



**Mwikaya & another v Ngaruiya & another (Civil Suit
E014 of 2021) [2023] KEELC 18071 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 18071 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT E014 OF 2021**

JA MOGENI, J

MAY 25, 2023

BETWEEN

STEPHEN MBITHI MWIKAYA 1ST PLAINTIFF

LUCIA MARY MBITHI 2ND PLAINTIFF

AND

MUNGAI NGARUIYA 1ST DEFENDANT

ELIZABETH WANJIKU NGARUIYA 2ND DEFENDANT

RULING

1. The Notice of Motion dated November 25, 2022 was filed herein pursuant to Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 45 Rule 1(1), and Order 51 Rule 1 of the Civil Procedure Rules, 2010 for the following orders:
 - i. Spent
 - ii. That this Honorable Court be pleased to review the disposal orders listed as numbers 1, 2, and 3 in its judgment dated 2nd June 2022 delivered by Hon Mogeni to include the other three parcels, being LR Nos 12715/5814, LR No 12715/5821 and LR No 12715/5822 which formed part of the Defendants' claim in their counter-claim but which the said disposal orders in judgment omitted.
 - iii. That the cost of this application be provided for
2. The grounds upon which the application has been brought have been elaborately set out in the Notice of Motion I see no value of repeating the same here.



3. In support of the application the Defendant/Applicant relied on the affidavit sworn on November 25, 2022 by Norman Asega advocate. He averred that the Honorable Court omitted the three parcels of land mentioned in the counter-claim though the court allowed the counter-claim.
4. He contended that no reference is made to the fate of the three parcels of land omitted yet the defendants wish to commence execution proceedings to realize the fruits of the judgment.
5. In response to the application the Plaintiff/Respondent contended vide the Replying Affidavit sworn by 1st Plaintiff/Respondent with authority of the 2nd Plaintiff/Respondent, Dr Stephen Mbithi Mwikya on February 2, 2023 that the plaintiffs/respondents have proffered an appeal against the judgment and a copy was attached marked as SMM “1 &2”.
6. The plaintiff/respondent averred that the fate of the other 3 parcels of land will be determined by the Court of Appeal. Further that the defendants/applicants have not taxed nor extracted the decree and therefore there is no urgency called for in this application.
7. Further that the titles of the three parcels were not fraudulently obtained and that the documents relating to ownership of these parcels formed part of the evidence before the court during the hearing of this suit.
8. The Court has carefully considered the grounds and relevant provisions of the law under which the Notice of Motion dated November 25, 2022 has been brought. The Court has also perused the judgment made by this Honorable Court on June 2, 2022, pleadings and well as the written submissions filed by Learned Counsel.
9. The brief background is that this suit was filed in this Honorable Court on November 24, 2020 for, inter alia, a permanent injunction restraining the defendants by themselves, their servants, employees and or agents or otherwise from interfering with the quiet possession of the property described as LR 12715/5813. The court found in favor of the defendant who had filed a counter-claim seeking to be declared as the owner of the suit property. The Counter-claim has introduced three other parcels which however was not the subject of the suit. The Court record shows that on the basis of the current application, is the Judgment issued on June 2, 2022 seeking a review to have the court include the other three suit properties in its order. It is thus on the basis of the foregoing that the Defendant/Applicant has now moved the Court for review of its judgment on the basis of the grounds set out in application.
10. Section 80 of the [Civil Procedure Act](#) provides as follows on the issue of review-
 - “ 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.”
11. Order 45 Rule 1(1) of the [Civil Procedure Rules](#) provides as follows on the issue of review-
 - “(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 appealed or the order made, or on account of some mistake or error apparent on the face of the record, or 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 order without unreasonable delay.” (emphasis added).

12. This court’s understanding of the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1(1) of the *Civil Procedure Rules* is that a review is limited to –
- a. discovery of a 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 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
 - d. an application for review on any of the above grounds must be made without unreasonable delay.
13. Having reread the judgment of this court that forms the subject of this application. I cannot say that the alleged failure by this court to include the three other parcels namely LR 12715/5814, LR 12715/5821 and LR 12715/5822 in the final order was an error apparent on the face of the record. As has been held in numerous decisions, an error or omission that can be subjected to review must be self-evident and should not require deep interrogation.
14. The Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Another* [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.” (emphasis added).



15. In the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal stated thus on the issue of review of a Court decision-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omissions on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a 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 the law. Misconstruing a statute or other provisions of the law cannot be a ground for review.” (emphasis added).

16. The ruling delivered on June 2, 2022 by Judge Mogeni J states as follows-

1. “A declaration be and is hereby issued that the property LR 12715/5813 is the property of the defendants.
2. A permanent injunction be and is hereby issued restraining the plaintiffs by themselves, their servants’ employees, and or agents or otherwise from interfering with the defendant’s properties known as LR 12715/5813
3. An order be and is hereby issued of vacant possession and eviction of the plaintiffs in respect of the subject property being LR 12715/5813
4.”

17. In this court’s view, there was no ambiguity, error or omission in the ruling of 2/06/2022. I find nothing to review in the said ruling. Parties to this case had a right of appeal and as already stated hereabove the plaintiffs/respondents have already filed an appeal and order of the Court of Appeal dated 8/02/2023 is filed hereto.

18. In the said circumstances, I find the application dated November 25, 2022 to be without merit. It is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH DAY OF MAY 2023

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MOGENI

JUDGE

In the Virtual presence of

Mr Kyalo Mbobu for Plaintiffs/Respondents

No appearance for Defendants/Applicants

Ms Caroline Sagina : Court Assistant.

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MOGENI

JUDGE

