



Amolo (Suing on behalf of and the donee of the power of attorney of Theodore Overbeck) v Mohamed; Gatuhu (Interested Party); Yusuf & another (Applicant) (Environment & Land Case 92 of 2021) [2024] KEELC 6243 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6243 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 92 OF 2021
NA MATHEKA, J
SEPTEMBER 26, 2024

BETWEEN

EUNICE ACHIENG AMOLO (SUING ON BEHALF OF AND THE DONEE OF THE POWER OF ATTORNEY OF THEODORE OVERBECK) PLAINTIFF

AND

BILAL MOHAMED DEFENDANT

AND

RUTH WANJIRU GATUHU INTERESTED PARTY

AND

BILALI HASSAN YUSUF APPLICANT

WILLIAM LODUPOILISWAKERI APPLICANT

RULING

1. The application is dated 14th March 2024 and is brought under Order IA, 1B, 3, 3A & 80 of the [Civil Procedure Act](#), Order 1 Rule 10(2), 10 Rule 11, 45 of the Civil Procedure Rules seeking the following orders;
 1. That this application be certified as urgent and service of the same be in the first instance dispensed with.
 2. That pending the hearing of this application interpartes, this Honourable Court, be pleased to grant a temporary stay of execution of its judgment delivered on 25th day of October, 2023 and the decree issued therefrom on 27th of February, 2024.



3. That this Honourable Court be pleased to review and set aside its judgment delivered on 25th day of October, 2023 and the decree issued therefrom on 27th of February, 2024 and cause this suit to be heard de novo
 4. That this Honourable Court be pleased to join the Applicants to this suit as Necessary parties.
 5. That the costs of this application be provided for.
3. It is the Supported by the affidavits of Bilalli Hassan Yusuf and William Lodupoi Leswakeri on the grounds that this suit was initiated against stranger, but surprisingly it is being executed against the Intended Necessary Parties/Applicants. This suit was never served upon the Intended Necessary Parties/Applicants who are the actual occupiers of the suit property. The applicants stand to suffer irreparably should the plaintiff be allowed to proceed with the execution she has initiated to its completion. The applicants, as things stand right now, are being condemned unheard. There are errors apparent on the face of the record since the Plaintiff, who has pleaded that she is just an attorney of one of the proprietors of the suit property, pleaded to be declared as one of the proprietors of the suit property pursuant to a power of attorney, a document which does not confer proprietary interest in land, and apparently has succeeded. The applicants are persons whose presence before this Honorable Court is necessary in order to enable it effectually and completely adjudicate upon and settle all questions involved in this suit.
4. This court has carefully considered the application and relied on the supporting affidavit. In the case of Mwioko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171 is relevant. It was held, that;

“A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

5. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section 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.”

6. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states 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. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In *Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal held 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 evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law”.

8. From the above provisions of the law, authorities cited and facts of this case the Applicants submitted that this suit was initiated against a stranger, but surprisingly it is being executed against the Intended Necessary Parties/Applicants who are Bilalli Hassan Yusuf and William Lodupoi Leswakeri. This suit was never served upon the Intended Necessary Parties/Applicants who are the actual occupiers of the suit property. I have perused the court record and find that the said named defendant one Bilal Mohammed was served through registered post. The persons on the ground appear to be Bilalli Hassan Yusuf and William Lodupoi Leswakeri and the judgement is now being executed against them. I find that the Applicants have a right to fair hearing. I find that this application is merited and I grant the following orders;



1. The Court reviews and set aside its judgment delivered on 25th day of October, 2023 and the decree issued therefrom on 27th of February, 2024 and this suit to be heard de novo
2. The Applicants are enjoined in this suit as Defendants.
3. That the cost of this application be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

