



**Ndungu v Ndungu & 2 others (Environment & Land Case
8 of 2020) [2024] KEELC 5492 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5492 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 8 OF 2020
A NYUKURI, J
JULY 24, 2024**

BETWEEN

MONICA RWINU NDUNGU PLAINTIFF

AND

EDWARD KAMAU NDUNGU 1ST DEFENDANT

LAND REGISTRAR MACHAKOS 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Before court is a notice of motion application dated 9th June 2023 filed by the 1st defendant seeking the following orders;
 - a. Spent
 - b. That the firm of Nyaata & Nyaata Advocates be granted leave to come on record for the 1st defendant in the place of D. K. Thuo & Company Advocates.
 - c. Spent
 - d. That the judgment of this honourable court dated 8th March 2023 be reviewed and substituted with an order dismissing the plaintiff's case.
 - e. That costs of the application be provided for.
2. The application is based on grounds on the face of it and supported by the affidavit dated 9th June 2023 and sworn by Edward Kamau Ndungu, the 1st defendant/applicant. He deposed that by the judgment of this court delivered on 8th March 2023, the plaintiff was awarded land parcel number Donyo Sabuk/donyo Sabuk West Block 1/234. Further that at the time of judgment, the defendant had been represented by the firm of D. K. Thuo & Company Advocates but he now wishes to change



- his advocates to Nyaata & Advocates. He also stated that there is a discovery of new evidence that was not in the applicant's possession when judgment was entered and that there is an error on the face of the record.
3. According to the applicant, the court awarded the suit property to the plaintiff notwithstanding that the suit property had been transferred to the applicant as a nominee of his late father in respect of the shares held at Muka Mukuu Farmers' Co-operative Society (Muka Mukuu). He further averred that after instructing the firm of Nyaata & Nyaata Advocates who wrote a letter dated 8th April 2023 to Muka Mukuu, seeking clarification on the issues relating to the said shares held by his late father and how they were disposed, Muka Mukuu replied that his late father had appointed him as his nominee and that the shares were later transferred to the applicant's name pursuant to the said nomination. He stated that when judgment was delivered, the letter from Muka Mukuu was not in his possession and that therefore the said letter is a discovery of new evidence.
 4. He further deponed that failure to join Muka Mukuu to these proceedings by the plaintiff was an error apparent on the face of the record. That he had been in open and continuous possession of the suit property and that he would suffer irreparably if execution of the judgment proceeded. He attached a copy of the judgment; a copy of his advocate's letter dated 8th April 2023; and a copy of a letter from Muka Mukuu dated 11th April 2023.
 5. The application is opposed. Monica Rwinu Ndungu, the respondent herein filed a replying affidavit dated 10th July 2023. She opposed the application on three grounds. The first ground was that there has been an inordinate delay in filing the application for review without plausible reasons since judgement was delivered on 8th March 2023 whereas the application was filed on 9th June 2023. The second ground was that discovery of new evidence as alleged in the application was a sham since the core of the defence at the hearing of this suit was that the applicant was a nominee of his late father, which allegation he supported with documents allegedly from Muka Mukuu, and which documents and evidence were interrogated by this court and the nomination found to be fraudulent. She also deponed that the applicant had failed to attach the alleged letter to Muka Mukuu and the alleged response thereof.
 6. The deponent's third and last ground of opposition was that she had already lodged an application for rectification of the title deed with the Registrar of Lands at Machakos Lands Registry and that the same had been processed, hence the application has been overtaken by events. She argued that the application herein was an attempt to mislead the court and a futile attempt to amend the pleadings and delay the respondent from enjoying fruits of the judgment. She stated that the applicant's actions are dishonest and she prayed that the application be dismissed for being misconceived and an attempt to delay her from sub diving the estate of the late Ndungu Mugo among the beneficiaries. She attached application for rectification of register.
 7. The application was canvassed by way of written submissions. On record are the applicant's submissions dated 8th January 2024. There are no submissions on record in support of the respondent's case. The court has duly considered the submissions made by the applicant.

Analysis and determination

8. The court has considered the application, the response thereto and the submissions by the applicant. The issues that arise for this court's determination are;
 - a. Whether leave should be granted to the firm of Nyaata & Nyaata Advocates to come on record for the 1st defendant, and
 - b. Whether the applicant has satisfied the requirements for a review of the judgment herein.



9. Order 9 Rule 9 of the Civil Procedure Rules provides that where a party who was previously represented by an advocate until after judgment, wishes to change their advocate or act in person, they can only do so with leave of court. A party has a right to be represented by an advocate of their choice. In the instant case, there is no impediment of any manner whatsoever that would stop the firm of Nyaata & Nyaata Advocates to represent the applicant. For those reasons, I grant leave to the said firm to come on record for the 1st defendant in this matter.
10. Regarding review, Section 80 of the Civil Procedure Rules provide for the jurisdiction of the court and the grounds for grant of orders for review.

Section 80 of the Civil Procedure Act Cap 21 Laws of Kenya which states as follows:

1. 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.

Order 45 rule 1 of the Civil Procedure Rules, 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.
- (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.

11. Therefore, to demonstrate the entitlement to orders of review, an applicant must show discovery of new evidence that they could not avail at the trial even upon exercise of due diligence; or that there is an error apparent on the face of the record or that there is sufficient cause for review. In addition, an application for review must be made expeditiously.
12. Explaining the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608 stated as follows:-

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. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule

13. For the court to review a decision on the basis of an error apparent on the face of the record, the applicant must demonstrate a glaring error of law apparent on the record which stares one in the face. An error which can only be shown upon a convoluted and long winding argument cannot be said to be an error apparent on the face of the record.
14. In the instant case, the applicant alleges to have made discoveries of new evidence relying on the letter dated 8th April 2023 by his advocates Nyaata & Nyaata Advocates to Muka Mukuu seeking information on the shares held by his father and how they were disposed of and an alleged reply by Muka Mukuu dated 11th April 2023. The judgment herein was delivered on 8th March 2023, while the letter by Nyaata & Nyaata Advocates was allegedly written on 8th April 2023, which is a month after judgment had been delivered. The applicant has not demonstrated how the letters from his advocate and Muka Mukuu were new evidence that could not be available even on exercise of due diligence. This is because if all what was needed to get the alleged new evidence was a letter from the applicant’s advocate, then the applicant has not told the court why he failed to write that letter to Muka Mukuu in 2020 when the suit herein was filed and had to wait after judgment to write the same. It is clear that Muka Mukuu was available and even gave the 1st defendant some of the documents he produced in defence and therefore there is no truth in the allegation that the documents from Muka Mukuu could not be produced before the trial herein, upon exercise of due diligence on the part of the 1st defendant. In addition, the applicant’s evidence in chief in defence was that he learnt from the offices of Muka Mukuu that his late father’s shares had earlier been transferred to him as a nominee. This court having considered that evidence, alongside the rest of the evidence, made a finding in the judgment that the alleged nomination of the defendant was fraudulent. In the premises, I find and hold that the alleged evidence and documents from Muka Mukuu attached to their letter of 11th April 2023 as well as the letter from Nyaata & Nyaata Advocates, is not and cannot amount to new evidence that could not have been produced by the 1st defendant upon exercise of due diligence, before this matter was heard.
15. The other ground relied upon by the 1st defendant is that there is an error on the face of the record because this court awarded the suit property to the plaintiff notwithstanding that the same had been transferred to the 1st defendant in his capacity as nominee of his late father. An error apparent on the face of the record ought to be a clear error of law that stares one in the face. This court gave reasons why it awarded the suit property to the plaintiff despite the 1st defendant’s evidence of being his father’s nominee, which nomination the court found as being fraudulent. If the 1st defendant is dissatisfied with the position taken by this court on the question of him being his father’s nominee, then he ought to have appealed and not sought for review, because there is no error apparent on the record and or in the court’s finding that stares one in the face, calling for review. The 1st defendant’s allegation of new evidence and the complaint that the court decided against the weight of his evidence concerning his nomination, is clearly an attempt for him to have a second bite at the cherry, which is an abuse of the court process and which this court will not countenance, because litigation must come to an end.



16. For the above reasons, I find and hold that the 1st defendant's application dated 9th June 2023 lacks merit and the same is hereby dismissed with costs to the plaintiff.

17. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mrs. Nyaata for 1st defendant

Mr. Muturi holding brief for Mr. Gitonga for plaintiff/respondent

No appearance for 2nd & 3rd defendants

Court assistant – Josephine

