



Thuku & 2 others (Suing as Officials of Uzima Court Welfare Group) v Muli (Environment & Planning Miscellaneous Application E005 of 2023) [2024] KEELC 13522 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13522 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & PLANNING MISCELLANEOUS APPLICATION E005 OF 2023
JG KEMEL, J
NOVEMBER 28, 2024

BETWEEN

STEPHEN MUTHIMA THUKU (CHAIRMAN) JOSEPH NDUNGU MWANIKI (SECRETARY) JULIUS MUCHINA (TREASURER) (SUING AS OFFICIALS OF UZIMA COURT WELFARE GROUP) APPLICANT

AND

SAMUEL SOMBA MULI RESPONDENT

RULING

Application dated 5/12/2023

1. The Application is dated the 5/12/2023 filed by the Applicants seeking the following Orders;
 - a. Spent
 - b. That the Honourable Court be pleased to set aside and or review its Ruling delivered on 9/11/23 dismissing the Miscellaneous Application dated the 11/9/2023.
 - c. The Applicant be granted unconditional leave to file an appeal out of time against the whole Ruling of Hon P Mutua, SPM delivered on 26/7/23 in Thika MCL&E No 48 of 2023 and intended appeal be deemed to be properly filed.
 - d. That the Honourable Court grant orders of injunction preventing the Respondent from conducting further construction, excavating on, defacing, digging pits and trenches or in any other way interfering with the current state of his land parcel known as LR No. 17564/1247 located in the controlled development area known as Uzima Court in Juja Sub-County pending hearing and determination of this Application.



- e. This Honourable Court does grant orders of injunction preventing the Respondent from conducting further construction, excavating on, defacing, digging pits and trenches or in any other way interfering with the current state of his land parcel known as LR No. 17564/1247 located in the controlled development area known as Uzima Court in Juja Sub-County pending hearing and determination of the intended Appeal.
 - f. Costs of this Application be provided.
2. The Application is supported by the grounds annexed thereto and the supporting affidavit of Stephen Muthima Thuku deponed on the 5/12/2023. The deponent stated that the Respondents are dissatisfied with the decision of the Hon Magistrate delivered on the 26/7/2023 and has proffered an intended appeal. That the appeal was however filed out of time and hence the Application dated the 11/9/2023 seeking orders for leave to file the appeal out of time. He contends that this Court heard and determined the Application and dismissed it on the grounds that the Applicants failed to demonstrate evidence in form of minutes of the meeting convened by the members of the Applicant's welfare group in support of the delay in filing the appeal within the prescribed time. That the said minutes of the meeting were availed to the Advocate for the Applicants but the said Advocate inadvertently failed to annex the same to the Application which was an oversight. That the Court should not visit the inadvertence of the Advocate on them.
 3. The Application was opposed by the Respondent vide his Replying Affidavit deponed on 22/1/2024 wherein he addressed the Court as thus; the Application falls short of the requirements of review as prescribed by statute; there is no discovery of new and important matter that was not within the knowledge of the Applicants at the time of filing the Application nor any error apparent on the face of the record; that the minutes of the members are documents in the custody of the Applicants and therefore cannot be termed as new and important matter; mistake of counsel was not cogently proved on credible evidence.
 4. Parties filed written submissions which I have considered in the Ruling.
 5. The key issue is whether the Applicants are entitled to review of the Ruling of the 9/11/23 and secondly whether orders of injunction ought to be granted in favour of the Applicants.
 6. 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.”

7. 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 hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason. 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 decision reiterated that mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to 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”

8. In the instant case the Applicants have pegged their Application on review on grounds that they have now annexed the minutes of the meeting of the members approving the filing of the appeal against the decision of the trial Magistrate. That their Advocate failed to annex the same and that the mistake of counsel ought not be visited on them. The Court notes that the said undisclosed counsel failed to swear an affidavit on when he was served with the minutes and the explanation why the Advocate failed to annex the said minutes. The Court agrees with the Respondent that the mere admission that the minutes were actually in the custody of the Applicants cannot qualify them to be new and important matter. In the circumstances the Court is unable to hold that the lack of explanation on the delay is attributable to the mistake of counsel. The Court answers the 1st issue in the negative.
9. The second issue of injunction is now moot given the decision of the Court above. The Application is unmerited. It is dismissed with costs to the Respondent.
10. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muriithi HB Mr. Thuku for the Applicants

Otieno Mudanyi for the Respondent

2nd Defendant - Absent

Court Assistant – Phyllis

