



**Mwanzi v Amita (Environment & Land Case 459 of 2014)  
[2023] KEELC 328 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 328 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 459 OF 2014  
DO OHUNGO, J  
JANUARY 31, 2023**

**BETWEEN**

**JOHN H. MWANZI ..... PLAINTIFF**

**AND**

**RICHARD LISANGALI AMITA ..... DEFENDANT**

**RULING**

1. Judgment was delivered in this matter on July 27, 2021 in favour of the plaintiff. The defendant, his agents and his family were ordered to vacate the plaintiff's portion of land comprised in Isukha/Shiswa/1506 within 90 (ninety) days from the date of the judgement and in default eviction order to issue. It was also ordered that thereafter the District Surveyor Kakamega to visit the said portion of land and establish the blocked access road between parcels Isukha/Shiswa/1506 and 1505 and open the same. No order was made as to costs of the suit.
2. The plaintiff later filed notice of motion dated March 21, 2022. Upon hearing the application on June 9, 2022, the court granted an eviction order as per the decree and empowered the OCS Shisasari Police Station to provide security during the eviction.
3. The defendant subsequently moved the court through notice of motion dated July 7, 2022, which is the subject of this ruling. The following orders are sought in the application:
  1. [Spent]
  2. [Spent]
  3. That this honourable court be pleased to review its judgment given on July 27, 2021 and allow the applicant adduce new and important evidence which was not in his possession at the time of the hearing.
  4. That the costs of this application be provided for..



4. The application is supported by an affidavit sworn by the defendant. He deposed that he was not aware of the delivery of the judgment and that he only learnt of it when his neighbours started gossiping in the village that the plaintiff had obtained orders to enforce the eviction. That in arriving at the judgment, the court relied on decision of the land disputes tribunal, but he has obtained the decision of the Provincial Appeal Disputes Tribunal which overturned the decision of the District Tribunal which was relied upon in arriving at the judgment. The applicant concluded by stating that the decision of the Provincial Appeal Disputes Tribunal is new and important evidence which was not in his possession and that it shall have the impact of overturning the judgment herein. That if execution proceeds, he shall suffer irreparable harm by being rendered homeless.
5. In response to the application, the plaintiff/respondent filed a replying affidavit in which he took the position that what the defendant claims to be new evidence formed part of the defendant's documentary evidence at trial.
6. The application was canvassed through written submissions. The applicant filed his submissions on September 5, 2022 and cited section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. He urged the court to allow the application. In response, the respondent filed his submissions on November 1, 2022. He too cited the above legal provisions as well as the case of *Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR* and argued that what the applicant claims to be new and important evidence is not new since it was produced at trial. Consequently, the respondent submitted that the applicant is neither entitled to review nor stay of execution.
7. I have considered the application, the response thereto and the submissions. The issues that arise for determination are whether there is new and important evidence and whether the orders sought should issue.
8. The law relating to review is found at section 80 of the *Civil Procedure Act* which provides:  
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. Additionally, order 45 rule 1 of the *Civil Procure Rules* makes further provisions on review as follows:  
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.



10. The applicant has grounded his application for review on alleged discovery of new and important evidence. When faced with such an application, great caution is required on the part of the court since, as the Nigerian Supreme Court stated in the case of *Citec International Estate Ltd & Others v Francis & Others* (2014) LPELR-22314 (SC), an application for review is not meant to afford the losing party an opportunity to re-litigate or re-open a matter merely because such party is unhappy with the outcome. Our Court of Appeal echoed that caution in *D J Lowe & Company Limited v Banque Indosuez [1998] eKLR* where it stated:

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.

11. The applicant contends that the new and important evidence is the decision of the Provincial Appeals Committee. A perusal of the record shows that prior to trial, the applicant filed defendants list of documents dated February 26, 2015 and that item ii of the said list is “Proceedings of the Western Province Appeals Committee in Appeal No 99 of 2006”. The decision of the appeals committee was included within the said proceedings and was produced at trial as defence exhibit number 2.
12. This court (NA Matheka, J) stated in the judgment thus:

It is the defendant’s contention that the ruling and or determination in the said Kakamega CMC Misc Award No 185 of 2005 was in favour of the defendant and it is the plaintiff who misinterpreted the court order to suit his own position when the true position was that it was the decision of the Western Province Appeals Committee which should have been adopted as the final judgment of the court. That the proper interpretation of the decision of the Western Province Appeals Committee was to the effect that common boundary between the two land parcels Isukha/Shiswa/705 and 706 be determined using the existing map and not the annexation of part of defendant’s land parcel LR Isukha/Shiswa/706 to create the suit property herein.

13. It is thus apparent that the decision of the appeals committee is not new evidence since it was placed before the trial court and was considered in the judgment.
14. Both section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procure Rules* make it abundantly clear that review is not available where an appeal has been preferred against the decree or order sought to be reviewed. An appeal and an application for review in respect of the same decree or order cannot co-exist. Where an appeal exists, the matter sought to be remedied by review must merge in the appeal. See *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR* and *William Karani & 47 others v Wamalwa Kijana & 2 others [1987] eKLR*.
15. A perusal of the record herein shows that immediately upon delivery of the judgment, the defendant filed notice of appeal dated August 2, 2021 expressing dissatisfaction with the whole of the judgment. The notice of appeal, which is personally signed by the defendant, was paid for and a receipt issued on August 3, 2021 at 10.50 am. Review is therefore not available to the defendant/applicant in view of the appeal.
16. In view of the foregoing discourse, I find no merit in notice of motion dated July 7, 2022. I dismiss the application with costs to the plaintiff.



**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 31<sup>ST</sup> DAY OF JANUARY, 2023.**

**D O OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Mr Kombwayo holding brief for Mr Amasakha for the plaintiff

The defendant

Court Assistant: E Juma

