



REPUBLIC OF KENYA



Ahmed v Mandera County Government (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 7225 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7225 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023
JM MUTUNGI, J
OCTOBER 30, 2024**

BETWEEN

ABDULLAHI SHEIKH AHMED APPLICANT

AND

MANDERA COUNTY GOVERNMENT RESPONDENT

RULING

1. The Respondent/Applicant vide a Notice of Motion dated 22nd April, 2024 brought under Sections 1A, 1B,3A and 80 of the Civil Procedure Act, and Order 45 Rule 1 (b) of the Civil Procedure Rules, 2010 prays for orders:-
 1. Spent.
 2. The Judgment and Decree made by this Honourable Court on 27th November 2020 and 30th November, respectively, declaring the Plaintiff to be the legal owner of property LR No. 13139/680 be reviewed, varied, rescinded and set aside.
 3. Pending the hearing and determination of this application, the notice to show cause issued in ELCJR Case No. E001 of 2023 (ELC NO 27 OF 2018) on 9th April 2024 be suspended/stayed.
2. This motion was predicated upon the grounds set out on the body of the application and the Supporting Affidavit sworn by the Defendant's County Secretary, Mr. Billow Isack Hassan, on 22nd April, 2024. The Applicant affirmed that the Court on 27th November, 2020 entered Judgment in favor of the Respondent who was the Plaintiff in Garissa ELC No. 27 of 2018. In the Case the Respondent was declared as the owner of the property designated as LR No. 13139/680, Grant I.R No. 5287. The Applicant who was the Defendant in the case was ordered to vacate and relinquish possession of the disputed property or face forcible eviction.



3. The Applicant in the instant application contends that a recent survey report, dated 11th April 2024, and prepared by a certified Surveyor, revealed critical discrepancies as it showed there was in existence two distinct plans relating to FR Number 652/42. According to the Applicant, there has been a manipulation involving land parcel number Manderla Block 1/964 on one of the plans, where it was irregularly labelled as LR.13139/680 (the contested property). The Applicant further points out that various official documents, including a verification slip issued by the Director of Surveys, consistently identify the parcel in question as Manderla Block 1/964. The Applicant asserts that when the parcel designated as LR 13139/680 was surveyed in 2020, Manderla Municipality had already transitioned to a block/parcel system of numbering plots and that the verification slip by the Director of Surveys authorized the Surveyor to initiate the amendment process of the RIM to reflect this change in land administration.
4. The Applicant asserts that the coordinates provided for FR 652/42 accurately locate Manderla Block 1/964 on the map and in comparison, the disputed property was located several hundred meters away and is associated with FR/259/55, which encompasses 37 parcels, including the disputed property. The Applicant disputes the Respondent's assertion that the land in question was registered in 1995 arguing it was implausible since authentication process was only carried out in 2020. The Applicant further contended that the Respondent did not have any approved Part Development Plan (PDP) that was used to allocate him the plot in dispute. The Applicant thus argues the deed plan exhibited in respect of the disputed property could only have been obtained irregularly and fraudulently as the Survey records in regard to F/R 652/42 properly relate to land parcel Manderla/Block1/964 and not LR. No. 13139/680 claimed by the Respondent.
5. For the reasons stated above, the Applicant argues that the Judgment and decree in ELC No. 27 of 2018 was made on account of mistakes and errors apparent on the face of the record in regard to the status of the land the subject in the suit land hence a review was merited.
6. The Applicant/Respondent filed his Replying Affidavit sworn on 15th May, 2024 and affirmed that in ELC No. 27 of 2018, the Respondent/Applicant was ordered to vacate the suit property or, in the alternative, pay a sum of Kshs. 7,000,000/- as compensation being the market value of the property. The Applicant avers that the Respondent refused to vacate the property and/or make the payment for compensation as ordered and thus brought the matter to this Court to seek orders for Mandamus to enforce the payment of the decretal sum. The Applicant states that on 27th September 2023, the Respondent agreed to pay the sum but later filed the instant application to review the Judgment in ELC No. 27 of 2018 entered on 27th November, 2020. The Applicant contends that this Court lacks jurisdiction to entertain the application as it did not pass the Judgment that the Respondent seeks to have reviewed. Additionally, the Applicant asserts that the Respondent appealed the Judgment in ELC No. 27 of 2018 vide Nairobi [*Court of Appeal Civil Appeal No. E411 of 2021*](#), but has failed to prosecute the appeal after being denied a stay of execution of the Judgment and decree.
7. The Applicant argues that the Respondent's decision to file for a review of the Judgment in these proceedings was a poorly considered, last-minute effort aimed at evading the settlement of the decree in ELC No. 27 of 2018. The Applicant contended that the report presented by the Respondent does not reveal any new, significant evidence that would justify a reconsideration of the Judgment. The Applicant accused the Respondent of attempting to reopen the case to introduce issues not previously discussed in the Trial Court. The Applicant maintained that he acquired the disputed suit property legally and procedurally and denied claims of the existence of two identical plans FR/No. 652/42 as being unfounded asserting that his property was located in Manderla Township, contrary to the Respondent's claims of it being in Bulla Jamhuri. The Applicant refuted any knowledge of allegations regarding tampering with records of Manderla Block 1/964 and stated that he was not aware of the



contents of the letter dated 22nd October 2020 from the Director of Surveys allegedly authenticating the records. He maintained that his land was surveyed in 1995, debunking the Respondent's assertion that Survey was done in 2020 after the authentication.

8. The Applicant stated that the valuation report that he relied on before the Court and which was included in his bundle of documents in ELC No. 27 of 2018, confirmed that the property inspected was located in Mandera Town, on the second row behind Mandera Polytechnic Road and therefore could not be located where the Respondent claimed it was.
9. After careful consideration of the application, the Replying Affidavit, and the submissions presented by both parties, the issues that arise for determination are firstly, whether the Court has jurisdiction to adjudicate the application to grant the orders sought. Secondly, whether the application was properly made in these proceedings and/or the same ought to have been made in Garissa ELC No. 27 of 2018?
10. It is common ground that the Applicant/Respondent had instituted Garissa ELC No. 27 of 2018 against the Respondent/applicant and obtained Judgment in his favour on 27th November, 2020. Inter alia, a decree was issued against the Respondent/Applicant that the Respondent/Applicant do either vacate from the suit property LR. No. 13139/680 that the Court had decreed belonged to the Applicant/Respondent; or pay to the Applicant/Respondent compensation of a sum of Kshs 7,000,000/- being the market value of the said suit property.
11. Following the Judgment in Garissa ELC No. 27 of 2018 the Respondent/Applicant being dissatisfied and aggrieved by the Judgment lodged an Appeal in the Court of Appeal at Nairobi vide [*Civil Appeal No. E411 of 2021*](#). This appeal is yet to be heard and determined by the Court of Appeal. The Applicant/Respondent having exercised its right of appeal against the Judgment in Garissa ELC No. 27 of 2018 is precluded under Section 80 of the [*Civil Procedure Act*](#) and Order 45 Rule 1 of the Civil Procedure Rules from seeking a review in the same matter. Once a party in a suit exercises the option of Appeal against a Judgment, decree or order, such party loses the right of seeking a review before the Court that made the Judgment, decree or order. Section 80 of the [*Civil Procedure Act*](#) provides as follows:-
 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.
12. Order 45 Rule (1) of the Civil Procedure Rules reiterates the provisions of Section 80(a) and (b) and sets out the conditions that an Applicant seeking review must satisfy to be entitled to a review. Order 45 Rule (1) 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.

13. The Applicant's application dated 22nd April, 2024 seeks to have the Judgment entered against the Applicant on 27th November, 2020 in ELC No. 27 of 2018 reviewed, varied and/or set aside. The application though in its heading cites ELC JR Case No. 001 of 2023 (ELC No. 27 of 2018) was filed in the Judicial Review file (ELC JR Case No. 001 of 2023). The earlier file ELC No. 27 of 2018 has never been before the Court during the conduct of these proceedings. A review application in my view can only be made on the file in which the Judgment, Order or decree sought to be reviewed was made. The Applicant's instant application was filed in the Judicial Review file which does not contain the proceedings that gave rise to the impugned Judgment.
14. Be it as it maybe, the application to the extent that it seeks to review the Judgment and orders of Hon. E. C. Cheron, J delivered on 27th November, 2020 in ELC No. 27 of 2018 and in respect whereof the Applicant has filed an appeal in the Court of Appeal, the remedy of review would not be available to the Applicant. The application is without doubt misconceived as the Applicant having exercised its option to appeal against the Judgment lost the right to seek a review under Section 80 of the Civil Procedure Act and Order 45 Rule (1) of the Civil Procedure Rules. The Applicant cannot appeal and at the same time apply for review as that would constitute to conducting litigation by trial and error, hoping somehow one of the efforts will be successful. A party cannot be permitted to have several bites of the Cherry and must stick to a single bite and pursue the same to the end either through the Appellate process or the review process.
15. It is my determination therefore that the Applicant's application dated 22nd April, 2024 by way of Notice of Motion is devoid of merit and is dismissed with costs to the Respondent/Applicant.

RULING, DATED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 30TH DAY OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE

