



**Kirobon Farmers Co. Ltd v Nyarangi (Environment & Land Case 29 of 2017) [2023] KEELC 16803 (KLR) (13 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16803 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 29 OF 2017  
FM NJOROGE, J  
APRIL 13, 2023**

**BETWEEN**

**KIROBON FARMERS CO. LTD ..... PLAINTIFF**

**AND**

**SAMUEL ONCHURU NYARANGI ..... DEFENDANT**

**RULING**

1. This ruling is in respect of the application dated 30/01/2023 filed by the defendant and brought under Order 45 and 51 of the [Civil Procedure Rules](#), 2010 and Section 3A of the [Civil Procedure Act](#) and seeks the following orders:
  - a. Spent
  - b. That this honorable court do issue orders for a joint site visit under the court's supervision to establish the facts and prevailing circumstances on the suit property before issuing any orders in reference to the plaintiff's applications dated 16<sup>th</sup> January, 2023 and 18<sup>th</sup> July, 2022.
  - c. That this honorable court do review the judgement dated on 21<sup>st</sup> June 2022 so as to consider the evidence of Sammy Kiplagat Yebei (DW3) who testified and grant the defendant's prayer for an eviction order against the plaintiff as prayed in the counter claim.
  - d. That the court do make any other or further orders in the interest of justice.
  - e. That the costs of this application be provided for.
2. The application is supported by the supporting affidavit sworn by the defendant on 30/01/2023. The grounds on the face of the application and the supporting affidavit are that the plaintiff has planted trees and maize on the suit property; that the plaintiff has pushed the defendant to only occupy two points of the 100 acres of the suit property; that the court should review its judgement issued on 21/06/2022 on the grounds that there is an error apparent on the face of the record as the court did not consider



- the evidence of Sammy Kiplangat Yebei (DW3) who testified on 18/01/2022; that he has not executed the judgement because there was no express directive that the plaintiff be evicted from the suit land and that it is in the interest of justice that the application be granted.
3. The defendant filed a supplementary affidavit sworn on 03/02/2023 on 06/02/2023. He reiterated the contents of his supporting affidavit and deposed that on 10/10/2022 the plaintiff through its agents went to the suit property and threatened to take away his livestock; that they immediately cut down a tree on the suit land and took timber; that his farm worker reported the issue to the Wila Anti Stock Theft Station; that on 11/10/2022 they came back and put up structures for water tanks; that on 13/12/2022 the plaintiff through its agents ploughed the entire parcel of land and left no space for his livestock to graze on; that based on the foregoing, the court should not grant any orders of stay as the plaintiff has been harassing him; that he cannot execute the said judgment as the court did not issue orders of eviction as sought in his counterclaim and that it is in the interest of justice that the court reviews its judgement and issue among other orders, an order of eviction.
  4. In response to the application, Samuel K. Birir filed a replying affidavit sworn on 20/02/2023 and filed on the same date. He deposed that the court issued orders restraining the plaintiff from the suit property but the plaintiff has filed an appeal and an application for stay pending appeal; that it is not true that the court cancelled the title for LR no Molo South/Langwenda Block 17/1 (Seguton); that the court had ordered that the lease and certificate of lease be canceled which was erroneous as the records of the lease and certificate of lease had already been rectified by the Land Registrar; that upon rectification of the lease and the certificate of lease, the Land Registrar on the same date issued the plaintiff with a title for LR no Molo South/Langwenda Block/17/1 (Seguton); that at the inception of this suit, the plaintiff's members were on the ground and sought for an injunction against the defendant; that the issue raised in the supplementary affidavit of the defendant has been dealt with in the applications dated 3/10/2022 and 12/10/2022 and the court ruled that they shall be determined on appeal; that the defendant instead of complying with the judgement of the court, he is attempting to intimidate the members of the plaintiff; that the defendant's application seeking for review shows that he is dissatisfied with the judgment of the court and that the only option available to him is to appeal; that the court is *functus officio* and has no jurisdiction to grant the orders sought.
  5. The defendant filed his submissions dated 28/02/2023 on the same date while the plaintiff did not file any submissions.
  6. The defendant relied on Section 80 of the [Civil Procedure Act](#), Order 45 Rule 1 of the [Civil Procedure Rules](#), the case of *Republic v Public Procurement Administrative Review Board & 2 Others* [eKLR] Petition 112 of 2018 and submits that the court's failure to consider the evidence of Sammy Kiplangat Yebei (DW3) who testified during the hearing, amounts to an error apparent on the face of the record and the court should review its judgement on that ground.
  7. The defendant also relied on the cases of [Anthony Gachara Ayub v Francis Mabinda Thinwa](#) [2014] eKLR, *Sadar Mohamed v Charan Signh and another* [6] [1963] EA 557 and submitted that upon the court granting orders of review of the judgement, it should also grant orders of eviction against the plaintiff. The defendant submitted that he has not been able to execute the judgement because there is no express directive that the plaintiff be evicted from the suit property.

### **Analysis and determination**

8. After considering the application, replying affidavit, supplementary affidavit and submissions, the only issue that arises for determination is whether the court should review its judgement so as to consider



the evidence of Sammy Kiplang'at Yebei (DW3) and grant the defendant's prayer for an eviction against the Plaintiff as prayed in the counterclaim.

9. 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.”

10. 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...

(2) A party who is not appealing from a decree or order may apply for 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.”

11. 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 unreasonable delay.”

12. The defendant is seeking that the court reviews its judgement on the grounds that there is an error apparent on the face of the record as the court did not allegedly consider the evidence of Sammy Kiplangat Yebei in its final judgement. The defendant further seeks that the court grants an order of eviction as sought in his counterclaim. The plaintiff on the other hand argues that the court is functus officio and the only remedy available to the defendant would be to appeal the said judgement.

13. As was held in the case of *Republic v Public Procurement Administrative Review Board & 2 others (supra)*, the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.



14. 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.”

15. First, this court has noted that at paragraph 14 of its judgment, the dates of the pleadings cited by the defendant’s counsel in submissions are different from those on the record; the defence and counterclaim said to be dated 14/3/2017 is actually dated 9/3/2017; the defence and counterclaim said to be dated 6/11/2018 is actually dated 19/11/2018. Of course, this erroneous reference was borne of an error in the defendant’s submissions and may not be consequential as long as the court was aware of both pleadings. It is clear from the proceedings of 8/11/2018 that the defence dated 9/3/2017 was substituted with the defence dated 19/11/2018 and that the latter defence included a prayer for eviction.
16. This court also observes that there is an error apparent on the face of the record in that it is the correct position that the evidence of the third witness for the defence was not considered in the judgement. The evidence of DW3 is as follows: that he has lived with the defendant for 32 years, that in the year 2017 some persons came and claimed the land. In his statement he stated that he went to Seguton in the year 1990 and that he bought his portion of land in the year 2000; that he learnt that the property in question belonged to Justice James Onyiego Nyarangi and his wife Margaret Moragwa Nyarangi; that he is aware that the defendant is an offspring of the late Justice James Nyarangi who continued to be in occupation of the land after his parents met their demise and there has never been an issue of ownership since 1977 until 2017 when persons known to him came onto the property and started claiming ownership; that when the agitation for titles occurred in September 2016 the local chief assured them that the late Nyarangi’s issue of ownership would be addressed. He also stated that at one time the OCS asked all parties to keep off the land except the defendant who was in possession thereof.
17. The evidence of DW3 wholly supported the defendant’s counterclaim and established that the plaintiffs had not been on the suit land and only started making forays into the property recently thereby trespassing on it.
18. At paragraph 27 of the judgment, it was stated without qualification that the defendant’s counterclaim must succeed yet the raft of orders finally given by this court in the same judgment omitted an order for eviction. This court is persuaded that the omissions herein above arose out of a mistake and they should be corrected by means of review as sought in the instant application.



19. Consequently, I find that the defendant's application has merit and must succeed in terms of prayer no (c). In respect of prayer no (b) this court observes that it has been overtaken by events since the applications dated 18/7/2022 and 16/1/2023 have already been determined.
20. The judgment of this court dated 21/06/2022 is hereby reviewed to include the summary and analysis given herein in paragraphs 16 and 17 respectively in this ruling above regarding the evidence of DW3 and also to include the following order just after Order no (d):
- “(d) The plaintiff and its members or officials shall remove themselves forthwith  
(i) from the suit land known as Molo South /Langwenda Block 17 /1(Seguton) and in default thereof they shall be forcibly evicted there from and the Officer Commanding Keringet Police station shall provide security for the eviction process.”
21. The judgment dated 21/6/2022 shall therefore be hereafter read and construed as including the above order at all times. The costs of the instant application shall be borne by the plaintiff.

It is so ordered

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 13<sup>TH</sup> DAY OF APRIL 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU.**

