Kibett v Kangogo (Civil Appeal 107 of 2005)
[2024] KEHC 3068 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3068 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL 107 OF 2005

SM MOHOCHI, J

MARCH 18, 2024

BETWEEN

KANGOGO KIBETT .... APPLICANT

AND

JAMES CHANGWONY KANGOGO .... RESPONDENT

RULING

1. The Applicant moved Court vide the Notice of Motion dated 1st of March 2021 pursuant to Articles 40,47,48 and 159 of the 2010 Constitution, Sections 1A, 1B and 3A of the *Civil Procedure Act* CAP 21 Laws of Kenya, Order 9 Rule 9, Order 40 Rule 1, Order 45 Rule 1 and Order 51 of the *Civil Procedure Rules* together with the enabling provisions of the law seeking the following Orders;

    i. Spent

    ii. Spent

    iii. That, this Honourable Court be pleased to interpret the Decree herein 4 of the Decree and bring it to conformity with more so paragraph Judgement herein.

    iv. That, also this Honourable Court be pleased to interpret the meaning of the Decree herein vis a vis the acreage of land entitled to the Respondent in the judgement herein.

    v. Cost of the application be borne by the Respondent.

2. Judgment was entered by Justice D. Musinga as he then was on the 20th December 2006 and a decree thereon was extracted on 9th May 2007, Execution was undertaken and the Respondent moved out of the Suit property and relocated to Chelele where the Appellant had alleged he had constructed a house for him. He remained with peaceful and quite enjoyment albeit without title until the 1st of March

2021 when the Applicant moved Court under certificate of urgency after Thirteen (13) years, Nine (9) months and Twenty (20) days or a total of Five Thousand and Forty-Five (5,045) days.

3. The Application was supported by the sworn Affidavit of Kangogo Kibett has based his Application on the following six (6) grounds inter alia that;

 i. That, the judgement delivered by this Honorable Court On 20th December, 2006 and the Decree extracted on 9th May, 2007 are contradicting and used by the Respondent to unjustly enrich himself.

 ii. That, the Respondent is relying on the faulty Decree to evict the plaintiff from his lawfully acquired land at Chelele, Plot No. 16.

 iii. That, the Respondent is only entitled to 2 Acres of land at a place known as Chelele as rightly put in the Judgement herein but not the whole piece of land belonging Richard Koyima Kangogo who sold the 2 Acres to the Appellant/ Applicant.

 iv. That, the Respondent cannot use the Decree to acquire more land than that was contemplated by the judgement.

 v. That, since Equity looks at that as done which ought to be done, it therefore follows that the Respondent cannot vest himself land which is more in acreage than that that was provided in the Judgement herein.

 vi. That, it is in the interest of justice that the application be heard on priority basis to protect the interest of the Applicant.

4. It was the Applicant's averment in his sworn Affidavit;

 i. That, he owns some 2 acres of land at Kimorok farm at a place known as Chelele which I purchased from one Richard Koima Kangogo.

 ii. That, he allocated 2 acres of land from the above-mentioned land parcel to the Respondent which this Honourable Court noted in its Judgement.

 iii. That, however, the decree extracted by the Respondent and more especially paragraph 4 is coached in fraudulent terms to mean that the Judgment delivered herein meant that the whole of the above-mentioned land should be vested in the Respondent.

 iv. That, are conflicting as to what the respondent is entitled to.

 v. That, the Decree should reflect the judgement but no more.

 vi. That, as a result of the above, paragraph 4 of the decree should be reviewed to read the Respondent is entitled to 2 acres of the land above mentioned but not the whole of land parcel that belongs to Richard Koyima Kangogo.

 vii. That, allowing the decree as it is, will unjustly enrich the Respondent and will also amount to abusing the sole intention of the judgement herein.

 viii. That, since when the Judgement of this Honourable Court was delivered in 2006, he learnt of the decree this year when the Respondent attempted to enforce it to my detriment.

5. This Application had been dismissed for want of prosecution on the 24th February 2023 only for Mr. Nyagaka Advocate in a quick succession to file an application to reinstate dated 1st March 2023, the Application which Application was allowed undefended on the 19th September 2023.

6. Parties were directed to file submissions with respect to the reinstated Application dated 1st March 2021of which the Applicant duly complied on the 28th September 2023 while the Respondent filed written submissions on the 19th October 2023 in relation and opposition to the Application dated 1st March 2023 that was spent.

Analysis and Determination.

7. After carefully consideration of the evidence adduced, the parties' rival written submissions as well as the authorities relied on by the parties, what is whether the Applicant has met the threshold to grant the orders sought.

8. Section 1A. of the *Civil Procedure Act* provides for Objective of Act

    (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

    (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

    (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

9. Section 1B. of the *Civil Procedure Act* provides for Duty of Court

    (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

        (a) the just determination of the proceedings;

        (b) the efficient disposal of the business of the Court;

        (c) the efficient use of the available judicial and administrative resources;

        (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

        (e) the use of suitable technology.

10. Section 3A. Provides for the Saving of inherent powers of Court.

    Nothing in this Act shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

11. Section 63 provides for supplemental proceedings in order to prevent the ends of justice from being defeated.

> (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
>
> (e) make such other interlocutory orders as may appear to the Court to be just and convenient.

12. Section 80 of the *[Civil Procedure Act](#)* Cap 21 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."

13. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 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."

14. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held: -

> " 12. 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."

15. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held: -

> “ Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or “for any sufficient reason.” ... As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”

16. 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 exist: -
>
> (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”.

17. It is the relevant one in this matter as it relates to ‘judgments, decrees or orders. This Court examined the mechanics of its application in the case of *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR , stating:-

> “
>
> “ 27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the Court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.
>
> Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.”

18. The Australian Civil Procedure has provisions in *pari materia* with section 99. As was stated in the case of *Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc* [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the Court intended.

19. Nearer home the predecessor of this Court in *Lakhamshi Brothers Ltd v R. Raja & Sons* [1966] EA 313 endorsed that application of the rule, that is, to give effect to the intention of the Court when it

gave its judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted. Spry JA in Raniga Case (supra) also stated as follows: -

> " A Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention.
>
> What is certainly not permissible in the application of section 99, is to ask the Court to sit on appeal on its own decision, or to redo the case or application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order".

20. In Consideration of my unfettered discretion the Court has keenly considered the sworn Affidavit of the Applicant and finds the following;

    i. There was no inkling or suggestion of discovery of any new material which after exercising due diligence could not have been discovered earlier;

    ii. There is no suggestion of a mistake or error apparent on record that is sought to be reviewed;

    iii. No reason (sufficient or otherwise) has been advanced as to why the Court should review a judgment or decree after Thirteen (13) years, Nine (9) months and Twenty (20) days or a total of Five Thousand and Forty-Five (5,045) days.

    iv. The Applicant appear unperturbed by the delay in seeking the review but has maintained a stealth silence and making no case to justify the case as not been unduly delayed.

21. The Orders sought for interpretation of a judgment or decree are equally untenable with no place in review procedure I thus find that the Application dated 1st March 2001 is devoid of merit and accordingly dismiss the same.

22. While Appreciating that this is a family issue, the Court is constrained to condemn the Applicant to costs for filing this motion that for all intents and purpose is an abuse of the process of the Court.

23. Costs of this Application shall be awarded to the Respondent

Orders accordingly.

SIGNED, DATED AND DELIVERED

AT NAKURU ON THIS 18TH DAY OF MARCH 2024.

____

MOHOCHI S. M.

JUDGE