Board of Directors New Victory School & 7 others v Ndegwa; Chief Lands Registrar (Interested Party) (Environment & Land Case 119 of 2019) [2025] KEELC 699 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEELC 699 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 119 OF 2019

CG MBOGO, J

FEBRUARY 13, 2025

BETWEEN

BOARD OF DIRECTORS NEW VICTORY SCHOOL ..... 1ST PLAINTIFF

THE REGISTERED TRUSTEES OF KENYA ASSEMBLIES OF GOD - EMBAKASI PARISH ..... 2ND PLAINTIFF

THE REGISTERED TRUSTEES OF PENTECOSTAL ASSEMBLIES OF GOD - EMBAKASI PARISH ..... 3RD PLAINTIFF

THE REGISTERED TRUSTEES OF THE PRESBYTERIAN CHURCH OF EAST AFRICA - EMBAKASI PARISH ..... 4TH PLAINTIFF

THE REGISTERED TRUSTEES OF FULL GOSPEL CHURCHES OF KENYA - EMBAKASI PARISH ..... 5TH PLAINTIFF

THE REGISTERED TRUSTEES OF GOD'S LAST APPEAL CHURCH- EMBAKASI PARISH ..... 6TH PLAINTIFF

DUNCAN MWANGI NJUGUNA ..... 7TH PLAINTIFF

PETER KAMAU NDEGWA & 8 OTHERS ..... 8TH PLAINTIFF

AND

PETER NDIRANGU NDEGWA ..... DEFENDANT

AND

CHIEF LANDS REGISTRAR ..... INTERESTED PARTY

RULING

1. Before this Court is a Notice of Motion application dated 30th November, 2024 and filed by the Applicant/ Defendant. Pursuant to Sections 1A, 3, 3A & 80 of the *Civil Procedure Act*, Order 45 Rule 1(1) of the Civil Procedure Rules, Articles 48 and 159 of *the Constitution* of Kenya, the Applicant/ Defendant has sought the following orders:-

    a. That the Honourable Court be pleased to review its ruling delivered on 30th September, 2024.

    b. That upon review this Honourable Court be pleased to reopen the Defendant's case for purposes of giving evidence.

    c. That costs of the application be in the cause.

2. The grounds upon which the application is predicated are set out on its face and in the supporting affidavit sworn by Boaz Pius, the Defendant's advocate. Counsel deponed that the Applicant/ Defendant has discovered new and important material facts that were not in his possession nor within his knowledge, despite exercising due diligence.

3. Counsel averred that at all material times in the Defence herein, the Defendant's witness statement dated 21st April, 2022 was duly filed and uploaded in the CTS by the Defendant's former advocates, Orwa Seda & Company Advocates. The Defendant's current advocates stated that they could not have access to the said witness statements and sought assistance from the court registry staff.

4. Mr. Boaz Pius pleads that the Defendant will be prejudiced because the Honourable Court based its findings on matters that were not properly before it. He argues that it is in the interest of justice for the applicant to be fairly and fully heard, and the ruling delivered on 30th September, 2024 be reviewed in relation to the new evidentiary facts tendered herein. They also attest that no appeal has been filed against the order of 30th September, 2024. They contend that these are sufficient reasons to warrant the review of the order of this Honourable Court.

5. The Plaintiffs have opposed this application through a replying affidavit dated 13th January, 2025 and sworn by the 7th Plaintiff, Duncan Njuguna Mwangi. He deponed that the witness statement in question, though filed, was never served upon them or their advocates on record, as required by the Civil Procedure Rules 2010. They were further not afforded an opportunity to respond to its contents or to prepare adequately for the trial.

6. Duncan Njuguna Mwangi argued that the failure by the Defendant to serve the witness statement was a procedural default that cannot be cured by an application for review at this stage as the Plaintiffs already testified without the benefit of the said statement, closed their case and the Defendant's case was already closed. They further contend that the Applicant's non-compliance with mandatory procedural requirements renders the application devoid of merit, which cannot be cured by way of a review as no new material evidence has been presented before this Honourable Court.

7. He asserts that the grounds advanced in the application for review do not disclose any new and important matter or evidence that was not within the knowledge of the Applicant at the time of the initial proceedings. They contend that the applicant's grounds, that a witness statement was filed but not served, is not sufficient justification for invoking the review jurisdiction of this court under Order 45 Rule 1 of the Civil Procedure Rules.

8. According to Counsel, the doctrine of finality of litigation requires that parties abide by procedural timelines and ensure diligent prosecution of their cases. He attested that allowing the review application would undermine the principles of justice and fairness by reopening a matter that has already been determined. Furthermore, he deponed that the Plaintiffs stand to suffer under undue prejudice should this Honourable Court allow the application for review, as the Applicant's procedural default has caused unnecessary delay and expense.

9. He contends that the application for review is devoid of merit, amounts to an abuse of the court process and that the Applicant has failed to satisfy the conditions set out under Order 45 Rule 1 of the Civil Procedure Rules for granting a review.

10. As at the time this ruling was written, only the Defendant/Applicant had filed submissions.

11. Counsel for the Defendant/ Applicant filed Written Submissions dated 20th January, 2025. The issue for determination as identified by the Defendant, is whether the application herein is meritorious.

12. The Applicant's Counsel submits that they are aggrieved by the decision rendered by the Honourable Court on 30th September, 2024. This application has been brought under Order 45 Rule (1)(1) of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*.

13. Counsel submitted that Section 80 of the *Civil Procedure Act* gives the Applicant unfettered right to apply for review and gives the court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which an application for review may be granted. Counsel submitted that the Applicant has met the criteria set out in Section 80 of the *Civil Procedure Act* and Order 45 Rules 1 and 2 of the Civil Procedure Rules.

14. It was Counsel's submission that the Applicant is now seized of new and important facts which were at the time of prosecution of this matter, not in his possession despite exercising due diligence. These new facts are that unknown to the current advocate to the Defendant, a written witness statement dated 21st April 2022 had been filed and was uploaded on the CTS. When this matter came up for Defence hearing on 30th September, 2024, the Honourable Court held that without a written witness statement, the Defendant cannot testify or adduce any evidence. The court then ordered the close of the Defence case. They urge that the Plaintiffs have admitted that the statement was filed, though they denied being served with the same.

15. They argue that the one-page statement does not introduce new evidence or facts that were not within the Plaintiff's knowledge at the time of prosecution of their case. They further contend that it would be in violation of the Defendant's fundamental right to fair hearing if he is denied an opportunity to defend himself in the matter.

16. Counsel relied on the cases of Republic v Anti-Counterfeit Agency & 2 others ex-parte Surgipharm Limited [2014] eKLR, Rose Kaiza v Angelo Mpanjuiza [2009] eKLR as cited in Turbo Highway Eldoret Limited v Synergy Industrial Credit Limited [2016] eKLR and D.J. Lowe & Company Limited v Bonquo Indosuez, Nairobi Civil Application No. 217 of 1998.

17. Having considered the Application, Replying Affidavit and Submissions filed, the issue for the determination of this court is whether to allow review of the ruling of this court issued on 30th September 2024.

18. The remedy of review is prescribed under Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule (1) of the Civil Procedure Rules. Section 80 of the *Civil Procedure Act* provides that: -

    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."

19. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides that:

> " 1.
>
> (1) Any person considering himself aggrieved—
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> (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."

20. Based on the foregoing, there are three grounds which a party may prove to be granted orders of review: (a) discovery of new and important evidence which was not within the knowledge of the applicant or could not be produced at the time the orders were passed; (b) on account of a mistake or error apparent on the face of the record or (c) for any other sufficient reason.

21. The rationale for the remedy of review was set out by the Court of Appeal in the case of Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] KECA 872 (KLR) as follows:

> " The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice.
>
> In the High Court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review."

22. The Defendant/Applicant has through this application sought to review the ruling of this court delivered on 30th September, 2024, on the grounds of new and important evidence that was not within the applicant's knowledge and could not be produced at the time the subject matter orders were made.

23. They have relied on the Court of Appeal's determination in Rose Kaiza v Angelo Mpanjuiza [2009] eKLR as cited in where the court quoted the commentary by Mulla of the Indian Civil Procedure Code, 15th Edition at page 2726, on the ground of discovery of new and important evidence:

> " 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 ground of a 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 any new and important matter which was not within the knowledge of the party when the decree was made."

24. The Defendant/Applicant has also sought to rely on the case of D.J. Lowe & Company Ltd v Banque Indosuez Civil Appl. Nai. 217/98 (ur), which was also quoted with approval by the Court of Appeal in the Rose Kaiza Case above (supra) : -

> " 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, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

25. This court is guided accordingly. In the impugned ruling dated 30th September 2024, the Honourable Mr. Justice Oguttu Mboya declined to allow the Defendant's/Applicant's application for adjournment and leave to file and serve a witness statement on behalf of the Defendant. Defendant's Counsel, Mr. Boaz Agutu had alternatively sought that the court grant leave to the Defendant to produce the documents and to rely on the replying affidavit which was filed during the interlocutory proceedings. The court held that the Defendant's application for leave to file a witness statement was made with unreasonable and inordinate delay. It further held that the application appeared to be intended to steal a match on the Plaintiffs.

26. As to whether the replying affidavit filed in opposition to an interlocutory application can morph into a witness statement, the Honourable Court held that the replying affidavit has served its purpose and rendered redundant. The Defendant could therefore not seek refuge in the said replying affidavit. The court was also of the view that allowing the Defendant to rely upon the replying affidavit would affect the level playing field, to the prejudice and detriment of the Plaintiffs.

27. Moreover, the Honourable Court declined to allow the Defendant to produce documents in the absence of a witness statement, as it found it inconceivable. The court stated that allowing such an endeavor would defeat the rules procedure, as well as the import and tenor of the overrising objectives of the court. Lastly, the court held that the Defendant had failed to account for the five years delay had

not been accounted for and that the Defendant's conduct did not merit being dignified with equitable discretion

28. Defendant's/Applicant's counsel has sought review of the ruling elucidated above on the basis of new information, which is that unknown to the Defendant's/Applicant's Counsel, the previous counsel of the Defendant, Orwa Seda & Company Advocates, had in fact filed a witness statement dated 21st April, 2022.

29. Mr. Boaz Pius has asserted that this is information that despite the exercise of due diligence, was not within his knowledge. This court is however not persuaded that the Defendant's Counsel indeed exercised such due diligence, as by his own admission, the said witness statement has at all material times been uploaded and available on the Judiciary Case Management System (CTS).

30. This court takes due notice that the firm of Agutu & Co Advocates entered appearance for the Defendant on 25th May, 2023 and has participated in the hearing and adjudication of the Plaintiff's/Respondent's suit which began on 10th July, 2023. If indeed Defendant's/Applicant's Counsel had exercised reasonable diligence, when he took up the matter in 2023, he ought to have reviewed all documents that had been filed on behalf of the Defendant/Applicant as at such time. The knowledge of whether the witness statement was filed or not, ought to have been within his knowledge well before the Honourable Court issued the impugned ruling.

31. Even if this court were to find that the Defendant/Applicant had satisfactorily established grounds for review of the ruling issued by this court, and were it to allow the Defendant/Applicant to reopen his case, this will significantly extrapolate the hearing and determination of this suit. This is as the court would be bound to also allow the Plaintiff's/Respondent's to reopen their case in order to adequately respond to the Defendant's/Applicant's case and to even the playing field. This would undoubtedly visit prejudice against the Plaintiff/Respondent.

32. In view of the conclusion that the Defendant/Applicant has failed to establish any reasonable grounds for review of the ruling dated 30th September, 2024, this court finds that the application dated November 30, 2024 lacks merit and is for dismissal. Same is hereby dismissed. Costs of the application are to be borne by the Applicant/Defendant.

33. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

HON. MBOGO C.G.

JUDGE

13/02/2025

In the presence of:

Benson – court assistant

Mr. Boaz Agutu for the Defendant

No appearance for the Plaintiff

No appearance for the Interested Party