



REPUBLIC OF KENYA



KENYA LAW
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**Noor v Ngusare & another (Environment & Land Case
E240 of 2021) [2025] KEELC 406 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E240 OF 2021
AA OMOLLO, J
JANUARY 30, 2025**

BETWEEN

AMIN SHEIKH NOOR PLAINTIFF

AND

IRENE JARENGA NGUSARE 1ST DEFENDANT

REGISTRAR OF TITLES 2ND DEFENDANT

RULING

1. The Applicants filed a Notice of motion dated 29th July 2024 supported by an affidavit sworn by Amin Sheikh Noor on the same date seeking for the following orders
 - 1 Spent
 2. That this Honourable Court be pleased to review its judgment as delivered on 28th September 2023 on account of new evidence that was previously not in the Plaintiffs records.
 3. That this Honourable court be at liberty to grant the prayers as set out in the Plaint dated 5th July 2021.
 4. That this Honourable Court be at liberty to issue any such further orders as it deems just and expedient in the circumstances.
 5. That this Honourable Court do amend the Plaintiffs name from Abdi Sheikh Noor To Amin Sheikh Noor.
 6. That The costs of and incidental to the applications herein be in the suit
2. The grounds of the motion were that the the Plaintiff/Applicant sued the 1st Defendant vide a Plaint dated 5th July 2021 as the bona-fide purchaser of Apartment Number B6 Almond Villas, Rose Avenue Kilimani Erected on LR. NO. 2019/4350/2m purchased vide a sale agreement dated 3rd November



- 2016 executed by both parties. That soon thereafter the Plaintiff paid the requisite purchase price vide agreed instalments and the Defendant upon relocation equally received part of the payment through her proxy bank accounts in America.
3. The Applicant stated the Defendant upon receipt of all the proceeds of sale failed to execute the transfer documents to her prompting her to file the suit but the same was dismissed vide judgement rendered on 28th September 2023 on account of inability to prove that the payments had been made as per the agreement.
 4. She stated that the Plaintiff is now in possession of bank records that provide sufficient evidence of the payment of the purchase price as follows;
 - a. 03/07/2016 a payment of \$20,000.00
 - b. 08/06/2016 a payment of \$14,700.00
 - c. 23/08/2016 a payment of \$17,000.00
 - d. 09/01/2016 a payment of \$16,000.00
 - e. 09/09/2016 a payment of \$15,000.00
 - f. 11/2016 a payment of \$20,000.00
 - g. 02/03/2017 a payment of \$30,000.00
 - h. 27/03/2017 a payment of \$20,000.00
 - i. 05/04/2017 a payment of \$30,000.00
 - j. 04/05/2017 a payment of \$6,000.00
 - k. Legal Fees a payment of \$ 2,722.00
 5. That in light of the new evidence of the payment of the agreed purchase price, she is deserving of the prayers as sought in the Plaint. She stated that due to the foregoing and on account of her known proprietary interest in the stated premises, she holds one (1) ordinary share in Almonds Villas Ltd who are the management company as evidenced in the company's CR12 dated 5th July 2024.
 6. She reiterated that she has fully paid the 1st Defendant/Respondent her entire sum as per the sale agreement and that she has had an uninterrupted stay at the stated premises for over 10 years as an initial tenant and now an owner from the year 2016. The Applicant explained that on account of her business activities she has been out of the country for lengthy periods of time causing the delay in filing the instant application as she was unable to procure a majority of her bank statements having closed the stated accounts.
 7. In further support of her motion, the Applicant filed written submissions dated 30th October 2024 where she asserted that the court should review the judgment delivered on 28th September 2023 on account of new evidence that was previously not in the Plaintiff's records. She relied on the case of Republic –vs- Public Procurement Administrative Review Board & 2 Others which set the parameters set out in Order 45 of the Civil Procedure Rules which were further echoed by Mativo J in *Nasibwa Wakenya Moses v University of Nairobi & Another* [2019] eKLR.
 8. In line with the rules of issuance of review orders, the Applicant directed the Court's attention to the judgement dated 23rd September 2023 in particular, Paragraphs 15, 16, and 17 which she submits pointed the following gaps in the Plaintiff/Applicant's case thus;



15. The above email shows the intention of the 1st Defendant to sell the suit property to the Plaintiff and not an acknowledgement of receipt of any money, noting that the sale agreement was yet to be executed. The correspondence of 30th October 2015 enclosed a draft sale agreement to the parties for their perusal and amendment.

The sale agreement only confirms receipt of the deposit of Kshs 8270000 by the 1st Defendant. There is no evidence produced/provided to this court showing when and how the balance of the purchase price of Kshs 10980000 was paid and or evidence by the 1st Defendant confirming receipt of the balance.

16. The fact that the 1st Defendant did not enter appearance does not exempt the Plaintiff from demonstrating to this court that he had indeed made the full payment of Ksh. 19,250,000 being purchase price for the suit property. Having failed to produce such evidence of payment, this court finds it difficult to grant the orders both of specific performance and permanent injunction or any other reliefs prayed for in the plaint.
17. In conclusion, I make a finding that the Plaintiff did not produce sufficient evidence to discharge his burden of proof and the result is, this suit is dismissed with no order as to costs. (Emphasisours)
9. It is her contention that she has found new documentary evidence that is crucial in guiding this Court towards the just determination of the present claim, to wit; a duly executed Sale Agreement dated 3rd November 2016, and the Applicant's KCB Bank Statements for the period 12th August 2016 to 5th May 2017. That this court acknowledged the existence of a duly executed Sale Agreement dated 3rd November 2016, bringing out the intentions of the parties; in particular that a part payment of Kenya Shillings Eight Million Two Hundred and Seventy Thousand (Kes. 8,270,000.00) was made.
10. In addition, she urged that the court should adopt this new evidence of the duly executed sale agreement that first cements her case for review of the judgement delivered owing to the fact that in Clause 3 (b) of the Sale Agreement, the 1st Defendant confirms the proxy Account details where the balance of the purchase price being Kenya Shillings Ten Million Nine Hundred and Eight Thousand (Kes. 10,980,000.00) was to be paid in instalments and remitted in the United States in the name of Amelie N. Kacou in Texas USA.
11. That crossing over to the issue of the proof of payment of the balance of the purchase price, the Applicant brings to the fore new evidence vide its KCB Bank Statements which shows payment done of the purchase price instalments as per the agreement of the parties in July 2016. In concluding, she submitted that she was not able to adduce this evidence in the first instance because of her business activities that find her out of the country for lengthy periods of time thus unable to procure a majority of the bank statements as she had closed the stated accounts.

Analysis

12. This motion was brought under Order 45 of the Civil Procedure Rules which provides as follows:

- “(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”

13. In the case of Francis Njoroge V Stephen Maina Kamore (2018) eKLR, Njunguna J; held that:

“Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exists: -

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay”.

14. In the case of Turbo Highway Eldoret Limited –vs- Synergy Industrial Credit Limited [2016]eKLR Sewe J. cited the case of Rose Kaiza –vs- Angelo Mpanjuiza [2009]eKLR, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

“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.”

15. The Applicant in explaining the delay in filing this application stated that due to her nature of business, she is constantly travels out of the country thus was not able to file the application at first instance. Further, that she had closed the bank accounts through which she had made the purchase payments in installments and so it took her time to trace the payment records.

16. I have considered the new evidence which the Applicant is urging this court to use as a ground to review her judgement. They include a copy of an RTGS from KCB bank dated 7th June 2016 instructing transfer of funds USD 14700 in favour of the 1st Defendant. This transfer record is subsequent to an email from the 1st Defendant requesting for payment to be made in the sum of Kshs two (2) millio



and an invoice for Kshs 1,500,000 dated 1st June 2016 also from the 1st Defendant. This demonstration communication exchanged between the Plaintiff and the 1st Defendant regarding the sale of the subject property.

17. The 1st Defendant was duly served with the application through WhatsApp vide a phone number stated in the affidavit of service filed. It is thus my opinion that the Applicant has provided new evidence that falls within the ambit of Order 45 Rule 1 of the Civil Procedure Rules, and which were not within his reach. Consequently, I find in favour of the Applicant and proceed to grant the orders sought in the motion dated July 29, 2024 as prayed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2025

A. OMOLLO

JUDGE

