



**Mwongeli (Suing as an administrator of the Estate of Florence Mwongeli
Kiilu –Deceased) v Mbuvi & another (Environment & Land Case
288 of 2017) [2023] KEELC 17983 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 288 OF 2017**

TW MURIGI, J

MAY 31, 2023

BETWEEN

**ROBERT NGEI MWONGELI (SUING AS AN ADMINISTRATOR OF THE
ESTATE OF FLORENCE MWONGELI KIILU –DECEASED) PLAINTIFF**

AND

KATEVE KIILU MBUVI 1ST DEFENDANT

AIMI MA KILUNGU LTD 2ND DEFENDANT

RULING

1. By a Notice of Motion dated July 26, 2022, brought pursuant to the provisions of Sections 80, 3 and 3A of the *Civil Procedure Act*, Order 45 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. That this Honourable Court be pleased to review and/or set aside its judgment and orders issued on 17th day of January, 2019 in ELC Case No 288 of 2017 by Justice CG Mbogo.
 2. That this Honourable Court do order an injunction against the Defendants, their families, heirs, servants or otherwise from interfering in any manner with the shares and ownership of land parcel No 1005 and 845.
 3. That this Honourable Court do order that the investigation report done by the DCI office at Salama Police Station be filed or otherwise produced before this Court.
 4. 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 Robert Ngei Mwongeli sworn on even date.



The Applicant's Case

3. The Applicant averred that the Court dismissed his suit on account of an error apparent on the face of the record. The Applicant averred that the Court did not consider crucial evidence that was not on record which could have made the court to rule otherwise.
4. He further averred that the Court did not consider the fraudulent transactions between the Defendants, particularly the 2nd Defendant who was in charge of the documents and oversaw the subsequent transfer. He further averred that the Court did not consider the fact that the 1st Defendant did not present letters of administration to enable the transfer of shares from the deceased and the same was done illegally and irregularly.
5. The Applicant argued that the Court relied on the testimony of the 2nd Defendant despite failing to produce all the ownership documents. He argued that the Court did not take into consideration the absence of the Plaintiff's Advocate from Kituo Cha Sheria during the hearing.
6. The Applicant contended that the judgment of the court offends Article 159 2(d) of the [Constitution](#) which enjoins the Court to administer justice without undue regard to technicalities. He argued that the DCI Salama Police Station has commenced investigations regarding the suit property and whose report will disclose the history of the suit property. He urged the court to order the DCI Salama Police Station to produce or file the investigation report in Court.
7. Though duly served, the Respondent did not file a response to the application.
8. The application was canvassed by way of written submissions.

The Applicant's Submissions

9. The Applicant's submissions were filed in Court on December 19, 2022.
10. In the Applicant's submissions, Counsel reiterated the contents in the supporting affidavit. Counsel further relied the provisions of Order 45 Rule 1 of the [Civil Procedure Rules](#) and Section 80 of the [Civil Procedure Act](#). To buttress his submissions Counsel, relied on the following authorities though the same were not availed.
 1. Civil Appeal No 2111 of 1996 [National Bank of Kenya Vs Ndungu Njau](#).
 2. [Nyamogo & Nyamogo Vs Kogo](#).

Analysis and Determination

11. Having considered the application and the written submissions the following issues arise for determination:-
 - i. Whether the judgment delivered on the 29th of May, 2020 should be reviewed.
 - ii. Whether the Applicant is entitled to the orders sought.
12. The Applicant is seeking to review the judgment of this Court delivered on January 17, 2019 on the grounds that the suit was dismissed on account of material errors on the face of the record.
13. 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](#).



14. 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."

15. 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."

16. 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."

17. Similarly, in *Republic Vs 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."

18. The Applicant contended that the DCI Salama Police Station, is conducting investigations on the history of the suit property. He urged the court to direct the DCI to present the investigation report in court. The order sought by Applicant is overtaken by events as the suit has already been heard and determined.

19. 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 during the hearing of the suit.



20. As regards the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of *Nyamongo & Nyamongo Vs Kogo* (2001) EA 170 the court held as follows;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must 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 be 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.”

21. Similarly, in the case of *Timber Manufacturers and Dealers Vs 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.”

22. The Applicant contended that there is an error apparent on the face of the record to review the judgment of this Court.

23. The basis of this argument is that the Court did not consider the fraudulent transactions between the Defendants. In addition, the Applicant averred that the 1st Defendant did not produce letters of administration to enable it to transfer the shares. He argued that the judgment of the court offends the provision of Article 159(2)(d) of the *Constitution*. In the case of *Abasi Belinda Vs Fredrick Kangwanu and Another* (1963) EA 557 Bennet J aptly held as follows;

“A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

24. Similarly, the Court of Appeal in *Pancras T Swai Vs Kenya Breweries Limited* [2014] eKLR observed as follows: -

“It seems clear to us that the Appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts.”

25. The grounds laid by the Applicant do not disclose an error apparent on the face of the record but in my view, these are grounds for an Appeal. In the present application, the Applicant has not pin pointed the errors that are apparent on the face of the record.



26. 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 Vs 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.”

27. The Applicants have not demonstrated any sufficient reason to warrant a review of the Court’s judgment.

28. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.

29. The judgment sought to be reviewed was delivered on 17th of January, 2019. The instant application was filed on July 28, 2022. That duration is far from reasonable and the same has not been explained.

30. In so finding, I am persuaded by the findings in the case of *John Agina Vs Abdulswamad Sharif Alwi* CA Civil Appeal No 83 of 1992, where the court 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.”

31. In the end, I find that the application dated July 26, 2022 is devoid of merit and the same is dismissed with no orders as to costs.

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HON. T. MURIGI

JUDGE

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

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi.

In the absence of the parties.

