**Wabwire) & another v Origi (Environment & Land Case 112 of 2017) [2024] KEELC 5894 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5894 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ENVIRONMENT & LAND CASE 112 OF 2017**

**BN OLAO, J**

**SEPTEMBER 18, 2024**

**BETWEEN**

**PETRONILLA BARASA WABWIE (ADMINISTRATOR OF THADEOUS WABWIRE) .................................................................................... 1ST PLAINTIFF**

**ANN NEKESA WABWIRE ................................................................ 2ND PLAINTIFF**

**AND**

**PHILIP JUMA ORIGI ........................................................................... DEFENDANT**

**RULING**

1. This ruling was due on 25th April 2024. However, I was out of the station for urgent personal reasons. Then in May 2024 I proceeded on my pre-scheduled annual leave until July 2024 and thereafter the vacation until 15th September 2024.

2. That explains the delay which is highly regretted. This ruling is being delivered soon after the start of the new term.

3. The dispute between Philip Juma Origi (the Applicant) and Ann Nekesa Wabwire and Petronila Barasa Wabwire (the 1st and 2nd Respondents) over the ownership of the land parcel No Bukhayo/Matayos/2481 (the suit land) was determined on 19th December 2022. By that judgment, this Court decreed that the Applicant had trespassed onto the suit land belonging to the Respondents and directed him to vacate therefrom within six (6) months or be evicted therefrom. He was also permanently injuncted from interfering with the plaintiffs' use and occupation of the suit land. The Applicant does not appear to have appealed that judgment.

4. By his Notice of Motion dated 18th December 2023, the Applicant has approached this Court citing the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1(1) of the Civil Procedure Rules. He seeks the following orders:

1. Spent
2. That the firm of B. M. Ouma & Company Advocates be granted leave to come on record for the Applicant.
3. That this Honourable Court be pleased to review, vary, set aside the orders issued on 19th December 2022.
4. That this Honourable Court be pleased to make any other order or relief as it may deem just and fair to meet the ends of justice.

The application is premised on the grounds set out therein and supported by the Applicant's supporting affidavit of even date.

5. The gravamen of the application is that although this Court in it's judgment delivered on 19th December 2022 had found that the suit land belonged to the Respondents, that was not correct and this Court was misled by the Respondents. That there is now new evidence showing that the land parcel NO Bukhayo/Matayos/5813 is owned by the Applicant. That there is now new evidence showing that the land parcel NO Bukhayo/Matayos/4683 does not belong to any of the parties herein but instead belongs to one Daniel Mudanyi Ochenja who is not a party in this suit. That this is new evidence which was not presented to this Court but was obtained later. There is therefore a need to review the orders which touch on the land parcel NO Bukhayo/Matayos/4683. It is in the interest of that this application be allowed as the said Daniel Mudanyi Ochenja might be evicted from his land yet he is not a party to these proceedings.
6. The following documents are annexed to the application:
    1. Certificate of Official Search for the land parcel NO Bukhayo/Matayos/5813 in the name of the Applicant.
    2. Certificate of Official Search for the land parcel NO Bukhayo/Matayos/4683 in the name of Daniel Mudanyi Ochenja.
    3. Mutation Form.
7. The application is opposed and the Respondents filed grounds of opposition dated 22nd February 2024. Therein, the Respondents have stated, inter alia, that during the hearing the evidence and the report of Land Registrars showed that the Applicant's land lies elsewhere and is not part of the suit land. That the Applicant's land parcel NO Bukhayo/Matayos/5813 did not form part of the pleadings and further, the person who sold him the land did not testify during the hearing. There is no ground for review and the application should be dismissed and the Applicant should have appealed if not satisfied with the judgment.
8. The application has been canvassed by way of written submissions. These have been filed by Mr B. M. Ouma Advocate instructed by the firm of B. M. Ouma & Company Advocates for the Applicant and by Mr J. V. Juma Advocate instructed by the firm of J. V. Juma & Company Advocates for the Respondents.
9. I have considered the application, the grounds of opposition and the submissions by counsel.
10. The Applicant seeks two substantive orders:
    1. The firm of B. M. Ouma & Company Advocates be granted leave to come on record for the Applicant.

2. This Court be pleased to review, vary or set aside the judgment delivered on 19th December 2022.

I will consider them in that order:

**1: Leave For Ouma & Company Advocates To Come On Record For Applicant:**

11. The record shows that the Applicant was previously represented by the firm of Marisio Luchivya & Company Advocates who filed his defence but did not turn up during the hearing though served. The Applicant conducted his own defence in person. Order 9 Rule 9 of the Civil Procedure Rules is couched in the following terms:

> "Where there is a change of advocate, or where a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court –
>
> a. Upon an application with notice to all the parties; or
>
> b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

The Applicant having previously been represented by the firm of Marisio Luchivya & Company Advocates, the firm of B. M. Ouma & Company Advocates ought to have complied with the provisions of Order 9 Rule 9 of the Civil Procedure Rules to enable them come on record for the Applicant. Ideally therefore, the said firm ought to have cited the above provisions in their Notice of Motion which should also have been served upon the previous Advocates including the firm of J. V. Juma & Company Advocates. That has not been done. Is it fatal, to this application?

12. The answer to the above question was given by the Court of Appeal in the case of *Tobias M. Wafubwa -v- Ben Butali 2017 Eklr [c.a. Civil Appeal No 3 of 2016*] as follows:

> "We would go further to add that provided that where the failure to comply with rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of *the Constitution* and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings."

The mischief which Order 9 Rule 9 of the Civil Procedure Rules was intended to address was basically to protect advocates from mischievous clients who wait until a judgment has been delivered then sack the advocate thus denying them their fees – S. K. Tarwadi -v- Veronica Muehlmann 2019 eKLR. In the circumstances of this case, the firm of Marisio Luchivya & Company Advocates which was previously appearing for the Applicant opted not to show up in Court when the hearing commenced on 31st October 2022. The Applicant prosecuted his case in person and there was no subsequent attempt by that firm to continue appearing in Court on behalf of the Applicant. There is therefore nothing to suggest that the Applicant by engaging the firm of B. M. Ouma & Company Advocates to act for him is trying to mischievously deny his previous counsel their fees. In any case, the counsel himself decided to make a no show in the proceedings. I have also not heard Mr. J. V. Juma counsel for the Respondents complain that allowing the firm of B. M. Ouma & Company Advocates will prejudice them or their clients.

13. In the circumstances, the firm of B. M. Ouma & Company Advocates is hereby allowed to come on record for the Applicant.

**2: Whether The Judgment Delivered On 19Th December 2022 Should Be Reviewed Or Set Aside:**

14. The judgment delivered by this Court on 19th December 2022 was not a default exparte judgment. It was a final judgment delivered after all the parties had been heard including the Applicant who opted to prosecute his defence and close it after his then counsel failed to show up at the trial. That is not the judgment that can be set aside under the Rules. In the case of Kenya Power & Lighting Company Ltd -v- Benzene Holdings Ltd T/a Wyco Paints Ltd C.a. Civil Appeal No 132 of 2014 [2016 eKLR], the Court held that:

> " Apart from the provisions of Order 10 Rule 11, Order 12 Rule 7 and Order 36 Rule 10 of the Civil Procedure Rules dealing with the setting aside of default judgments, the Civil Procedure Rules does not have a provision for setting aside of a final judgment. A party aggrieved by a final judgment can either move the Court under Order 45 for a review of the resultant decree or by lodging an appeal in terms of Order 42".

As I have already stated above, the judgment herein was not a default judgment. It was rendered after all the parties herein had been heard in support of their respective cases. It follows therefore that the remedy of setting it aside is not available to the Applicant.

15. The Applicant has in the alternative sought the review of the said judgment. The power to do so is donated by Section 80 of the *Civil Procedure Act* which provides:

80: "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."

The procedure for invoking the above provision is set out in Order 45 Rule 1(1) of the Civil Procedure Rules in the following terms:

45(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."

It is clear from the above that to be entitled to orders of review, the Applicant must satisfy the following conditions:

1. Show that there has been a 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 when the order was made.
2. Demonstrate some mistake or error apparent on the face of the record; or
3. Provide any other sufficient reason; and
4. Approach the Court without unreasonable delay.

16. The thrust of the Applicant's case is that there is now new evidence showing that the land parcel NO Bukhayo/Matayos/4683 does not belong to the Respondents as they had earlier informed the Court. Further that there is now new evidence showing that the land parcel NO Bukhayo/Matayos/5813 is owned by the Applicant. That the land parcel NO Bukhayo/Matayos/4683 infact belongs to one Daniel Mudanyi Ochenja who is not a party to this suit and who stands to be evicted from his land as a result of the judgment herein. The Applicant having relied on the ground of new and important matter or evidence as the basis of seeking a review of the judgment herein, I shall be guided by the fact that mere discovery of new and important matter or evidence is not sufficient. It must be also 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 ..." In the case of Rose Kaiza -v- Angelo Mpanju Kaiza C.a. Civil Appeal No 225 of 2008 [2009 eKLR], the Court of Appeal while discussing the ground of new and important matter or evidence as a basis of review cited with approval the following passage from Mulla's Civil Procedure Code 15Th Edition at page 2726 thus:

> " Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the discovery of new evidence, it must be established that the Applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the Petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of new and important matter which was not within the knowledge of the party when the decree was made." Emphasis added.

Further, in the case of D. J. Lowe & Company Ltd -v- Banque Indosuez, C.a. Civil Applicati*On No 217 of 1988*, the Court of Appeal sounded a caution in such applications based on that ground. It said:

> " Where such a review application is based on fact of the discovery of fresh evidence, the Court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed that party must show that there was no remissness on his party in adducing all possible evidence at the hearing." Emphasis added.

As I have already stated above, the fulcrum of the Applicant's application for review is two fold. First that the land parcel NO Bukhayo/Matayos 4683 belongs to one Daniel Mudanji Ochenja and not to the Respondents and secondly, that it is infact the land parcel NO Bukhayo/Matayos/5813

which belongs to the Applicant. This is how the Applicant has averred in paragraphs 3, 4 and 5 of his supporting affidavit:

3: "That the Respondents filed a suit purporting to be the owner of the land parcel registration NO Bukhayo/Matayos/2481 and 4683 which is not true that any of them belongs to me. Attached hereto and marked PJO – 1 (a) – (b) are copies of Official Search Certificate."

4: "That L.R NO Bukhayo/Matayos/2481 and 4683 which Court determined do not belong to me at all therefore the Court had not seen evidence to confirm that indeed I own Bukhayo/Matayos/4683 which was claimed by Respondent."

5: "That there is new evidence proving that the land parcel registration NO Bukhayo/Matayos/4683 does not belong to the Respondent or myself as claimed by him in fact for a different person Daniel Mudanyi Ochenja who is not a party to this suit. Attached hereto and marked PJO-2 is a copy of mutation."

And in ground NO 4 of the Notice of Motion, the Applicant states:

4: "That there is new evidence showing that the land parcel NO Bukhayo/Matayos/5813 is owned by the Applicant."

What this Court needs to interrogate, therefore, is whether indeed the issues raised in the preceding paragraphs of the Applicant's affidavit and the grounds upon which the application is founded amount to "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."

17. With regard to the averments in paragraph 3 of the Applicant's supporting affidavit, at no point did the Respondents plead in their plaint that they are the owners of land parcel NO Bukhayo/Matayos/4683. Their claim, as per paragraph 3 of their plaint was that the land parcel NO Bukhayo/Matayos/2481 belonged to Thadeous Wabwire whose Estate they were now the Administratrixes. They produced as part of their documentary evidence the Certificate of Official Search for the said land showing that they hold the title thereto in trust for the family. Indeed it was the Applicant who introduced the land parcel NO Bukhayo/Matayos/4683 in paragraph 4 of his defence in which he pleaded thus:

4: "The Defendant has no knowledge of land parcel NO Bukhayo of Matayos 2481 measuring 1.6 Ha and state that he only purchased from intended third party land parcel NO Bukhayo/Matayos/4683"

Therefore, it was the Applicant himself who pleaded that he is the owner of the land parcel NO Bukhayo/Matayos/4683 which he claimed to have purchased from one Emily Milkwambo and was even issued with the title deed thereof. However, he did not produce a copy of the said title deed. His counsel Mr. B. M. Ouma has submitted on this issue at page 3 of his submissions as follows:

> " In this case, the Applicant was not able to file his documentation as such evidence was not available for the Court to consider and make a well informed decision.
>
> The Court relied on the evidence of the land registrar and county surveyor who were in possession of the records but it is unfortunate that the land registrar did not disclose to Court in their report dated 8th June 2021 that L.R NO Bukhayo/Matayos/4683 did not belong to the Applicant but the Court went on to make a determination in reliance to the said report vide judgment delivered on 19th December 2022."

The ownership of the land parcel NO Bukhayo/Matayos/4683 cannot in the circumstances, be as new and important matter or evidence because the Applicant himself pleaded that it belonged to him having purchased it from one Emily Milkwambo. For avoidance of doubt, the Applicant pleaded in paragraph 6 of his defence thus:

6: "The defendant replies to the content of paragraph 5 of the plaint and states that the order sought by the plaintiff against him in this suit are for malice and aimed to prejudice his ownership rights as sole proprietor of the land Bukhayo/Matayos/4683 which he was issued with a valid title deed on 30/12/2016". Emphasis added.

If the Applicant holds the title to the land parcel NO Bukhayo/Matayos/4683 since 30th December 2016, which incidentally he did produce as part of his documentary evidence, during the trial, he cannot now turn around and claim that there is discovery of new evidence showing that the said land parcel NO Bukhayo/Matayo/4683 does not belong to either the Respondent or himself. The Respondents had no business with the ownership of the said land. It was irrelevant to their claim which was that the Applicant had trespassed onto the suit land being land parcel NO Bukhayo/Matayos/2481. And if the Applicant believed that the evidence regarding the ownership of the land parcel NO Bukhayo/Matayos/4683 was relevant to his case, he was at liberty to produce its title document during the trial. After all, as per his own admission, he had been in possession of the title thereto since 30th December 2016 some 6 months prior to the filing of this case on 6th June 2017 and some 6 years before he testified on 30th October 2022. The ownership of the land parcel NO Bukhayo/Matayos/4683 cannot therefore, by any stretch of imagination, be new and important evidence or matter which was not within his knowledge in view of his own admission that it is his property. He has annexed to his application a copy of certificate of Official Search to the said land showing that it was registered in the name of one Daniel Mudanyi Ochenja on 11th May 2021 as the fourth proprietor. However, he selectively leaves out the register that would indicate who was the registered proprietor thereof in 2016.

18. That ground for review has clearly collapsed.

19. In ground NO 4 of his Notice of Motion, he has pleaded that there is new evidence showing that the land parcel NO Bukhayo/Matayos/5813 is owned by himself. He has annexed to the application a certificate of Official Search showing that the said land was registered in his name on 19th December 2016 and he was issued with the title deed thereto on 26th May 2021. That means that when he testified before this Court on 31st October 2022, he already had the said title deed. Again, that cannot be new and important evidence or matter to warrant a review of this Court's judgment. In any event, the ownership of the land parcel NO Bukhayo/Matayos/5813 was of no relevance in these proceedings which was essentially concerned with a trespass on the land parcel NO Bukhayo/Matayos/2481.

20. The long and short of all the above is that the Applicant has been unable to demonstrate the discovery of new and important matter or evidence which was not within his knowledge or which could not be produced at the time of the trial. If anything, all the evidence which he now alludes to was not only well within his knowledge but was completely irrelevant for the purposes of the dispute before this Court. For that reason alone, this application must be dismissed.

21. Most importantly however, the Applicant was required to file this application without unreasonable delay. The judgment herein was delivered on 19th December 2022. This application was filed a year later on 18th December 2023. The delay of 12 months is unreasonable and has not been explained taking into account the fact that the judgment was delivered in open Court in his presence. That delay clearly dis-entitles him to the remedy of review.

22. In his application, he also pleads in paragraph 3 of the grounds upon which it is premised that the Respondents herein misled the Court "that the said suit parcel belonged to them a fact which is not true." If this Court was misled either in law or fact, that can only be a good ground for appeal but not for an application for review – Pancras T. Swai -v- Kenya Breweries Ltd 2014 eKLR. In that case, the Court approved the holding by Bennet J In Belinda -v- Fredrick Kangwamu 1963 E.A. 557 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."

23. The up-shot of all the above is that the Notice of Motion dated 18th December 2023 is devoid of any merit. It is accordingly dismissed with costs to the Respondents.

**BOAZ N. OLAO**

**JUDGE**

**18TH SEPTEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 18TH DAY OF SEPTEMBER 2024 BY WAY OF ELECTRONIC MAIL AND WITH NOTICE TO THE PARTIES.**

**BOAZ N. OLAO**

**JUDGE**

**18TH SEPTEMBER 2024**