



**Odunga v Kandete & 3 others (Environment & Land Case
17 of 2017) [2023] KEELC 50 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 50 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 17 OF 2017
FO NYAGAKA, J
JANUARY 18, 2023**

BETWEEN

LAWRENCE P. B. ODUNGA PLAINTIFF

AND

THOMAS KANDETE 1ST DEFENDANT

DONALD MASAKARI 2ND DEFENDANT

ELIZABETH AKINYI 3RD DEFENDANT

PETER NASASA 4TH DEFENDANT

RULING

1. Before me is an application dated June 26, 2022. It is brought under Order 22 Rule 22 and Order 45 Rule 1(a) of the Civil Procedure Rules, 2010 and Section 63(e) of the Civil Procedure Act and all enabling of the law. The Applications seeks the following orders:
 1.spent
 2.spent
 3. ...spent
 4. That this Honourable Court be pleased to review the judgment delivered on November 19, 2019 by dismissing this suit for lack of *locus standi* by the Plaintiff.
 5. Costs of this application and the suit be awarded to the 1st and 2nd Defendant/Applicants.
2. The Application is grounded on the contentions that there is sufficient reason to review the judgment; there is a judgment in Kitale ELC No. 145 of 2015 pronouncing that land parcel number LR. No. 5777/3 which was later converted to parcel No. Saboti/Sikhendu/Block 5/Chepkorok should revert



to the original 126 owners; the Plaintiff herein is not among the 126 members referred to in Kitale ELC No. 145 of 2015 and thus has no locus standi in this suit; and the Defendants/ Applicants had no knowledge of the said Kitale ELC No. 145 of 2015 as the judgment herein preceded the one in the said suit.

3. The Application was supported by an Affidavit sworn by one Donald Masakari which was sworn on the same date. In it, the deponent repeated the contents of the grounds in support of the Application, save that he attached to it and marked as annexure DM-1 a copy of the judgment sought to be reviewed. He then singled out the finding of the Court in the judgment that the Plaintiff was declared by the Court to be entitled to 2 acres comprised in land parcel LR. No. 5777/3 Chepkorok to the exclusion of the Defendants, and an order of injunction restraining them, their agents and or servants and/or anybody claiming through them from trespassing upon the Plaintiff's land and costs of the suit.
4. He deponed further that there was a judgment in Kitale ELC. No. 145 of 2015 which was delivered to the effect that land parcel LR. No. 5777/3 reverts back to the original 126 members and be transferred to them. He repeated that the Plaintiff was not among the 126 members hence had no locus standi in this suit. Further, he swore that the defendants/Applicants had no knowledge of the judgment in Kitale ELC. No. 145 of 2015 hence having now had knowledge thereof the said decision constitutes sufficient reason for the review of the judgment herein.
5. Naturally, the Application was opposed by the Plaintiff. On June 21, 2022 he filed an Affidavit sworn on June 20, 2022. He deponed that the Application lacked merit and was a gross abuse of the court process. He stated that after the judgment in this suit was delivered, the Applicants never appealed against it. He then stated that the parties and cause of action in Kitale ELC. No. 145 of 2015 were totally different from those in the instant suit. He stated that he purchased the suit land in respect of Kitale ELC. No. 145 of 2015 from an original member of Chepkorok Farm Limited by name Selina Nakhumicha and his claim against her was still valid and was upheld by the Court. He stated further that the judgment in that suit neither nullified nor interfered with the ownership rights of the people who had bought land from the initial owners or shareholders. He then stated that the judgment in one case cannot apply to another to the extent of settling aside judgment in the other case.
6. He deponed that the application for review was an afterthought and an attempt to appeal against the judgment herein by way of backdoor, and if they were dissatisfied with the judgment they should have appealed against it. Further, he deponed that the application was brought only to forestall the eviction of the defendants/applicants from his land as ordered by the Court in November, 2019. He then stated that he was never a party in Kitale ELC. No. 145 of 2015 hence the prayer by the Applicants that the judgment therein applies to the instant one would amount to him being condemned unheard and would be against the principles of natural justice. He then stated that there was nothing new disclosed by the Defendants to warrant the grant of the application for review, and there was no error apparent on record to warrant the application being found meritorious.
7. The Defendants/Applicants filed a Further Affidavit on July 01, 2022 through one Donald Masakari. It was sworn on June 30, 2022. In it he deponed that since he had not appealed from the judgment, the application for review was apt. He then stated that although the parties in the two suits were different, the subject matter is the same, being parcel No. 5777/3 which registration was later changed to Saboti/ Sikhendu/Block 5/Chepkorok which they rightfully purchased, hence he believed that the instant application had met the threshold of one for review. He annexed to the Affidavit copies of a clearance certificate and agreements to show that they too indeed purchased land from one of the 126 original owners of the Farm in issue.



8. The Application was disposed of by way of written submissions. The Applicants filed theirs on July 01, 2022. The respondent filed his on November 07, 2022. In their submission, the Applicants framed three issues, namely, whether substantial loss would occur if the orders of stay of execution and suspension of the Notice to Show Cause was not granted; whether the prerequisites of review had been met; and whether the Application was brought within a reasonable time-frame. With regard to the first issue, they submitted that it was compelling to stay the eviction and suspend the Notice to Show Cause because the Respondent had commenced execution. They relied on the Uganda High Court case of *Watulatsu Samuel & 2 Others vs. Zirimu Haruna* 2010 (UGHC 186). In regard to the second issue, they submitted that the instant application having been brought under Order 45 Rule 1 of the Civil Procedure Rules requires that where a party is aggrieved by a decision against which an appeal can be filed but if not, he can apply for review of it. They submitted that since this Court had delivered a judgment in Kitale ELC. No. 145 of 2015 directing that land parcel No. 5777/3 reverts to the 126 original owners, the judgment herein should be set aside. They relied on the case of *Vivien Wendy Oyier v Juma Mohamed & 3 others*. As for the issue of unreasonable delay, they submitted that they brought the application for review immediately they discovered the judgment in Kitale ELC. No. 145 of 2015 hence the delay from 19/11/2019 was not inordinate.
9. As stated above, on November 07, 2022 the Respondent filed his written submissions dated November 04, 2022. He summed the argument that the parties and causes of action in Kitale ELC No. 145 of 2015 and the instant suit are completely different hence the judgment in that other suit should not be used to set aside the judgment herein. He then distilled the issues in Kitale ELC No. 145 of 2015 which he stated were whether the Defendants in that suit were among the people to whom the land comprised in LR. No. Saboti/Sikhendu Block 5/Chepkorok should be transferred by the Plaintiff to, while in the instant suit the issue was the ownership of the 2 acres of land he bought from another person, to the exclusion of the Defendants. He then stated that the judgment in Kitale ELC. No. 145 of 2015 did not refer to the instant suit. He reiterated the arguments in the Replying Affidavit he filed. He then stated that the judgment in Kitale ELC. No. 145 of 2015 did not in any way bar any buyer of land from the original owners from suing any person(s) in case he encroached or trespassed onto his property. He prayed that the application be dismissed with costs to him.
10. I have considered the Application, the Replying Affidavit and its annexures and the Supplementary Affidavit together with the annexures thereto. I have also given due consideration of both statutory and case law relevant, the submissions by the rival parties and the cases cited. I am of the view that the following issues are pertinent before me for determination:
 - a. Whether the application for review is merited;
 - b. Who to bear the costs of the Application.
11. It is not gainsaid that a judgment was delivered in this case on 10/12/2021 and is in the process of being executed. Also, there is no dispute that the Defendants never appealed from the judgment. Lastly, it is clear that the Applicants, who are two out of the four Defendants, have moved this Court in the instant Application for orders of review and setting aside the judgment. They have relied on Order 22 Rule 22 and Order 45 Rule 1 of the Civil Procedure Rules, 2010, and Section 63(e) of the *Civil Procedure Act*. Although they have stated that they also rely on all the provisions of the law, I do not find any meaning in that phrase because if there was any other provision of the law that they thought was the basis of their application, they would have stated it. Be that as it may, and Application for review may be brought also under Section 80 of the *Civil Procedure Act*. Order 22 Rule 22 provides for staying execution of decree in circumstances dissimilar from those in the instant case. In any event, the prayer for stay of the execution in the instant application is now spent.



a. Whether the application for review is merited

12. I cannot shy off from stating at this initial point that the Application before me is fraught with difficulty both in understanding it without reading meanings into it and granting it as it is. I point so because the substantive prayer in it, namely, (4) is to the effect that this Court reviews the judgment delivered on 19/11/2019 by dismissing this suit for lack of locus standi by the Plaintiff. At first, I was of the view that it was a typing error. But when I read the same prayer with the one sought in the interim, that is to say, number (2) in the same Application it referred to the same judgment. It is clear that judgment in this suit was delivered on December 10, 2021. There was never a judgment delivered in this matter on November 19, 2019. Instead the judgment delivered on November 19, 2019 was in Kitale ELC No. 145 of 2015. Following that, it means that if I were to determine the instant as it is, I would be required in this Application to consider the merits of an application for review of a judgment delivered in a different suit. That can never be. An Application for review has to be made in the same file where the judgment or ruling was delivered or order or decree was issued. On that account alone, the instant application would be nothing but a failure from the start. But if I were to consider the Application for review herein based on the fact that it was made in the right suit file which is this one, then the Application would still fail without going far for reason that there was no judgment delivered in this matter on the said date, and the Application herein being directed at a non-existent fact then it itself futile. No amendment to the Application has been sought to cure the defect.
13. This Court has on numerous occasions in matters other than this one complained of the paucity of drafting good pleadings or keenly at that. This is the same problem that has met the instant Application. It puts the Court in an awkward situation where, even when the Court relies on Article 159(2)(d) of the *Constitution* to overlook some of the errors committed by viewing them as technicalities, it places the Court at the position of appearing to be leaning towards the party who is in error yet that is not the case. The Court cannot bend towards any party without appearing as such, unless it is clear that the interests and ends of justice require it to exercise discretion that much because even the discretion should be exercised judiciously. I have done the best I can to interpret and understand the Applicants herein, based on the totality of the pleadings relating to the instant Application and the facts presented to me on them, and the fact that the Respondents did not do their homework well to discover such a serious error and oppose the Application on it. It on that basis that I am of the view that the instant Application having been brought in this suit, must have been directed at or been on the review of the judgment delivered in this matter on December 10, 2021 and I therefore proceed to determine the merits of the Application on along those lines. But I must state that it is embarrassing (even on courts) for parties to do a shoddy job in drafting pleadings and then expect that the courts to read meanings into them or ‘amend’ the pleadings by imagination and grant the reliefs the parties intend to obtain.
14. In the instant suit, the claim against the Defendants was for the reliefs of a declaration that Plot. No 5777/3 Chepkorok Farm belonged to the Plaintiff to the exclusion of the Defendants and other third parties
15. In the end, on December 10, 2021, judgment was entered against the Defendants as follows:-
 - (1) A declaration be and is hereby made that the 1st, 2nd and 3rd Defendants are not among the 126 people and to whom the land comprising in parcel No. LR. No. Saboti/Sikhendu Block 5/ Chepkorok should be transferred to.
 - (2) The Plaintiff is awarded costs of the suit as against the 1st, 2nd and 3rd Defendants together with the interest thereon.



16. The Applicants contend that they have sufficient reason for the court to grant the prayer for the review of the judgment herein. Following the practice of making legal findings by considering the issue, rule application and then conclusion, this Court is of the view that such a contention requires that the Court having stated the issue next restates and analyses the law. In an application for review of an order or judgment, the law applicable is Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010.
17. Section 80 of the Act provides as follows:
- “ any person who considers 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 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.
18. The substantive provision is supported further entrenched and broadened by the procedural provision of Order 45 Rule 1(1) of the Civil Procedure Rules. It provides in the same manner as Section 80 (1) and (2) save that Sub-rule (b) adds the following phrase detailing the reasons the basis of which an application may be made. The sub-rule is to the effect that any person
- “ who from the discovery of a 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 judgement to the court which passed the decree or made the order without unreasonable delay.”
19. It therefore follows that in accordance with Order 45 Rule 1, the conditions for the grant of orders of review are:
- a. discovery of new and important matter or evidence,
 - b. some mistake or error apparent on the face of the record or,
 - c. any other sufficient reason.
20. The Rule imposes a further (fourth) condition which applies to the three above, which is that the application must be made without unreasonable delay. It means that whenever the applicant is of the view that either one or more of the first three conditions exists he should move the Court without unreasonable delay. What is deemed unreasonable delay is a matter of fact, and it varies from case to case. Even then besides it not being unreasonable, the Applicant must satisfactorily explain the delay however small. The reasons he gives for the delay should be cogent and convincing.
21. Courts have stated the above conditions in a number of many decisions I need not repeat. But in the Supreme Court decision of Wachira Karani v Bildad Wachira (2016) eKLR the Court explained that sufficient cause (or reason) is a question of fact. Moreover, the Court of Appeal decision of Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243 and the persuasive decisions of re Estate of Japhet Avugwi Luseno (Deceased) [2020] eKLR and Francis Njoroge Vs Stephen



Maina Kamore [2018] eKLR emphasize the need to proof the four conditions before an order of judicial review issues.

22. Again, the Avugwi Luseno cause (above) emphasized the point that applications for review are not meant to substitute the remedy of appeal. I must agree with the decision by emphasizing that a party cannot squander his right of appeal and try to go round his failure by moving the Court for review of its order or judgment.
23. That said, the applicants herein contend that they have sufficient reason warranting the review of the judgment delivered on 19/11/2019. This is the reason I will consider, to find out if the application meets it. Sufficient reason has been defined previously by various courts. But it bears to begin the analysis of this by looking decision of the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. In it, the Court stated:

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

24. By “analogous” it means similar to each other (in some respects). It basically means that the reason must be one whose meaning and import revolves around the other three. In Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR the Court stated that:

“ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.”

25. Mativo J (as he then was) in Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR expressed himself that Sir Dinshah Fardunji:-

“Mulla, in the Code of Civil Procedure, [18th Edition, Reprint 2012, at Page 1147] ... (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’ ...means a reason sufficiently analogous to those specified in the rule.”

26. In Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR, it was held that

“28. An application for review may be allowed on any other “sufficient reason.” The phrase ‘sufficient reason’ within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in *Sadar Mohamed vs Charan Singh and Another* [13] where the court held that:-

“Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”



27. Therefore, in the instant Motion, for the Applicants to succeed, they needed to put forth before this Court a reason that relates to discovery of a new important matter or evidence or a mistake or error apparent on the face of record. In the material they brought before me, they argued that after the judgment they pray that it be reviewed was delivered, they discovered that another judgment was delivered (on November 192019) in Kitale ELC. No. 145 of 2015 in which LR. No. 5777/3 which was converted to LR. No. Saboti/Sikhendu Block 5/Chepkorok was to be transferred to the original 126 members of Kitale Chepkorok Farm Limited, and not the first three Defendants therein. To him, how the judgment in Kitale ELC No. 145 of 2015 related to the one in the instant was that the subject matter in both is the same.
28. At this juncture it is worthy of note the parties in Kitale ELC No. 145 of 2015 were Kitale Chepkorok Farm Limited as the Plaintiff against Peter Nasasa, Hassan Ndamwe, Andrew Gutitila, the Deputy County Commissioner Trans Nzoia West, and the Attorney General as Defendants. The cause of action in the suit was that the Defendants had unlawfully laid claim over membership in the Plaintiff and pressed for transfer of the suit land to themselves. The reliefs sought in the suit were a declaration that the 1st, 2nd and 3rd Defendants were not among the 126 members to whom the suit land, namely, Saboti/Sikhendu Block 5/Chepkorok which was initially registered as LR. No. 5777/3 which measured 1351 acres or thereabouts should be transferred to; any other relief the Court deemed fit to grant, and Costs. In the end, by a judgment delivered on December 10, 2021, the Court granted the relief sought and costs to be borne by the 1st, 2nd and 3rd Defendants.
29. In the instant suit, the parties are as shown in the heading. The cause of action was that the Defendants had unlawfully occupied and were using 2 acres which allegedly belonged to the Plaintiff by way of purchase from one of the original shareholders of the suit land known as No. 5777/3 Chepkorok part of which the 2 acres were. The reliefs sought in the Plaintiff which was amended on November 08, 2017 vide a copy dated 02/11/2021 but filed on that date were, (a) A Declaration that the 2 acres comprised in land parcel No. 5777/3 Chepkorok belonged to the Plaintiff to the exclusion of the Defendants and any other third parties, (b) An order of eviction of the Defendants from the 2 acres of land is issue, (c) A permanent injunction restraining the Defendants, their agents and/or servants and/ or anybody claiming through them from ever trespassing on the said 2 acres, (d) any other relief fit to be granted, (e) costs of this suit plus interest thereon. The Court granted all the reliefs except (d).
30. I have summarized the parties, the causes of action and reliefs sought and the judgments made in them so that it would be clear whether even by comparison the two suits and the findings of the Court would relate to either or the other so as to entitle the Court interfering with the judgment herein by way of review. First, as much the later acquisition of knowledge of the existence of another suit, namely, Kitale ELC No. 145 of 2015 would amount to discovery of a new matter, the question that his Court must answer is whether or not the import of the findings of the latter would have an impact on the judgment in the instant suit.
31. In my view the parties, the causes of action, the reliefs sought and even the findings of the Court in the two suits are completely different and unrelated. Clearly, in the former, the issue was membership and ownership hence transfer of the entire parcel portions of the subdivisions of the entire parcel to the original owners or shareholders. As to whether the said initial 126 members still owned or transferred their proprietorship to other persons and whom was not an issue. In any event if that ever arose, it would have to be sorted as between the respective parties or claimants. The parties herein were not parties in the former suit and the issues in dispute herein were not adjudged in that suit.
32. Again, the suit land in the former suit was 1351 acres comprising of LR. No. 5777/3 whereas herein it was only 2 acres of part of the entire parcel of LR. No. 5777/3. It cannot by any stretch of imagination



be said to be the same. In any event the issue herein is the determination of the true ownership of the 2 acres sued over and trespass and injunction. All these cannot amount to sufficient reason that can make this Court find that the judgment herein be reviewed. It is my view that the Applicants moved this Court in the instant Application with mischief, vexation, and in an abusive manner of its process. The requirements of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules have not been satisfied. There is no analogous reason to the other reasons for reviewing of a decision that has been set out by the Applicants. They are only splitting hairs and merely abusing this Court's process.

33. The Applicants contended that the Plaintiff/Respondent lacked locus standi to institute this suit. Their argument was that the Plaintiff having not been among the 126 members referred to in Kitale ELC No. 145 of 2015 to whom the land in issue therein was to be transferred to, he did not have the capacity to institute the instant suit. I have stated that the parties, causes of action, reliefs sought and findings of the Court in the two matters are greatly dissimilar. The claim of membership of the Plaintiff in Kitale ELC No. 145 of 2015 cannot in any way be related to the claim of ownership and trespass onto and an injunction against occupation of 2 acres of land, as in this case. The Plaintiff had all it takes, that is to say, the locus standi, to institute the instant suit. I reject the Applicants' contention.
34. The application was only a ploy to delay the execution of the decree of this Court, to buy time from moving out of the land or being evicted, and the Court shall not therefore entertain such kind of behavior. The Application is not one that falls within the limbs in which a review can be granted. There is no sufficient cause to review the judgment herein. The application is totally unmeritorious.
35. I could have said much about representation of the Applicants herein but I considered Article 159(2) (d) of the *Constitution*, 2010 regarding the requirement that justice be administered without undue regard to procedural technicalities and decided to resolve the instant Application on merits before considering the issue of representation. It is not that the issue of representation of parties is trivial and or a mere technicality: it is fundamental. But the circumstances herein are slightly different from those that would entitle this court to proceed to determine the Application on failure to comply with the provision. What appeared to me from the record, as will be seen below, is that the Applicants did their best to comply with the law regarding representation but failed to so do due to some miscommunication or misunderstood facts regarding representation. I could therefore not fault on them on that because there might have been instructions given earlier to counsel who entered into the consent to permit the Applicants' counsel to be on record but the instructions may not have been acted upon.
36. Having made findings on it, I now move to the deciding whether or not the Applicants are properly represented. Order 9 Rule 9 of the *Civil Procedure Rules, 2010* provides that if a change of advocates is to be effected or acting in person by party who has been represented by an advocate are to be done after judgment is entered, then an application has to be filed and served on all parties prior to that or a consent to be entered into between the outgoing advocates and the incoming ones and filed.
37. In this matter, as far as the Court record bears, as at the time of execution of judgment the firm of Ms. C.K. Yano & Company represented the Defendants. When the instant Application was filed, it was done after the counsel purporting to act for the Defendants filed a Notice of Change of Advocates after filing a consent entered into between themselves and the firm of Ms. D. M. Wanyama & Co. Advocates stated therein that they were acting for the Defendants. In the Court file there is neither a Notice of Change of Advocates filed by the said law firm on taking over matter from Ms. C. K. Yano & Co. Advocates nor an appointment by them after, if any, the Defendants acting in person prior to the judgment. To the extent the procedure was not followed, the instant application and its antecedent



supporting document in form of a Notice of Change of Advocates are incompetent. I would strike them out but since I have indicated that the Application is unmerited, it is dismissed.

(b) Who to bear the costs of the Application

38. The Application has been lost miserably. As to who is to bear the costs of the Application, it is clear costs follow the event and Section 27 of the *Civil Procedure Act* clearly provides that unless there are good reasons to be recorded by the Court, the one who loses the prayers to Court bears the costs thereof. Herein are four Defendants against whom the judgment was entered. The 3rd and 4th Defendants did not challenge the judgment by way of the instant application. They must have seen the light after their ‘road to Damascus’ ended with the (flash of the) judgment of the Court and thrown in the towel. They therefore cannot be condemned to bear costs which they did not occasion. Only he who rattles a snake should be bitten by it. Thus, the 1st and 2nd Defendant having subtly moved the Court in an application that ought not to have been urged will bear the costs thereof.

39. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 18TH DAY OF JANUARY, 2023.

HON DR IUR FRED NYAGAKA

JUDGE, ELC KITALE.

