



**Orioki v Olweny & another; Masese (Interested Party) (Environment & Land Case 266 of 2017) [2023] KEELC 16299 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16299 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 266 OF 2017  
A OMBWAYO, J  
MARCH 16, 2023**

**BETWEEN**

**WINFRIDA GESARE ORIOKI ..... PLAINTIFF**

**AND**

**ELIAKIM WASHINGTON OLWENY ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN LUTHER AWUOR ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**KEFAH GWARO MASESE ..... INTERESTED PARTY**

**RULING**

1. The plaintiff herein filed the Notice of Motion application dated January 31, 2023 brought under Article 159(2) of *the Constitution of Kenya 2010*, Section 1A, 1B, 3A & 80 of the *Civil Procedure Act*, and Order 45 Rule 1 of the *Civil Procedure Rules* seeking for orders that;
  - a. Spent
  - b. That this honourable court be pleased to set aside and/or vacate its ruling delivered on December 20, 2022 and all subsequent orders and decrees arising therefrom.
  - c. That this honourable court do grant the plaintiff/applicant leave to amend its plaint.
  - d. That grant of prayer 2 and 3 above, status quo ante December 20, 2022 be maintained on land parcel number Njoro/Ngata Block 9/28 (Mwangaza) pending the hearing and determination of the main suit herein.
  - e. Any further orders this honourable court may deem fit and just to grant..



- f. That costs of this application be provided for.
2. The application was based on the grounds that the plaintiff is the legal owner of land parcel No Njoro/ Ngata Block 9/28 (Mwangaza) which she has been in occupation of since January 10, 2009 to date. That pursuant to the court orders issued by this court on December 20, 2022, the Interested Party has attempted to evict the plaintiff from the suit property. That there is an error apparent on the face of the record as the orders do not allow the interested party to evict the plaintiff, the interested party did not prosecute his case as against any of the other parties and the suit was therefore dismissed prematurely. That the application is made to arrest the actions of the interested party and to invite the court to review its decision and allow the parties to prosecute their claims. That the Interested party will not be prejudiced in any way if the orders sought are granted. That unless the orders sought herein are granted, the plaintiff will suffer irreparable losses, damages and mental pain.
  3. The application is supported by the supporting affidavit sworn by the plaintiff on January 31, 2023. She reiterated the grounds on the face of the application and stated that she is advised by her advocates that based on the documents on record, the interested party's claim against the plaintiff and considering that all the defendants are dead, it would be fair that the suit proceeds between the plaintiff and the interested party and that she be directed to amend her plaint appropriately. That the interested party is claiming her suit property and yet as per the sale agreement dated February 4, 2009, the Interested Party purchased land parcel No Njoro/ Ngata Block 9/43 (Mwangaza) which is different with her parcel of land No Njoro/ Ngata Block 9/28 (Mwangaza). That the plaintiff purchased her property before the Interested Party did and that instead of the Interested party being in occupation of his property, he is in possession of the suit property that belongs to the plaintiff. That at the time of institution of this suit, the plaintiff was not aware that the defendants were deceased and that her former advocates on record did not take the necessary steps to substitute them which mistake should not be visited upon her. That the nature of the claim herein warrants the amendment of the plaint and she therefore seeks that her application be allowed as prayed.
  4. The plaintiff filed a further affidavit sworn on February 15, 2023 and filed on the same day. She deposed that it has been brought to her attention that her previous advocates on record filed a notice of appeal and that she has no intention of appealing against the said ruling. That the plaintiff desires to pursue the present application and that the suit having abated against the defendants herein and the interested party having obtained a title deed to the suit property, the court should exercise its original jurisdiction and mandate the hearing and determination of the dispute between the plaintiff and the interested party. That the court needs to determine how the interested party purchased land parcel No Njoro/ Ngata Block 9/43 (Mwangaza) and ended up with a title deed for land parcel No Njoro/ Ngata Block 9/28 (Mwangaza).

The interested party did not file any response to the application.

### **Submissions**

5. The application was canvassed by way of written submissions. The plaintiff filed her submissions dated February 15, 2023 on February 23, 2023 while the interested party did not file any submissions.
6. The plaintiff in her submissions reiterated the contents of her supporting and further affidavits before relying on Order 24 Rule 7 of the [Civil Procedure Rules 2010](#) and submitted that if the court does not allow the present application, neither of the parties can pursue a claim in respect of the suit property herein.



7. The plaintiff further relied on Article 159(2)(d) of *the Constitution*, the cases of *Belinda Muras & 6 others vs Amos Wainaina* [1978] KLR, *Phillip Chemwolo & Another vs Augustine Kubede* [1982-88] and submitted that she is only seeking to revive the suit between herself and the interested party.
8. The plaintiff also submitted that the interested party having been joined in these proceedings has a stake which cannot be wished away by the abatement of the suit against the defendants and that is why she is seeking to amend her plaint and pursue her claim over the suit property. She relied on the case of *Meme v. Republic* [2004] 1 EA 124, Order 1 Rule 9, 10, Order 8 Rule 3 and 5 of the *Civil Procedure Rules*.
9. The plaintiff further relied on Order 45 Rule 1 of the *Civil Procedure Rules* and concluded her submissions by stating that it is in the interest of justice that her application is allowed as prayed.

### **Analysis and Determination**

10. The plaintiff is seeking for the court to set aside its ruling delivered December 20, 2022 and be granted leave to amend her plaint.

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.

Order 45 Rule 1 of the *Civil Procedure Rules* 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 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 appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review.



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

"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."

12. The interested party had filed the application dated July 13, 2022 which sought for the dismissal of the suit on the grounds that both the defendants were deceased. The Court in its ruling delivered on December 20, 2022 held that the suit had abated on November 28, 2017 and therefore dismissed the suit and closed the file. It is this ruling that the plaintiff is seeking for the court to review.
13. The court can only review its orders upon discovery of new evidence which after exercise of due diligence was not within the knowledge of the applicant, on account of some mistake or error apparent on the face of the record or for any sufficient reason.
14. The plaintiff alleged that there was an error apparent on the face of the record to warrant the court to review its orders. The plaintiff stated that the said orders of December 20, 2022 do not allow the interested party to evict the plaintiff, that the interested party did not prosecute his case as against any of the other parties in the suit and the suit was therefore dismissed prematurely.
15. The Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243 stated as follows on what constitutes an error apparent on the face of the record;

"In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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 a long drawn process of reasoning or 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

16. It is my view therefore that the grounds relied upon by the plaintiff in stating that there is an error apparent on the face of the record do not fall within what the law considers to be an error apparent on the face of the record.
17. The plaintiff alleges that at the time of the institution of the suit, she was not aware that the defendants were deceased and that she would have expected her previous counsel on record to take appropriate steps which was not done and so counsel's mistake should not be visited upon her.



18. The plaintiff further alleges that the interested party is claiming her parcel of land No Njoro/Ngata Block 9/28 (Mwangaza) and yet he had purchased land parcel No Njoro/Ngata Block 9/43. The plaintiff also alleges that she therefore has a cause of action against the interested party and the court should set aside its orders that dismissed the suit and she be allowed to amend her plaint.
19. It is my view that the reasons given by the plaintiff in support of her application do not fall within the parameters within which the court can review its orders as provided for under Order 45 Rule 1 of the [Civil Procedure Rules](#). In conclusion, the plaintiff's application dated January 31, 2023 lacks merit and should be dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**A. O .OMBWAYO**

**JUDGE**

