. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge as he then was gave out the following principles from a number of authorities: -

- 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 a long 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.
14. I have considered the application for review and also the replying affidavit of Benson Wambugu Muchiri and do find that though it raises neither a new nor important matter as the issues raised therein were considered by the court. The issue of substantial loss was addressed by the court and therefore the court reached a decision that the respondents were likely to lose its ownership of the suit property if stay was not granted as they were still the registered owners and therefore if they succeeded on appeal when the property would have been transferred to the applicants they were likely to suffer substantial loss as the same was likely be transferred to third parties ultimately. The applicant in the replying affidavit to application dated 31st October 2023 does not demonstrate that they are capable of compensating the respondent if stay is not granted, the property is sold and yet the respondent succeeds in the appeal. The upshot of the above is that the application for review is dismissed with no orders as to cost

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 15TH DAY OF MAY 2024.

A. O. OMBWAYO

JUDGE

