



**Nyokabi v Kendagor & another (Environment & Land Case  
208 of 2012) [2023] KEELC 840 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 840 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 208 OF 2012  
FM NJOROGE, J  
FEBRUARY 16, 2023**

**BETWEEN**

**EUNICE NYOKABI ..... PLAINTIFF**

**AND**

**JAMES CHEPYATOR KENDAGOR ..... 1<sup>ST</sup> DEFENDANT**

**SIMON KIPLAGAT ROTICH ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of the defendant's Notice of Motion application dated August 2, 2022 brought under order 45 rule 1(2), rule 2(2) and rule 3(2) of the [Civil Procedure Rules](#) which seeks the following prayers:
  - a. That this honorable court be pleased to review its judgement dated October 30, 2018 and subsequent decree herein.
  - b. That this honorable court be pleased to issue an order of eviction and demolition against the plaintiff Eunice Nyokabi from land known as Baringo/Perkerra 101/791 and the in charge Kapdainig Police Station to ensure and/or aid compliance.
  - c. That the plaintiff bears the costs of this application.
2. The application is supported by the grounds on its face and in the supporting affidavit of Simon Kiplagat Rotich sworn on August 02, 2022. He deposed that the judgement and decree of the court dated October 30, 2018 is insufficient; that despite the findings of the court that there was no basis to interfere with the 2<sup>nd</sup> defendant's title, the plaintiff has defied the court's findings and continued to occupy the suit parcel of land; that it is necessary to issue an order of eviction and demolition against the plaintiff in respect of land parcel no Baringo/Perkerra 101/791; that the officer in charge Kapdainig police station should ensure compliance; that the 2<sup>nd</sup> defendant filed Nakuru ELC no E16 of 2021



Simon Kiplagat Rotich vs Eunice Nyokabi seeking eviction orders against the plaintiff herein; that the court hearing Nakuru ELC no E16 of 2021 observed that he ought to have sought a review instead of filing another suit; that there is a pending appeal filed by Eunice Nyokabi which is Civil Appeal no 44 of 2019 Eunice Nyokabi Versus James Chepyator Kendagor and Simon Kiplagat Rotich which has never been admitted; that he will suffer irreparably if his application is not allowed since there is a judgment in force that he is yet to enjoy and that the plaintiff should not be allowed to continue disobeying the orders of court.

3. In response to the application, the plaintiff filed a replying affidavit sworn on September 19, 2022 and filed on September 26, 2022. She deponed that the application has been filed four years after the delivery of the judgment and therefore it has been filed after unreasonable delay; that order 45 rule 1 of the Civil Procedure Rules provides for grounds for review; that she is advised by her advocates on record that orders of review cannot be granted without a glaring omission, evident mistake or similar error; that there is no error apparent on the face of the record that is supposed to be cured; that the judgement sought to be reviewed is subject to an appeal which is Nakuru Civil Appeal no 7 of 2019; that this court is therefore *functus officio* and does not have any capacity to interfere with its judgment since it is subject of an appeal at the superior court and that the application should for that reason be dismissed.
4. The application was canvassed by way of written submissions. The plaintiff filed her submissions dated November 22, 2022 on November 24, 2022 while the defendants did not file any submissions.
5. The plaintiff in her submissions identified the following issues for determination;
  - a. Whether this court has authority to issue eviction orders in light of it being *functus officio*;
  - b. Whether this court can review its own judgement, in the circumstances of this case;
  - c. Who should bear the costs of this suit?
6. On the first issue, the plaintiff submitted that the court in its judgement delivered on October 30, 2018 dismissed her suit and that the 2<sup>nd</sup> defendant did not have a counterclaim and therefore there was no positive order issued in his favor. She relied on the cases of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550, Election Petitions nos 3, 4 & 5 *Raila Odinga & others vs IEBC & Others* [2013] eKLR, *Kenya Airports Authority vs Mitubell Welfare Society & 2 Others* [2016] eKLR and submitted that the court is *functus officio* and it therefore does not have the authority to reopen the case.
7. On the second issue, the plaintiff relied on the case of *Dock Workers Union & 2 Others vs Attorney General & another Kenya Ports Authority & 4 Others (Interested Party)* [2019] eKLR and submitted that the 2<sup>nd</sup> defendant's application for review does not fall under the grounds upon which orders of review can be granted. The plaintiff relied on various cases including the case of *Tiwi Beach Hotel Ltd vs Brown* Nairobi HCC No. 136 of 1982 [1993] KLR 595 in support of her arguments.
8. The plaintiff concluded her submissions by seeking that the 2<sup>nd</sup> defendant's application be dismissed.

### **Analysis and determination**

9. After considering the application, replying affidavit and submissions, the only issue that arises for determination is whether the court should review its judgment delivered on October 30, 2018 and issue an order of eviction and demolition against the plaintiff Eunice Nyokabi.
10. Section 80 of the *Civil Procedure 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.

11. Order 45 rule 1 of the Civil Procedure Rules provides as follows:

1.

- (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.

12. The Court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR held as follows:

“Section 80 gives the power of review and order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”

- 13. The defendants in this matter are seeking that the judgement delivered on October 30, 2018 be reviewed and an order of eviction be issued against the plaintiff.
- 14. The plaintiff on the other hand argues that the 2<sup>nd</sup> defendant did not file a counterclaim seeking eviction orders and therefore there is no basis for the court to review its orders.
- 15. A perusal of the defendant’s Statement of Defence dated November 9, 2009 and filed on November 10, 2009 shows that the defendants denied the plaintiff’s claim, sought the dismissal of the plaintiff’s suit and did not seek for orders of eviction.



16. Grounds upon which a court may review its orders are very specific as provided for under order 45 rule 1. I am in agreement with the plaintiff that the reasons given by the defendants in support of their application do not fall under the circumstances provided for under order 45 rule 1 of the Civil Procedure Rules.
17. It is this court's view that the defendants herein have not demonstrated that they have discovered new evidence which was not within their knowledge and neither is there any error apparent on the face of the record to warrant review of the court's judgement. There is no any other analogous ground upon which this court can issue an order of review.
18. The upshot of the foregoing is that the defendants' application dated August 2, 2022 lacks merit. It is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

