



**Gitari v Gitari (Environment & Land Case E040 of 2021)  
[2024] KEELC 7530 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7530 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE E040 OF 2021**

**BN OLAO, J**

**NOVEMBER 12, 2024**

**BETWEEN**

**ESTHER NGONYO GITARA ..... PLAINTIFF**

**AND**

**DOMINIC CHEGE GITARI ..... DEFENDANT**

**RULING**

1. Judgement with regard to the ownership of the land parcel NO Bukhayo/Bugengi/2504 (the suit land) was delivered in favour of Esther Ngonyo Gitara (the Plaintiff/ Respondent) as against Dominic Chege Gitari (the defendant/ Applicant) on 23<sup>rd</sup> November 2023. The thrust of the judgement was that the Applicant was decreed to be holding the title to the suit land in favour of the Respondent and her family. That trust was determined and the defendant/Applicant was directed to surrender the original title deed to the suit land to the Land Registrar Busia for cancellation so that a new title can be issued to the Plaintiff/Respondent to hold in trust for her family.
2. The Applicant was aggrieved by that judgement and immediately lodged a Notice of Appeal on 23<sup>rd</sup> November 2023.
3. The Applicant has now approached this Court with his Notice of Motion dated 4<sup>th</sup> June 2024 and premised under the provisions of Sections 3, 3A and 80 of the *Civil Procedure Act* and Order 46 Rule 1 of the Civil Procedure Rules. He seeks the following orders:
  1. Spent
  2. That this Honorable Court be pleased to review the judgement made on 22<sup>nd</sup> November 2023 (it was actually 23<sup>rd</sup> November 2023).
  3. That costs of this application be provided for.



The application is based on the grounds set out therein and is also supported by the Applicant's affidavit of even date.

4. The thrust of the application is that facts which were not previously in the knowledge of the application and which show a fraudulent transfer of the suit land have now emerged and vitiate the judgement. That this came to light when the Applicant approached the Director of Criminal Investigation (DCI) to investigate the issues related to the suit land. The DCI found evidence of impersonation and fraud which will alter the outcome of the Court's decision hence this application.
5. The following documents are annexed to the Notice of Motion:
  1. Copy of the judgement delivered on 23<sup>rd</sup> November 2023.
  2. Copy of a report by the DCI dated 23<sup>rd</sup> February 2024 together with several other annexures including the certificate of death of one James Githekwa Wairagu.

The application is opposed and the Respondent filed grounds of opposition dated 28<sup>th</sup> June 2024 stating, inter alia that the Applicant has not demonstrated sufficient grounds to warrant a review of the judgement herein. That the Applicant has not shown how the findings of the DCI will affect the judgement of this Court on the issue of trust which was the main issue for determination by this Court. Further, the impugned agreement was not the basis of this Court's judgement delivered on 23<sup>rd</sup> November 2023 since the report by the DCI made findings on the signature of one James Githakwa Wairagu who died way back in October 2006 and whose Estate is not a party to this suit. This application is scandalous, vexatious and an abuse of the process of this Court and has not met the threshold of Order 45 of the Civil Procedure Rules. It should be dismissed with costs.

6. The application has been canvassed by way of written submissions filed by Mr Balongo instructed by the firm of Balongo & Company Advocates for the Applicant and by Mr Ochiel instructed by the firm of Okeyo Ochiel & Company Advocates for the Respondent.
7. I have considered the application, the rival affidavits and annexures thereto as well as the submissions by counsel.
8. The law on review of judgements and orders is found in Section 80 of the *Civil Procedure Act* which 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."
9. The procedure for review of a judgement or order is provided for in Order 45 Rule 1 of the Civil Procedure Rules as follows:
  - 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.” Emphasis mine.

10. It is clear from the above rule that a party seeking the remedy for the review of a judgement or order must satisfy the following requirements:

1. Show that there has been a discovery of new and important matter or evidence which could not be produced at the time the decree or order was made.
2. Demonstrate that there is some mistake or error apparent on the face of the record.
3. Provide any other sufficient reason.
4. File the application for review without unreasonable delay.

In paragraph (a) of the grounds upon which the application is based, the Applicant has stated the reason to be:

- a. “Facts not in the knowledge of the application (sic) at the time of judgement have emerged.”

In paragraphs 4 and 5 of his supporting affidavit, the Applicant has deponed as follows:

- 4: “That Applicant herein being suspicious at post judgment meditation of the Respondent approached the DCIO to investigate related issues to the parcel of land.”
- 5: “That the DCIO office has come back with evidence of impersonation and fraud (see annexed documents marked DCG-2).”

It is not clear to me what the Applicant means by the phrase “post judgement meditation” above.

What is clear, however, is that the ground upon which this application is predicated is “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.” While considering this ground as a basis for a review of a judgement, the Court of Appeal sounded the following caution in the case of D.j. Lowe & Company Ltd -v- Bonquo Indosuez C.a Civil Application No 217 of 1988 (NBI):

“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.” Emphasis mine.

My understanding of the above is that in an application for review based on the ground of new and important matter and evidence, a party is not permitted to go on a fishing expedition for new evidence to bolster his case. In support of this application, the Applicant has produced a Forensic Document Examiner’s Report dated 23<sup>rd</sup> February 2024 the import of which is not immediately clear to this



Court. But if the intention is to show that he, rather than the Respondent, was the one who purchased the suit land from one JAMES GITHAKWA WAIRAGU or that in fact the said James Githakwa Wairagu could not have sold the suit land to the Respondent or that the sale agreement was a forgery, the Applicant did not in his evidence in chief suggest that he had executed any sale agreement for the suit land or that he had lost it. Nowhere in his statement dated 10<sup>th</sup> June 2022 and which he adopted as his testimony during the trial did he refer to any sale agreement. Infact in the penultimate paragraph of that statement, he states that:

“I have filed a suit to have Mary Hill be evicted and that is what elicited the claim herein. The suit is pending in Court. My mother reported the issues to CID Busia but upon investigation the claim was dismissed.”

If the CID Busia investigated the Respondent’s complaint over the suit land and dismissed it, that was the right time to take any action against either the Applicant or the Respondent for the alleged impersonation and fraud which he now alleges and wishes this Court to admit as new matter or evidence in June 2024 a whole year since he testified in this Court on 5<sup>th</sup> July 2023. The expression “new and important matter or evidence” under Order 45 Rule 1 of the Civil Procedure Rules must logically mean “new and important matter or evidence” which, though in existence at the time of the trial, was not within the knowledge of the party seeking the remedy of review and could not be produced at that time. It cannot certainly mean, as the Applicant now seeks to do, a report prepared one year after the trial to try and support his case. Otherwise, that would amount to a re-opening of the case which is clearly not what the rule on review was designed for. On that ground alone this application must collapse.

11. The Applicant was also required to approach the Court “without unreasonable delay.” The judgement which he seeks this Court to review was delivered on 23<sup>rd</sup> November 2023. This application was filed on 14<sup>th</sup> June 2024 some seven (7) months later a delay which has not been explained and is clearly unreasonable. And even if he was waiting for the Forensic Examiner’s Report before moving to this Court, that report was prepared on 23<sup>rd</sup> February 2024 yet it took the Applicant four (4) months to file this application. That delay is both unreasonable and has not been explained. Most importantly it disentitles the Applicant to the remedy of review which must therefore be declined.
12. On the issue of costs, the parties are a mother and his son. I must therefore continue to walk the path which I took in my judgement delivered on 23<sup>rd</sup> November 2023 and direct that they meet their own costs.
13. The up-shot of all the above is that having considered the Notice of Motion herein, I issue the following disposal orders:
  1. The Notice of Motion dated 4<sup>th</sup> June 2024 is dismissed.
  2. The parties shall each meet their own costs.

**BOAZ N. OLAO**

**JUDGE**

**12<sup>TH</sup> NOVEMBER 2024**

**RULING DATED, SIGNED AND DELIVERED ON THIS 12<sup>TH</sup> DAY OF NOVEMBER 2024 BY WAY OF ELECTRONIC MAIL.**

