



Gatiba & another v Wanjiru & another (Environment & Land Case 66 of 2020) [2024] KEELC 6148 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6148 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 66 OF 2020**

JG KEMEI, J

SEPTEMBER 24, 2024

BETWEEN

CHARLES KIMANI GATIBA 1ST PLAINTIFF

PETER KUNGU WAITATHU 2ND PLAINTIFF

AND

RUTH KUNGU WANJIRU 1ST DEFENDANT

**FRANCIS NJOGU KUNGI (SUING AS THE ADMINISTRATORS OF THE
ESTATE OF PAUL KUNGU KABAGE) 2ND DEFENDANT**

RULING

1. It is the Defendants/Applicants' Notice of Motion dated 18/10/2023 expressed under Order 45 Rule 1, Sections 80 1A and 1B of the [Civil Procedure Act](#) and Article 50 of [the Constitution](#) of Kenya seeking orders that;
 - a. Spent.
 - b. The firm of Kamuiru Muibu & Co Advocates be allowed to come on record after Judgment.
 - c. Pending inter partes hearing the Court be pleased to order stay of execution of the Judgment dated 25th September 2023.
 - d. Upon the hearing and determination of the instant application the Honorable Court be pleased to review and or revise its orders to declaring that the Applicants to be holding Land parcel Number Limuru/Ngecha/177 for and on behalf of his deceased brothers Waitathu Kabage and Gatiba Kabage and the Judgment be set aside.
 - e. Upon granting prayer 4 above the suit be dismissed.
 - f. Costs.



2. Annexed to the Application is the Supporting Affidavit of even date sworn by Francis Njogu Kungu, the 2nd Applicant. He deponed that during the hearing of the suit, it was never brought to the attention of the Court that the Plaintiffs/Respondents had not obtained Letters of grant of Administration in respect of the estates of the late Waitathu Kabage and Gatiba Kabage whom they purported to act for. That for that reason the Respondents lacked locus standi, an affront to the Rules of procedure. That the ultimate Judgment annexed as F-1 rendered in Court that the 2nd Applicant held the suit land in trust for the respondents as a result of customary trust but the proceedings thereto are a nullity for want of locus standi aforesaid.
3. Opposing the application, the 1st Respondent Charles Kimani Gatiba filed his Replying Affidavit dated 17/1/2024 on his behalf and that of the 2nd Respondent. He deponed that they instituted the suit in their capacity as members of the family of Kabage Kungu and not as legal representatives of the Estates of their late fathers. That para 4 of their plaint was categorical that “all parties to this suit are members of the Kabage family” a fact that the Court appreciated and noted to reach its findings in paras 1 & 75 of its Judgment delivered on 25/9/2023. That the instant motion is a mere afterthought and the issues raised do not go to the root of the suit and the findings on customary trust thereto. That the Court is functus officio and it cannot be invited to sit on its appeal. He urged the Court to dismiss the application with costs.
4. On 14/3/2024 directions were taken and parties elected to prosecute the Application by way of written submissions. The Applicants through the firm of Kamuiru Muibu & Co. Advocates filed submissions dated 25/5/2024.
5. It was submitted that the Applicant is the legal representative to Paul Kungu Kabage who was a brother to Waitathu Kabage and Gatiba Kabage. Rehashing the provisions of Section 80 CPA and Order 45 Rule 1 of the Civil Procedure Rules, the Applicant posited that there is an error on the face of the record since the respondents filed a suit without the requisite legal representative as required under Section 45 of the *Law of Succession Act* (LOSA). That the law does not recognize an instance where customary trust claimants would institute a suit without grant of representation of a deceased person. Reliance was placed on the Court of Appeal decision in Fatuma R Sebe & Another Vs. Rashid Masaudi Nasoro & Another [2019] eKLR where the Court emphasized on the requirement to take a grant of representation.
6. On the other hand, the Plaintiffs/respondents through the firm of Chesikaw & Kiprop Advocates filed submissions dated 21/5/2024. They drew two issues for determination to wit, whether the Applicants have established sufficient grounds for review of this Court’s decision and whether the Court is functus officio and cannot entertain the instant Application.
7. Answering the first issue in the negative, the Plaintiffs cited the provisions of Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules. They posited that there is no discovery of new evidence herein to warrant review of the Judgment. That the issue of locus standi is moot since the Plaintiffs’ suit was instituted in the capacity of Kabage Kungu’s family members and not as the legal representatives of their deceased fathers. That indeed that disclosure was made at para. 4 of the Plaint and the Court duly recognized the parties as family members in para. 1 of the Judgment. That the instant application has not disclosed any error or mistake apparent on the face of the record to call for its review.
8. On the second issue, the Plaintiffs posited that the Court drew issues for determination and fully determined them in the Judgment and became functus officio. That allowing the instant application will amount to this Court sitting on appeal on its own decision which practice is contrary to the law.



That the instant application is an afterthought designed to defeat the Plaintiffs' interests in the suit property.

9. The singular issue for determination is whether the application is merited.
10. On the issue of leave for the firm of Kamuiru Muibu & Co. Advocates to come on record post Judgment, the Applicants have sought to come on record by an order of the Court. There being no opposition to this prayer, and in light of a party's constitutional right to choose counsel of their choice, I am inclined to allow it as prayed.
11. Have the Applicants established a case for review of the Judgment? The legal provision governing the Court's power to review a decision are found in Section 80 of the [Civil Procedure Act](#) and amplified by Order 45 Rules 1 & 2 of the Civil Procedure Rules that;

“ 80. Review

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.

Application for review of decree or order [Order 45, rule 1.]

(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.”

12. Flowing from the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the Court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by anchoring review on discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
13. In the persuasive decision of Mativo J (as he then was) in *Alpha Fine Foods Limited Vs. Horeca Kenya Limited & 4 Others* [2021] eKLR, in analyzing the preconditions for a Court to exercise Review of its own decision, the Learned Judge reiterated that mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review must 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. The Court cited with approval the Indian Supreme Court case of *Ajit Kumar Rath Vs. State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 that;

“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 for 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.”

14. In the instant case the Applicants have not demonstrated any due diligence they undertook to obtain the alleged Letters of administration if at all. Indeed, they fully participated in the hearing of the case on trial. In any event the Plaintiffs are emphatic that they did not institute the suit as legal representatives of their late father, but as family members claiming trust over the suit land. The Applicants did not refute these averments.
15. Additionally, in the case of *Republic v Medical Practitioners & Dentists Board & Another & Another; MIO1 on behalf of MIO2 (a Minor) & Another (Interested Party); Kingángá (Exparte) (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated))* [2021] KEHC 298 Mativo J (as he then was) aptly discussed what constitutes a mistake or error apparent on the face of the record as follows;

“The term “mistake or error apparent” by its very connotation signifies an error which is evident perse from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1.”

16. The Court has not been shown that there is an error on the face of record to warrant the excise of its discretionary powers. In my view this ground for review is moot for consideration in light of the



conclusion that the Plaintiffs' case was not filed in their capacity as legal representatives. In any event, the alleged error does not fall within the strictures of review set out in the preceding paragraphs.

17. In the case of Abasi Belinda Vs. Frederick Kangwamu and Another [1963] E.A. 557 the Court held that:

“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”

18. On the same point, the authors, Chittaley & Rao in the Code of Civil Procedure (4thEdn) Vol.3, pg 3227 in explaining the distinction between a review and an appeal have this to say:

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”

19. In the end the application is bereft of merit. It is dismissed with costs payable by Applicants.

20. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF SEPTEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Shikali for Plaintiff/Respondent

Defendant/Applicant – Absent but served

Court Assistants – Phyllis/Oliver

