



Kivelenge (Suing as the legal representative of the Estate of Kivelenge Nzano - Deceased) v Kivai & another (Environment & Land Case 208 of 2017) [2023] KEELC 17978 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17978 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 208 OF 2017**

TW MURIGI, J

MAY 31, 2023

BETWEEN

EUNICE NDUKU KIVELNGE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIVELNGE NZANO DECEASED) PLAINTIFF

AND

MATENGE N'THANO KIVAI 1ST DEFENDANT

FREDRICK MUTISYA KISILU 2ND DEFENDANT

RULING

1. Before me for determination is a Notice of Motion dated December 3, 2022 brought under articles 159(2)(d) of the *Constitution of Kenya, 2010*, sections 1A, 1B & 3A of the *Civil Procedure Act*, order 51 rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law in which the Applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. That in the alternative to prayer No. 2 herein above, should this Court be of the view that the hearing ought to proceed, the intended hearing be restricted only to the issues between the 1st and 2nd Defendants.
 4. That thereafter and upon the 2nd Defendant proving its claim against the 1st Defendant, this Honourable Court be pleased to reinstate the judgment dated and delivered on July 30, 2019 allowing the subdivision of land parcel No. Nzaui/Kalamba/25(hereinafter the suit property) to proceed in terms of 50% in favour of both the 1st and 2nd Defendants with a rider that the



2.2 acres sold to the 2nd Defendant by the 1st Defendant be hived off from the 1st Defendant's share and transferred to the 2nd Defendant.

5. That the costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Eunice Nduku Kivelenge sworn on even date.

The Applicant's Case

3. The Applicant averred that the suit between herself and the 1st Defendant was heard and determined vide the judgment delivered on July 30, 2019. That in its judgment, the Court ordered that the suit property be divided equally between herself and the 1st Defendant herein.
4. That in the process of preparing for the subdivision of the suit property, the 2nd Defendant sought for stay of execution pending the hearing and determination of his application to be enjoined in the suit herein.
5. That the Court vide a ruling delivered on July 24, 2019, set aside the judgment to enable the 2nd Defendant to file a defence so as to prosecute his suit against the 1st Defendant. She contended that the 1st and 2nd Defendant have a dispute for the reason that the 1st Defendant allegedly sold 2.2 acres to the 1st Defendant.
6. She further averred that she has no interest in the dispute between the Defendants and urged the Court to reinstate the judgment in terms of 50% in favour of both the 1st and 2nd Defendants with a rider that the 2.2 acres sold to the 2nd Defendant by the 1st Defendant be hived from the 1st Defendant's share of the suit property and be transferred to the 2nd Defendant. The Applicant contended that in the alternative, the hearing of the suit should be restricted to the issues between the 1st and 2nd Defendants.

The 1st Defendant's Case

7. Opposing the application, the 1st Defendant filed grounds of opposition dated December 20, 2022 on the following grounds:-
 - i. The application is grossly misconceived, a blow in darkness, incompetent, frivolous, vexatious, ill fated, spurious, unmeritorious and an abuse of the court process.
 - ii. The judgment delivered in this suit on July 30, 2019 was set aside in its entirety on July 24, 2020 thereby paving the way for the hearing of the suit de novo.
 - iii. The Plaintiff/Applicant ignored and neglected to appeal against the order for setting aside made on July 24, 2019.
 - iv. The application is misconceived and grossly incompetent in the sense that it purports to beseech the court to sit on appeal of the ruling of Justice Mbogo pronounced on July 24, 2019.
 - v. The application is so bad that one cannot fail to notice that the Applicant is talking about a judgment dated June 30, 2019 which is non-existent.
 - vi. That the application should be dismissed with costs.
8. The parties were directed to canvass the application by way of written submissions. The 1st Defendant urged the Court to dismiss the application for the reason that the Applicant did not file its submissions as directed.



Analysis And Determination

9. Having considered the application and the grounds of opposition, the only issue that arises for determination is whether the Applicant is entitled to the orders sought.
10. The Applicant is seeking to reinstate the judgment delivered on July 30, 2019 in terms of 50% in favour of both the 1st and 2nd Defendants with a rider that the 2.2 acres sold to the 2nd Defendant by the 1st Defendant be hived from the 1st Defendant's share of the suit property. That in the alternative, the hearing of the suit should be restricted to the issues between the 1st and 2nd Defendants. In a nutshell, the Applicant is calling upon this Court to review the judgment delivered on July 30, 2019.
11. The law that governs applications for review is set out in section 80 of the [Civil Procedure Act](#) and in order 45 rule 1 of the [Civil Procedure Rules](#).
12. 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.
13. Order 45 rule 1 of the [Civil Procedure Rules](#) provides that;
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.
14. The provisions of Order 45 were restated by the Court of Appeal in the case of [Benjob Amalgamated Limited & another Vs Kenya Commercial Bank Limited](#) (2014) eKLR where the Court held that: -

“In the High Court both the [Civil Procedure Act](#) in section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”



15. Similarly, in *Republic v Public Procurement Administrative Review Board & 2 others* (2018) eKLR the Court held that: -

“Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”

16. It is apparent from the above provisions that in an application for review, an Applicant must satisfy the following requirements: -

- 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.
- b. Existence of some mistake or error apparent on the face of the record.
- c. Any other sufficient reason.
- d. Application be made without unreasonable delay.

17. In the present matter, the Applicant has not shown that there is discovery of new or important matter of evidence that the Applicant could not have placed before the Court before the judgment was delivered on July 30, 2019.

18. The Applicant must establish that there is an error apparent on the face of the record. In the case of *Nyamogo & Nyamogo Advocates v Kogo* (2001) 1 EA 173 the Court of Appeal held as follows;

“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 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 a long drawn process of reasoning 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 possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.”

19. Similarly, in the case of *Timber Manufacturers and Dealers v Nairobi Golf Hotels (K)* HCCC No 5220 Of 1992, Emukule J held that;

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

20. The Applicant has not pin pointed or shown that there is an error apparent on the face of the record.

21. The Court finds no error apparent on the face of the judgment delivered on July 30, 2019.



22. The Court is also mandated to consider if there are sufficient reasons to review the Court’s judgment. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of *The Official Receiver and Liquidator v Freight Forwarders Kenya Ltd* (2000) eKLR stated that;

“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

23. The Applicant has not demonstrated any sufficient reason to warrant a review of the Court’s judgment.

24. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay. The judgment sought to be reviewed was delivered on July 30, 2019. The instant Application was filed on December 5, 2022. That duration is far from reasonable and the same has not been explained. In so finding I am persuaded by the holding in the case of *John Agina v Abdulswamad Sharif Aiwi CA* Civil Appeal No 83 of 1992 where the Court held stated as follows:-

“An unexplained delay of two years in making an application for review under order 44 rule 1 (now order 45 rule 1) is not the type of sufficient reason that will earn sympathy of the court.”

25. In the end, I find that the application dated December 3, 2022 is devoid of merit and the same is dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF MAY, 2023.

HON. T. MURIGI

JUDGE

In The Presence Of:-

Court assistant - Mr. Kwemboi

Ngolia for the 1st Defendant

Mukula for the 2nd Defendant

Hassan holding brief for Wambua for the Plaintiff.

