



**Wasike v Fedha (Environmental and Land Originating Summons  
E013 of 2021) [2024] KEELC 5692 (KLR) (18 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5692 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E013 OF 2021  
EC CHERONO, J  
JULY 18, 2024**

**BETWEEN**

**JOYCE KHISA WASIKE ..... PLAINTIFF**

**AND**

**STEPHEN WANGUSI FEDHA ..... DEFENDANT**

**RULING**

1. Vide a Notice of Motion brought under Sections 1A, 1B, 3 & 3A of the [Civil Procedure](#) and Order 12 Rule 7 of the [Civil Procedure Rules](#) dated 11<sup>th</sup> April 2024, the applicant seeks the following orders;
  - a. Spent.
  - b. That this Honourable Court be pleased to review, discharge and or vacate the orders issued on 9<sup>th</sup> April, 2024 dismissing the Defendant/Applicant's notice of Motion dated 8<sup>th</sup> March, 2024 for want of prosecution.
  - c. That the costs of this application be in the cause.
2. The application is premised on the grounds on the face of the said application and the supporting affidavit sworn by Stephen Wangusi Fedha, the applicant herein on 11<sup>th</sup> April, 2024.
3. It is the Defendant/Applicant's case that the application dated 8<sup>th</sup> February was dismissed on 9<sup>th</sup> April, 2024 for want of prosecution. He stated that he is keen to have his application heard and that the error of Counsel who failed to attend court on the said date should not be visited upon him as a litigant. The Applicant stated that he is interested in having this matter heard and determined within the shortest period possible. Lastly, the applicant argued that the application has been filed without undue delay.
4. By way of a response, the Plaintiff/Respondent filed a replying affidavit sworn on 6<sup>th</sup> May, 2024 where she deposed that the current application is misconceived, incompetent and incurably defective. It was her contention that the Defendant/Applicant has not demonstrated any reason for reviewing,



- discharging and /or vacating the court orders issued on 9<sup>th</sup> April, 2024. It is also her contention that the application by the Defendant/Applicant to reinstate a dismissed application in itself is a nonstarter, dead on arrival with no chances of success. It is her contention that the application is aimed at denying her the fruits of her judgment since no appeal has been preferred against the judgment of the court.
5. The Defendant/Applicant filed a supplementary affidavit in support of his application sworn on 22<sup>nd</sup> May, 2024. According to him, no prejudice will be caused to the Respondent/plaintiff in the event this application is allowed. It was argued that counsel in conduct of his case failed to attend court on 9<sup>th</sup> April, 2024 due to an emergency. The Defendant/Applicant argued that he has filed a Notice of Appeal dated 26<sup>th</sup> February, 2024 against this court's judgment and has since obtained typed proceedings and is in the process of filing his record of appeal.
  6. Directions were taken in which the parties agreed to file submissions to buttress the parties positions. At the time of preparing this ruling the Plaintiff/Respondent had not filed her submissions while the Defendant/Applicant filed his submissions dated 22<sup>nd</sup> May, 2024. where he submitted that he has sufficiently explained his counsel's absence in court on 9<sup>th</sup> April, 2024 and that the current application has been filed timeously and that no prejudice will be occasioned upon the Plaintiff/Respondent in the event the same is allowed. The Defendant/Applicant urged the court to allow the application as prayed by reinstating the application dated 8<sup>th</sup> March, 2024. Reliance was placed in the case of [\*Ngugi vs. Thogo\*](#) (Civil Application 372 of 2018) [2021] KECA 88 (KLR).
  7. I have considered the application herein, affidavit in support, replying affidavit and submissions thereto. By way of background, this is a matter where this Court rendered its judgment in favour of the plaintiff/applicant on 20<sup>th</sup> February 2024. Aggrieved by the said decision, the Defendant/Applicant filed a Notice of appeal dated 26<sup>th</sup> February and subsequently filed an application for stay dated 8<sup>th</sup> March, 2024. The said application was fixed for hearing on 9<sup>th</sup> April, 2024. When the said application came up for hearing on 9<sup>th</sup> April 2024, both parties and their counsels were absent. The court therefore dismissed the application for want of prosecution with no orders as to costs. The Defendant/Applicant thereafter filed the current application seeking to have the orders of this court issued on 9<sup>th</sup> April, 2024 reviewed, discharged and/or vacated.
  8. Although the application seeks review of the order dismissing the application dated 8<sup>th</sup> March 2024, the same is brought under Order 17 Rule 7 which has nothing to do with review applications. It is to be noted that application has invoked Sections 1A, B and 3A of the [\*Civil Procedure Act\*](#) which are sections of general application. That notwithstanding, this court is duty bound under Article 159(2)(d) to determine disputes without due regard to procedural technicalities. The question for determination therefore is, whether under the circumstances of this case, the Applicant has met the threshold for the grant of review orders.
  9. The law governing review orders is Order 45 rule (1) of the [\*Civil Procedure Rules\*](#) as read with Section 80 of the [\*Act\*](#). For such orders to issue, the applicant must prove that there is discovery of new or important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time the decree or order was made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reasons. It is therefore incumbent upon the applicant to bring himself within the above ingredients before this court can exercise its discretion in his favour.



10. 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.”

11. 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.....”

12. In my view, the applicant has not given any single ground in support of the application for review. He has instead concentrated on arguing on unrelated issues including giving reasons his hitherto advocate failure to attend court on 9<sup>th</sup> April, 2024 and argued that the error of an advocate should not be visited on a litigant. However, the applicant’s hitherto advocate has not sworn an affidavit explaining why he did not attend court during the hearing of the said application. On the face of the application, the applicant has not proved any of the ingredients for review under Order 45(1) of the *Civil Procedure Rules* to warrant the grant of the orders. From the face of the record, there is no error apparent nor mistake nor discovery of any new evidence nor material facts nor any other sufficient reason to warrant this court to either review, discharge or vacate the orders issued on 9<sup>th</sup> April, 2024.

13. For the foregoing reasons, I find the Notice of Motion application dated 11<sup>th</sup> April, 2024 without merit and the same is hereby dismissed with costs.

14. It is so ordered.

**READ, DATED AND SIGNED AT BUNGOMA THIS 18<sup>TH</sup> DAY OF JULY, 2024.**

.....  
**HON.E.C CHERONO**

**ELC JUDGE**

**In the presence of;**

- 1. Mr. Wanyonyi for Applicant/defendant
- 2. Mr. Were for the Plaintiff/Respondent
- 3. Bett C/A

