



**Ethuru v Thikanyi & 3 others (Environment & Land Case 2 of 2019) [2024] KEELC 5731 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5731 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 2 OF 2019**

**CK NZILI, J  
JULY 31, 2024**

**BETWEEN**

**ANDREW KOBIA ETHURU ..... PLAINTIFF**

**AND**

**JOSHUA THIAINE THIKANYI ..... DEFENDANT**

**AND**

**ANDREW KIUNGA THIKANYI ..... RESPONDENT**

**AND**

**SUB-COUNTY LAND ADJUDICATION OFFICER TIGANIA EAST SUB  
COUNTY ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The court is asked to grant leave to the firm of J.G Gitonga to come on record in place of Ndubi Ondubi & Associates for the applicants and to review or set aside the judgment of this court and hear the matter afresh. The reasons are contained on the face of the application and in the supporting affidavits of Andrew Kiunga Thikanyi and Joshua Thiane Thikanyi. The 1<sup>st</sup> applicant avers that although the suits had been consolidated with Tigania PMCC No. 74 of 2011, where he was the 2<sup>nd</sup> plaintiff, he did not testify against the claim by the 2<sup>nd</sup> applicant. Further, the 1<sup>st</sup> applicant says that the judgment delivered on 1.11.2023 did not address his claim in the said consolidated suit. He states that he is ready and willing to prosecute his claim.
2. Additionally, the applicant avers that had the 2<sup>nd</sup> applicant, who was the defendant, produced exhibits in the paginated bundle dated 15.3.2023, probably the court would have reached a different finding in



- this matter. The applicant states that he stands to suffer irreparable loss and injustice unless the orders sought are granted.
3. The 1<sup>st</sup> applicant avers that he was not notified of the hearing date, so he did not attend court on 31.1.2023 and 10.7.2023 and that he came to know about the judgment from the 1<sup>st</sup> defendant on 30.5.2024. The 1<sup>st</sup> applicant terms the occupation of the land by the decree-holder as unlawful and that if the orders sought are reviewed, there will be no prejudice or injustice to him.
  4. The 2<sup>nd</sup> applicant, in his affidavit, states that when the matter came up for hearing on 10.7.2023, counsel then representing him sought an adjournment to apply to cease acting for them, and by an application dated 7.7.2023 the court on 10.7.2023, allowed his lawyers to do so. The 2<sup>nd</sup> applicant states that the former lawyers on record had not notified him of the intention to cease acting for them or served them with the said application. He says that when the hearing commenced, he did not have his file and was therefore unable to produce the documents in his paginated bundle of documents dated 15.3.2022. Further, the 2<sup>nd</sup> applicant avers that had he produced the said documents as exhibits; the court would have probably reached a different finding. He urges the court to find that it is in the interest of justice to grant the orders sought.
  5. The application is opposed through a replying affidavit by the plaintiff, Andrew Kobia Ethuru, sworn on 24.6.2024 for not satisfying the three conditions on review as per order 45 Rule 1. Civil Procedure Rules. Reliance was placed on Isaac Kirimi Mboroki vs John Gikunda Mboroki Civil Application No. E043 of 2023, plot owners Welfare Group vs Simon Cherorot ELC No. of 2016 and Robert Njue Nyaga & another v Michele Nyaga.
  6. The plaintiff-respondent avers that the 1<sup>st</sup> applicant was not condemned unheard because he gave authority to the 2<sup>nd</sup> applicant to prosecute the suit dated 29.8.2011; hence, when DW 1 testified, he also adopted the 1<sup>st</sup> applicant's witness statement. The respondent avers that after his former lawyer's application was allowed, the 2<sup>nd</sup> applicant told the court that he was ready to proceed with the hearing and went on to produce his evidence before the court without mentioning that he needed any document held in the file at the custody of his former lawyers on record.
  7. Similarly, the respondent avers that he was in occupation of his land, and therefore, it was not true that the applicants would suffer any prejudice or injustice, unlike him, who would suffer more if the matter was to be reopened. The respondent avers that the court is functus officio; otherwise, the application was a disguised appeal, and litigation, which has taken 13 years, should come to an end. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not file any response to the application.
  8. A party seeking a court to exercise the power of a review under Order 45 of the Civil Procedure Rules has to surmount four main hurdles namely; apply without unreasonable delay; demonstrate that there is an error apparent on the face of the record; show the discovery of new and essential material that was not available with use of due diligence at the time the orders or decree was made and lastly establish any other sufficient cause or reason.
  9. In Sinopec International Petroleum Service Corporation vs Public Procurement Administration Review Board & others (Civil Appeal E012 of 2024 (2024) KECA 184 (KLR) (23<sup>rd</sup> February 2024 (Judgment), the court held that it was not the duty of the court to either enlarge the scope of a legislation or the intention of the legislature, when the language of the provision was in plain and unambiguous words and, that courts decide what the law is and not what the law ought to be. The court went on to say that in construing a statute the first rule is literal and may not speculate what the legislature intended.



10. Section 80 of the *Civil Procedure Act*, as read together with Order 45, Civil Procedure Rules are the operating law on review. It is an available remedy for a party who, though he has a right to challenge the decision in question by an appeal, opts to apply for review before the court that made the order or decree. See *Yani Haryanto vs E.D & F Man (Sugar) Ltd* Civil Appeal No. 122 of 1992.
11. In *Stephen Somek Takwenyi & another vs David Mbuthia Githare and others* NRB Milimani HCC No. 363 of 2009, the court observed that in a civilized world, the legal process was the machinery used in a court of law to vindicate a man's right or to enforce its duties and courts can be used both properly or improperly or be abused. Therefore, to avoid this, the court said it had the inherent jurisdiction to prevent such an abuse of its process, intervene, and stop the proceedings or put an end to it.
12. In *H. A vs L.R* (2022) eKLR, the court said that the provisions of Order 45 Rule 1 of the *Civil Procedure Rules* are meant to assist genuine litigants and not to assist parties who have deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice and therefore to apply for review with the intention of an opening up fresh fronts for litigation on appeal would amount to abuse of the court process and contravene the overriding objective to dispose of suits expeditiously.
13. On delay, the court in *Asset Recovery Authority vs Charity Wangai Getbi & others* (2020) eKLR cited *Kuria vs Shab* (1990) KLR, that an applicant must exhibit that he acted expeditiously.
14. A party seeking review must also demonstrate how the court erred in the exercise of its discretion. See *Mohammed Fugicha vs Methodist Church of Kenya & others* (2020) eKLR. Review cannot be based on fresh arguments or correction of erroneous views taken earlier in a judgment or order. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier. There must be a patent error of law or fact that does not require any elaborate argument as held in *Ajit Kumar Rath vs State of Orisa* 9SCC 596 page 608 cited in *Republic vs Advocates Disciplinary Tribunal Exparte Apollo Mboya* (2019) eKLR and *Nyamogo & Nyamogo vs Kogo* (2001) E.A 170.
15. While exercising the power of review, a court cannot sit on appeal of its judgment. Review is impermissible without a glaring omission, evident mistake, or similar ominous error. A point may be a good ground of appeal but not for a review. See *Republic vs Advocates Disciplinary Tribunal* (*supra*).
16. Applying the cited case law to the facts in this application, the 1<sup>st</sup> applicant states that he was not aware of the hearing dates and was not notified of the case; he did not offer any defense or prosecute his claim. Further, he says that his exhibits were not produced or considered. On his part, the 2<sup>nd</sup> applicant blames the former lawyers and the court for not granting him a fair hearing to produce his exhibits or for not considering them; otherwise, the court would have reached a different position.
17. A perusal of the court file shows that parties, by consent on 17.5.2022, agreed on a scene visit in the presence of their lawyers. A report was eventually filed before the court, and the parties' lawyers were given copies to peruse and seek further instructions. Following this, by a ruling dated 7.12.2022, the plaintiff in the main suit was allowed to amend the plaint and serve it upon the defendant. An amendment was eventually filed on 13.12.2022 and served upon the firm of Ndubi Ondubi & Associates on 13.12.2022.
18. The 1<sup>st</sup> defendant filed a statement of defense dated 20.1.2023, accompanied by further witness statement. Parties were given several hearing dates for 7.12.2022 and 30.1.2023. PW 1 & PW 2 eventually testified and produced several exhibits. PW 2 was stood down for 7.3.2023 and later for 10.7.2023. Come 10.7.2023, the court was told that the applicants had become uncooperative. The court declined to adjourn the matter. An application to cease acting was served upon the 2<sup>nd</sup> applicant, who did not oppose it and opted to proceed with the matter in person.



19. PW 2 was recalled for re-examination. Eventually, PW 3 testified and was cross-examined by the 2<sup>nd</sup> applicant. After the close of the plaintiff's suit, the 2<sup>nd</sup> applicant opted to offer his defense and adopted the two witness statements dated 15.3.2022 and 20.1.2023 as his evidence in chief. He opted to close his defense. There was no request for an adjournment to call any other witness. After that, the 2<sup>nd</sup> applicant filed written submissions dated 26.7.2023.
20. The applicants allege that the judgment by this court did not cover the issues raised in the second suit. That is not true. Paragraph 44 of the judgment referred to the pleadings in the two files. Paragraphs 53 – 57 and 68 referred to the 1<sup>st</sup> defendant's secondary suit, which he did not prosecute with exhibits on the alleged encroachment.
21. Paragraph 65 of the judgment referred to the failure of the 1<sup>st</sup> applicant to attend court or prosecute his claim dated 29.8.2011. In Tigania PMCC no. 74 of 2011, the verifying affidavit dated 29.8.2011 was signed by the 2<sup>nd</sup> applicant, stating that he had consent and authority to make and swear it from the 1<sup>st</sup> applicant. The consent was attached and dated 29.8.2011. It stated that the 1<sup>st</sup> applicant had given the 2<sup>nd</sup> applicant consent and authority to sign, swear and prosecute the suit on his behalf.
22. In his witness statement dated 29.8.2011, the 1<sup>st</sup> applicant repeated that the 2<sup>nd</sup> applicant was authorized to swear and make all documents relevant to the suit on his behalf, regarding parcel L.R No. Meru North/Athinga/Athanja/7670. The 1<sup>st</sup> applicant submitted that he was condemned unheard. He does not explain where he was between 2011 and 2023 during the lifetime of the suit; if at all, he had not authorized the 2<sup>nd</sup> applicant to prosecute the suit on his behalf. There is no evidence that the 2<sup>nd</sup> applicant notified the court that the 1<sup>st</sup> applicant had no longer authorized him to continue representing him in court. The additional statement dated 20.1.2023, which the 2<sup>nd</sup> applicant relied upon as his evidence in chief referred to Parcel 7670 and asked the court to allow their claim in Tigania PMCC No. 74 of 2011. The same request was made in the statement of defense dated 20.1.2023 by the 2<sup>nd</sup> applicant.
23. Exh No. 1 shows that the 1<sup>st</sup> applicant was present during the scene visit on 15.6.2022 and pointed out the boundaries to his L.R No. Athinga/Athanja/7670 to PW 1. The order dated 23.5.2022 for a scene visit to take place was by consent of parties to visit parcel L.R No's. 4735, 7670, and 232.
24. From all the preceding records it is clear that the applicants were aware of what was happening in their suits and that of the respondents. The applicants have been unable to pinpoint any error apparent on the face of the record, new and essential material that was not available before the court and which, if produced, would have made the court reach a different finding.
25. There is no dispute that the list of documents dated 15.3.2022 contained the title deeds for L.R No's. Meru North Athinga/Athanja/4735, 7670 and 232, tracing map and judgment in Criminal Case No. 65 of 2010. All these exhibits were referred to by PW 1 in his land survey report produced as P. Exh No. (1). The judgment in Tigania was produced as P. Exh No. (10). The 2<sup>nd</sup> applicant, who was representing the 1<sup>st</sup> applicant as his authorized agent, extensively commented on the said documents with reference to P. Exh No. (1), in his additional witness statement dated 20.1.2023. The applicants had no rival land survey reports to counter the claim by the respondents on trespass.
26. A party who has lost a claim may not use the route of review to have a second bite of the cherry. The review should not be used as a means to strengthen one's case once it has been dismissed to perhaps attempt to influence the court to reach a different outcome on alleged new evidence.
27. The delay between 7.11.2023 and 14.6.2024 to apply for review has not been explained at all. The 1<sup>st</sup> applicant waived his rights and ceded them to the 2<sup>nd</sup> applicant. He cannot wake up from his slumber



and blame the respondents or anyone else yet he should have been the one following up with his authorized agent to establish the progress of the suit. See [Hezekiah Kipkorir Maritim & others vs Philip Kipkoech & Tenai & others](#) cited in [Plot Owner's Welfare Group & others vs Simon Chererot](#) (supra).

28. I entirely agree with the respondent that the applicants have failed to meet the threshold of review based on the caselaw of *Robert Njue Nyaga & another vs Micheni Aphaxard Nyaga* (supra) *Isaak Mboroki vs Mboroki* (supra). The application is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 31<sup>st</sup> DAY OF JULY, 2024**

In presence of

C.A Kananu/Mukami

Andrew Ethuru

Mr. Gitonga for the 1<sup>st</sup> & 2<sup>nd</sup> defendants

Mawira for C.P Mbaabu for the respondents

**HON. C K NZILI**

**JUDGE**

