



Karimi & 2 others v National Land Commission & 5 others (Environment and Land Miscellaneous Application 12 of 2021) [2023] KEELC 16356 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16356 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 12 OF 2021
JO OLOLA, J
MARCH 23, 2023**

BETWEEN

**JORAM MUKURI KARIMI 1ST APPLICANT
KIMANI MUCHIRI MUBAGAYA 2ND APPLICANT
PETER MWANGI KAGAI 3RD APPLICANT**

AND

**THE NATIONAL LAND COMMISSION 1ST RESPONDENT
THE COUNTY GOVERNMENT OF NYERI 2ND RESPONDENT
KENYA INFORMAL SETTLEMENT IMPROVEMENT PROGRAMME 3RD
RESPONDENT
GEORGE MAINA NJOROGE 4TH RESPONDENT
PETER NJATHI WAIGWA 5TH RESPONDENT
STEPHEN KAGOKO MAINA 6TH RESPONDENT**

RULING

1. By the Notice of Motion dated and filed herein on June 7, 2022, the three applicants urge the court to be pleased to review and/or set aside its ruling delivered on May 19, 2022 and to instead order the maintenance of status quo pending the hearing and determination of this application.
2. The application which is supported by an Affidavit sworn jointly by the three (3) applicants is premised on the grounds:
 - (a) That on May 19, 2022 the court dismissed the applicants' application dated August 24, 2021 on account of apparent error on the face of the record;



- (b) That the court did not consider crucial evidence which was in court record and which could have made this court to rule otherwise;
 - (c) That the honourable court did not consider that a copy of the judgment was part of the proceedings requested for by the applicants hence lack of it would have hindered the applicants from preparing their Memorandum of Appeal in time;
 - (d) That further, the court failed to consider that from the said copy of judgment, the applicants were not present during the delivery and hence could not prepare their Memorandum of Appeal until a copy of the judgment was supplied to them;
 - (e) That from the foregoing, it is apparent from the face of the record that the court erred in holding that the request for proceedings was not a satisfactory explanation for the delay in filing the appeal;
 - (f) That the honourable court failed to consider that no prejudice would have been suffered by the respondents if the extension to file the Memorandum of Appeal was granted to the applicants;
 - (g) That also, the honourable court failed to consider that the delay occasioned by the applicants was not inordinate since they endeavoured to process the proceedings within the shortest time possible.
 - (h) That there are thus material errors on the face of the court record and hence there are sufficient grounds for the court to review its earlier orders as prayed;
 - (i) That this application has been brought in good faith; and
 - (j) That it is only just and expedient that this application be allowed.
3. The county government of Nyeri (the 2nd respondent) is opposed to the grant of the orders sought in the application. By its Grounds of Opposition dated June 29, 2022, the 2nd respondent states:
- 1. That the application as filed does not meet the parameters for review under order 45 rule 1 of the Civil Procedure Rules, 2010; and
 - 2. That the prayer sought is untenable as the applicants want to substitute the ruling delivered on May 19, 2022 with an order of *status quo* pending the hearing and determination of the application. Granting the prayer will thus be in vain and will serve no purpose.
4. George Maina Njoroge, Peter Njathi Waigwa and Stephen Kagoko Maina (the 4th, 5th and 6th respondents respectively) are equally opposed to the grant of the orders sought. By their Grounds of Opposition dated June 28, 2022, the said respondents object to the application on the grounds that:
- 1. That application lacks merit is misconceived is a gross abuse of the court process and untenable;
 - 2. The application is frivolous, vexatious and with no basis in law;
 - 3. The advocates for the applicant are irregularly on record having not sought leave as required by the law Civil Procedure Rules, order 9 rule 9;
 - 4. That no new and important matter or evidence has been brought to warrant review of the said ruling as required under order 45 rule 1. Hence the applicants should have preferred an appeal as the honourable court is *functus officio*; and
 - 5. The application is bad in law and ought to be dismissed as it infringes on the proprietary rights of the 4th, 5th and 6th respondents as enshrined in the Constitution under article 40.



5. In further response to the application, the 4th, 5th and 6th respondents have sworn and filed a Replying Affidavit sworn on their behalf by the 4th respondent and filed herein on June 29, 2022 wherein they reiterate that the application is bad in law and that it does not meet the threshold for review as set out under order 45 rule 1 of the Civil Procedure Rules.
6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the learned advocates representing the parties herein.
7. By their application before me, the 3 applicants urge the court to review and/or set aside its ruling delivered herein on May 19, 2022 and in its place to grant “an order maintaining *status quo*” pending the hearing and determination of this application.
8. On matters of review, order 45 rule 1 of the Civil Procedure Rules pursuant to which the application is brought provides as follows:
 - (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 the judgment to the court which passed the decree or made the order without unreasonable delay ...”
9. The foregoing provisions are founded on section 80 of the [Civil Procedure Act](#) cap 21 laws of Kenya which states as follows:

“ Any party who considers himself aggrieved –

 - (a) by a decree or an order from which an appeal is allowed by this Act, but from which no appeal has been preferred;
 - (b) by a decree or order from which no appeal is allowed by this Act;

May apply for a review of the judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
10. It is clear from the foregoing that the review remedy is only available to a party who, though he has a right to challenge the decision in question by an appeal, is not appealing or one who has no right of appeal.
11. An order for review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error however must be self-evident and should not require an elaborate argument to be established. It is also trite law that it will not be sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.



12. As was stated in *Nyamogo & Nyamogo vs Kogo* (2001) EA 170:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefinitiveness inherent in its very nature and it must be defined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by along drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

Again, if a view adopted by the court in the original record is a possible one, it cannot be an error on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

13. In the matter before me, the applicants urge the court to review its orders of May 19, 2022 on account that the court did not consider crucial evidence which was in the court record and which should have made the court rule otherwise. They fault the court for failing to consider that they did not have a copy of the judgment they required to enable them appeal in time and that they could not prepare a Memorandum of Appeal when they had not been present when judgment was rendered in the lower court. Those in my humble view are grounds for an appeal and not for review.

14. As was stated in *National Bank of Kenya Limited vs Ndungu Njau* (1996) KLR 469 (CAK) at page 381:

“In my discernment an order cannot be reviewed because it is shown that the Judge decided the matter on a foundation of incorrect procedure and or his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case ... In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborative argument to expose.”

15. It follows in the circumstances herein that I did not find any basis for the application before me and I hereby dismiss the same with costs to the respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 23RD DAY OF MARCH, 2023.**

In the presence of:

Ms Wangechi for the applicant

No appearance for the respondents

Court assistant - Kendi

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J O Olola

JUDGE

