



REPUBLIC OF KENYA



KENYA LAW
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**Kirikia & another v Shakue & another (Environmental and Land Originating
Summons 5 of 2007) [2024] KEELC 13222 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 5 OF 2007
EK MAKORI, J
NOVEMBER 14, 2024**

BETWEEN

WAMAITHA KIRIKIA 1ST PLAINTIFF

MUGO J KIRIKA 2ND PLAINTIFF

AND

TIMA SHAKUE 1ST DEFENDANT

MOHAMED SAAD SHAKUE 2ND DEFENDANT

RULING

1. Application dated 29th May 2024 significantly seeks:
 - i. Stay of execution of the Judgment and decree dated 24th January 2019 and 13th April 2022, respectively, pending the hearing, determination, and final disposal of the application for review.
 - ii. Consequently, setting aside the said Judgment and decree.
2. The applicant - Tima Shakue, in her affidavit in support of the application deposed on 29th May 2024, contends that the Court relied on erroneous documents to enter the judgment and that- an allotment letter dated 11th June 1979 from the Commissioner of Lands and Certificate of Grant dated 17th February 1992. A perusal of the court record shows that the allotment letter and grant do not exist. What is in the court file is a Certificate of Grant No. 55627 issued to JAF Oil Co. Ltd concerning Portion No. 9613 dated 1st July 1979. The portion, therefore, referred to as No. 200, is different from the suit property.
3. In a replying affidavit deposed by the respondent Mugo J. Kirika, he argues that the application was brought inordinately late, 6 years after judgment. The document averred by counsel for the applicant



is strange and was never mentioned in the judgment by this Court (Olola J.). The applicant preferred an appeal, which has never been prosecuted after an out-of-court settlement failed.

4. Parties were directed to file written submissions.
5. After meticulously reviewing the materials and submissions placed before me, I frame the issues for this Court's determination as whether to grant a stay of execution pending review(sic) and set aside the judgment in place and who should bear the costs of the current application.
6. If I understand the applicant well, the application seeks a review of this court Judgment (Olola J.) dated 24 January 2019.
7. Review is provided for in section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. It states as follows, and the Courts have strictly followed these provisions:

Section Any person who considers himself aggrieved—

80:

- (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.”

Order 45:

- (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.”

8. The conditions for reviewing judgments or orders of the Court as set above have been echoed by this Court; see, for example - *Josiah v Nyaga* (Civil Appeal 34 of 2021) [2023] KEHC 2054 16th March 2023(Ruling):

“Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter or evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay.”



9. The applicant contends the materials and the Grant exhibited to pass judgment in favour of the plaintiffs reflect that the land belongs to a third party other than the plaintiffs. Therefore, the decision is flawed and needs to be reviewed. The respondent finds this strange because such a document is never mentioned in the body of the judgment.
10. I have reviewed the judgment of this Court by my brother - Olola J. The document introduced by the applicant was never referred to and nowhere in the decision of the Court. Throughout the judgment, the Court refers to portion No. 200 Watamu (see the evidence of the Surveyor PW2).
11. Therefore, the applicant has not pointed to any iota of error committed by the Court, new and important evidence that could not have been diligently procured, nor can I see any other sufficient reasons to review the judgment in place. Besides, the application is brought six years after the judgment of this Court—inordinately late. There is also a pending appeal, which has never been prosecuted. At best, the application represents an abuse of the Court process.
12. The application dated 29th of May 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 14TH DAY OF NOVEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Matini, for the Respondent

Happy: Court Assistant

In the Absence of:

Ms. Minyanzi, for the Applicant

