



REPUBLIC OF KENYA



KENYA LAW
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**Nderitu v Ali & 2 others (Environment & Land Case 200 of 2015)
[2023] KEELC 15754 (KLR) (20 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 200 OF 2015
MAO ODENY, J
FEBRUARY 20, 2023**

BETWEEN

DOUGLAS IKUA NDERITU PLAINTIFF

AND

OMAR ALI 1ST DEFENDANT

ABDUL RATIF 2ND DEFENDANT

COUNTY GOVERNMENT OF KILIFI 3RD DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated March 14, 2022 by the Plaintiff/Applicant seeking the following orders: -
 - a) Spent
 - b) That this Honourable court be pleased to issue a temporary order of stay of execution of judgement delivered on July 10, 2020 by Hon JO Olola and the decree issued on February 2, 2021 and all other subsequent orders or any proceedings before the Deputy Registrar pending inter- parties hearing.
 - c) That upon granting the above prayer and upon inter- parties hearing, this Honourable court be pleased to review and thereafter discharge, vary or set aside the judgment and consequential orders thereof.
 - d) That upon granting the above prayer, this Honourable court be pleased to order and direct that a Comprehensive Physical planning and Survey reports be conducted and be filed in court for the purposes of ascertaining whether the Plaintiff's renovation of old houses have encroached into the 1st and 2nd defendants' plots.



- e) That upon granting the above prayer, this Honourable court do find it proper that the 1st and 2nd defendant do not own any plot on the disputed areas.
- f) That costs of this application be in the cause

Applicant's Case

- 2. The application is premised on the grounds on the face of the application and the supporting affidavit of the Applicant who deponed that he filed a suit against the Defendants/Respondents which was heard and determined and judgment delivered against him.
- 3. It was the Applicant's case that he was aggrieved by the judgment of the court and instructed his former advocate to prefer an appeal but he failed to do so. He further state that this Honourable court was misled and misdirected to believe that the 1st and 2nd Defendants/Respondents own plots which was not the fact and failed to note that the 1st and 2nd Defendants/Respondents are owners of only one residential house without land hence there was no issue of encroachment at all as was decided by the court.
- 4. The Applicant further stated that the court misdirected itself by assuming and reaching a decision that the renovation of the old Swahili house which had four rooms and he renovated to create six rooms had encroached on the Defendants/Respondents which was not the case.
- 5. The applicant also deponed that the 1st and 2nd defendants filed a Bill of Taxation and proceeded to have it taxed without his knowledge and as a result he was condemned unheard.

Defendant/respondents' Case

- 6. The 1st and 2nd Defendants filed a joint replying affidavit stating that judgment was delivered against the Plaintiff on July 10, 2020 in the presence of the parties and the Plaintiff's advocates Messrs. Richard Otara & Company advocates were served with a draft decree on February 5, 2021.
- 7. That the Plaintiff has not filed any appeal but chose to move the court almost two years post judgment delivery and at no point was the court misled or misdirected to believe that the Defendants owned the land.
- 8. The Respondent further deponed that the Plaintiff in suing the 3rd Defendant, gave rise to investigations by the physical planning office who produced reports dated November 27, 2015 and March 9, 2016 confirming that the Plaintiff had encroached on to a road reserve as well as the property occupied by them and the issue in relation to house without land and not encroachment was dealt with by Hon Justice JO Olola in the judgment.
- 9. The 3rd Defendant/Respondent filed grounds of opposition dated April 11, 2022 opposing the Plaintiff's application on the grounds that the application does not conform to the requirements of Order 9 Rule 9 of the *Civil Procedure Rules, 2010*, the Plaintiff's advocate lacks locus standi to make the prayers before this Honorable court and is an abuse of court process.

Plaintiff/applicant's Submissions

- 10. Counsel reiterated the Applicant's averments and submitted that the court rendered an unjust verdict to the detriment of the Plaintiff therefore should be reviewed and judgment and consequential orders set aside.



11. On the issue whether counsel is properly on record, counsel submitted that he conformed with the provisions of Order 9 Rule 9 by having a consent between the firm of Richard Otara and Company advocates and AM Omwancha and Company advocates.
12. Counsel relied on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules and submitted that the application has met the threshold for review. Counsel also cited the cases of *Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR* and *Pancras T Swai v Kenya Breweries Limited [2014] eKLR*.

Respondents' submission

13. Counsel for the Respondents submitted that the application has not met the provisions of Order 45 rule 1 hence the application lacks merit, and further that the Applicant has not produced any new evidence as per the criteria set out in the case of *Stephen Gitbua Kimani V Nancy Wanjira Wariungi T/A Providence Auctioneers [2016] eKLR*.
14. It was counsel's argument that the Plaintiff's advocate is not properly on record relied on Order 9, rule 9 of the Civil Procedure Rules on the issue of change of Advocate after judgment.
15. Counsel further submitted that the Applicant has not established that there is a mistake or apparent error on the face of the record or sufficient reason to warrant a review and relied on the cases of *National Bank of Kenya Limited V Ndungu Njau, CA No 211 of 1996, [1997] eKLR* and *Sardar Mohamed v Charan Singh Nand Singh [1959] EA 793*, and urged the court to dismiss the application with costs.

Analysis And Determination

16. The issue for determination is whether the application meets the threshold for review as envisaged under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.
17. I reproduced the averments of the Plaintiff/Applicant where he stated that the 'he was aggrieved by the judgment of the court and instructed his former advocate to prefer an appeal but he failed to do so. He further stated that this Honourable court was misled and misdirected to believe that the 1st and 2nd defendants/respondents own plots which was not the fact and failed to note that the 1st and 2nd defendants/respondents are owners of only one residential house without land hence there was no issue of encroachment at all as was decided by the court.'
18. Looking at the grounds upon which the Applicant is seeking for review, it is evident that this is the wrong forum as what ideally the Applicant is seeking for is that this court sits on appeal of its own judgment. The Applicant is aggrieved by the judgment and states that the court misdirected itself, was misled hence reaching an unjust decision. This the language of a memorandum of appeal and this should be directed to the next level court which is the Court of Appeal.
19. The governing law on review of court orders in civil proceedings is set out in Section 80 of the *Civil Procedure Act* as read with Order 45 (1) of the Civil Procedure Rules. Section 80 of the Act gives the court power or jurisdiction to review its own orders while Order 45 (1) defines the parameters within which that power should be exercised.
20. Section 80 of the Act provides as follows; -

' 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.'
21. Order 45 Rule (1) (b) provides that a party seeking review of court orders must satisfy any of the following conditions: -
- i. That he had discovered a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be provided at the time the decree or order subject matter of the application was issued;
 - ii. That there was some mistake or error apparent on the face of the record;
 - iii. That there exists other sufficient reason(s) to warrant the review sought; and
 - iv. That the application was made without unreasonable delay.
22. There is nowhere in the application or averments to the effect that the Plaintiff has discovered new and important evidence which was not within his knowledge and could not have provided during the hearing. What the Applicant is complaining about is his grievance with the judgment and according to him the court misdirected itself and was misled by the Defendants.
23. The Plaintiff also seeks to introduce new evidence where he prayed that upon review the court do direct that a comprehensive Physical planning and survey be conducted and a report filed in court for ascertain whether the Plaintiff's renovation of old house has encroached onto the 1st and 2nd Defendant's plots.
24. In the case of *Evan Bwire v Andrew Aginda Civil Appeal No 147 of 2006* cited fin the case of *Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR* the Court of Appeal held as follows:
- ' An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.'
25. The upshot is that the Applicant has failed to demonstrate that there is any mistake or error apparent on the face of record and/or any sufficient reason to enable this court set aside its decision. The application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF
FEBRUARY, 2023.**

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

