



Waithaka & 2 others v Waiganjo (Environment and Land Appeal E062 of 2021 & 17 of 2022 (Consolidated)) [2024] KEELC 13373 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13373 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E062 OF 2021 & 17 OF 2022 (CONSOLIDATED)**

JG KEMEI, J

NOVEMBER 18, 2024

BETWEEN

JOSEPH WANJOGU WAITHAKA 1ST APPELLANT

BETH WACEKE MACHERU 2ND APPELLANT

JOSEPH NGANGA MUCHIRI 3RD APPELLANT

AND

PATRICIA NJOKI WAIGANJO RESPONDENT

RULING

1. By a Motion dated 28/6/2024 premised on Article 53 of *the Constitution* of Kenya, Order 45 of the Civil Procedure Rules and Sections 1A, 3A, and 15 of the *Civil Procedure Act* the 1st Appellant/Applicant seeks Orders that;
 - a. Spent.
 - b. The firm of Waweru Nyambura & Company Advocates to come on record for the Appellants after Judgment.
 - c. Spent.
 - d. This Honorable Court be pleased to review the Judgment issued by this Honorable Court.
 - e. This Honorable Court be pleased to set aside the Judgment rendered by the Honorable Court on 24th April 2023.
 - f. The Honorable Court do issue the orders it deems necessary pending the hearing and determination of this Application.



2. The Application is premised on the grounds annexed thereto and Supporting Affidavit of Joseph Wanjogu Waithaka, the 1st Applicant. He averred that Judgment was delivered on 24/4/2023 in respect of the suit land, Ruiru/Ruiru East /Block 2/3516 registered in the Respondent's name. That there is now discovery of new evidence in form of a letter from Nyakinyua Investment Company & Gatundu Nyakinyua Company Ltd marked 'A' disclosing the true owner of the suit land. That the Company has also issued a Share Certificate and agreement entered between the buyer and seller of the suit land and the author of the letter is willing to testify in Court. That these documents were not in possession of the Applicant and had the Hon Court had the benefit of analyzing them, it would have reached a different outcome hence the Application.
3. The Application is contested by the Respondent, Patricia Njoki Waiganjo who filed her Grounds of Opposition and a Replying Affidavit, both dated 20/9/2024.
4. In the Grounds of Opposition she contended that the Application is defective in law and has been filed inordinately. That it does not meet the threshold for Review as set out under Order 45 of the Civil Procedure Rules and the proper forum for such an Application is the subordinate Court which issued the decree.
5. In her Replying Affidavit, she avowed that the Applicant ought to have applied for witness summons to Nyakinyua Investments Ltd at the trial Court to produce such evidence if at all. That on her part she produced Exh. 6 in her List of Documents being a clearance letter from Nyakinyua Investments Ltd. That the said letter annexed as 'PNW-1', showed that she is the bona fide owner of the suit land and the Applicant never objected to the production of the letter in the trial Court.
6. On 24/9/2024 directions were taken and parties elected to canvass the Application by way of written submissions.
7. The Applicant through the firm of Waweru Nyambura & Co. Advocates filed submissions dated 8/10/2024 whereas the firm of Nganga Ngigi & Co. Advocates filed the Respondent's submissions dated 8/10/2024 which I have read and considered.
8. The singular issue for determination is whether the Application is merited.
9. On the Applicant's prayer for leave to come on record, the legal provision is found in Order 9 Rule 9 (b) of the Civil Procedure Rules that;
 - “9. Change to be effected by order of Court or consent of parties [Order 9, rule 9.]
When there is a change of advocate, or when 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.”
10. The right to legal representation by Counsel of a party's choice is a constitutional tenet to ensure fair hearing. A glean of the Plaintiffs' Replying Affidavit and Grounds of Opposition does not contain any objection to the instant prayer. It is allowed as prayed.



11. Unto the prayers for Review and setting aside of Judgment, undoubtedly the Court's power to review its decisions is limited as enshrined in statute. The power of review must be exercised within the framework of Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules, 2010.
12. Section 80 of the *Civil Procedure Act* 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.”
13. Order 45 of the Civil Procedure Rules states;
 - “ 1. 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.”
14. 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 instant Application, the Applicant contends that there is discovery of new evidence in form of a letter from Nyakinyua Investment Company & Gatundu Nyakinyua Company Ltd marked 'A' disclosing the true owner of the suit land. That the company has also issued a Share Certificate and agreement entered between the buyer and seller of the suit land and the author of the letter is willing to testify in Court.
15. It is trite that an Applicant relying on this ground of discovery of new evidence, must demonstrate that the said evidence could not be availed at the time of trial despite due diligence. It is simply not enough



for an Applicant to state that he has discovered new evidence. The Applicant has not demonstrated any due diligence he undertook to avail the evidence in the trial Court. Needless to add that the letter was procured way after the delivery of the Judgement of this Court to show that the said evidence was nonexistent at the time of the trial. There was no explanation why a witness was not procured from the company during the trial if indeed the evidence was crucial to the Applicants case.

16. The Court of Appeal in the case of *Mzee Wanjie & 93 Others Vs. A.K. Sakwa & 3 Others* [1982-88] 1 KAR 465 Chesoni, Ag JA enunciated the principles to be followed by a Court before which an Application for review based on discovery of new evidence is made as follows:-
 - a) The Applicant must show that the evidence could not have been obtained with reasonable diligence for use at the trial;
 - b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
 - c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.
17. Later the same Court in *D.J Lowe & Company Limited Vs. Banque Indosuez* [1998] KECA 108 (KLR) while dismissing an appeal challenging a Ruling that declined review based on new evidence emphasized that where such a review Application is based on the 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 an event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.
18. Based on the forgoing precedents, I reach the inevitable conclusion that the Applicant has failed to establish any due diligence on his part to adduce the new evidence in the trial Court. The prayer for Review of Judgement is therefore unmerited and it fails.
19. In the end the prayer for setting aside the Judgement is moot for consideration.
20. The Application save for prayer b is dismissed with costs to the Respondent.
21. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 18TH DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Mueni HB Ms. Waweru Nyambura for the 1st, 2nd and 3rd Appellants

Ms. Wainaina HB Ngige for the Respondent

Court Assistant – Phyllis

