



**Kiminza v Musymi (Environment & Land Case E016 of 2020)
[2023] KEELC 17819 (KLR) (17 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17819 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E016 OF 2020**

**TW MURIGI, J
MAY 17, 2023**

BETWEEN

MARY MUMBUA KIMINZA PLAINTIFF

AND

KIILU MUSYMI DEFENDANT

RULING

1. By a Notice of Motion dated 18th April 2022 brought pursuant to the provisions of Order 45 Rules 1, 2, and 3, Order 51 of the [Civil Procedure Rules](#), Sections 80, 1A and 3A of the [Civil Procedure Act](#), and all other enabling provisions of the law the Applicant seeks the following orders:-
 1. Spent.
 2. That pending the hearing and determination of this application, there be a temporary stay of execution of the ruling of Honourable Justice Mbogo C.G. made on 22nd March 2022 and all consequential orders thereof.
 3. That the ruling of Honourable Justice Mbogo C.G made on 22nd March, 2022 be reviewed, varied and/or set aside to have the Notice of Motion application dated 7th December, 2020 be dismissed with costs in the cause.
 4. That in the alternative and without prejudice to prayer No 3 above, the ruling of Honourable Justice Mbogo C.G made on 22nd March, 2022 be reviewed, varied and/or set aside to have the status quo regarding occupation, use and control of the property Kibwezi/Kibwezi/85 also known as Kibwezi Settlement Scheme No. 85 Usalama be maintained pending the hearing and determination of the main suit.
 5. That the Makueni County Surveyor or any other licensed Surveyor be and is hereby ordered to visit the suit property Kibwezi/Kibwezi/85 also known as Kibwezi Settlement Scheme No.



85 Usalama in the presence of the parties or their representatives and compile a comprehensive survey report on the actual occupation, use and control of the property to be produced before the Honourable Court.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The Applicant's Case

3. A summary of the grounds and the averments is that the suit herein was filed together with a Notice of Motion dated 07/12/2021 and defended by the Statement of Defence and Counter Claim together with the replying affidavit. The Applicant averred that the application was allowed in terms of prayer No. 4 vide the ruling delivered on 22nd March, 2022.
4. The Applicant contended that the ruling contains mistakes or errors apparent on the face of the record as the Defendant does not have employees or servants on the suit property except his entire family that resides thereon.
5. Further, that the Applicant did not present any evidence of felling of trees, damaging or wasting of the suit property.
6. The Applicant contended that there are sufficient reasons to warrant the review, varying and/or setting aside of the ruling as follows:-
 1. That the Court awarded costs yet the Plaintiff/Applicant had pleaded that the costs be in the cause.
 2. By holding at paragraph 29 of the impugned ruling that the Defendant is in occupation of the suit property yet in paragraph 33 the Court held that the Plaintiff was in possession.
 3. By holding that the issue of fraudulent transfer to the Plaintiff can only be determined at the main hearing and then proceeding to hold in paragraph 31 that the Plaintiff had established a *prima facie* case.
 4. By holding that the Plaintiff had established a *prima facie* case yet no title deed has been issued for the suit property.
 5. By holding that the balance of convenience tilts in favour of the Plaintiff yet in the same ruling the Defendant is in occupation of the property.
 6. By issuing a mandatory injunction in terms of prayer No. 4 of the application at the interlocutory stage.
 7. By allowing the application against the weight of evidence in the matter.
 8. By delivering the ruling from Narok Law Courts via Microsoft teams thus denying them an opportunity to participate and point out the above anomalies.
 9. That arising from the contradictory anomalies it is prudent for the surveyor to visit the suit property in the presence of the parties and their representatives so as to compile a comprehensive report on actual occupation and control of the property which will assist the Court in making a fair, just and informed determination of the dispute herein.



The Respondent's Case

7. The application was opposed by the Respondent who filed a replying affidavit. The Respondent averred that the application is an abuse of the Court process as it does not meet the threshold for the grant of an order of review. She further averred that there is no new and important matter which could not have been discovered with the exercise of due diligence at the time of hearing of the application.
8. She argued that the Applicant has not explained the delay in bringing the present application. She averred that the Applicant has not asserted that there is an error on the face of the record. She maintains that there was no irregularity in the manner in which the ruling was delivered.
9. She argued that the application is an attempt to delay the determination of this case and urged the Court to dismiss it with costs.
10. The application was canvassed by way of written submissions.

The Applicant's Submissions

11. The Applicant's submissions were filed on 19th January, 2023.
12. In the Applicant's submissions, Counsel reiterated the contents of the grounds and the affidavit in support of the application.
13. To buttress his submissions Counsel relied on the following authorities:-
 - i. [*Board of Trustees National Social Security Fund Vs Micheal Mwalo*](#) (2015) eKLR.
 - ii. [*Hezron Kamau Gichuru Vs Kianjoya Enterprises Ltd & Another*](#) (2022) eKLR.

The Respondent's Submissions

14. The Respondent's submissions were filed on 7th February, 2023.
15. Counsel submitted that the Applicant has not met the threshold for the grant of the orders sought. Counsel contended that the application is an appeal disguised as application for review since the Applicant is asking the Court to re-evaluate the evidence.
16. To buttress this argument Counsel relied on the following authorities:-
 - i. [*Francis Njoroge Vs Stephen Maina Kamore*](#) (2018) eKLR.
 - ii. [*Republic Vs Advocate Disciplinary Tribunal Ex parte Apollo Mboya*](#) (2019) eKLR.

Analysis And Determination

17. Having considered the pleadings, the application and the rival submissions, the only issue that arises for determination is whether the Court should review the ruling delivered on the 22nd March, 2022.
18. 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.
19. 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.
20. 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.
21. 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.”
22. 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.”
23. 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.
24. 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 application.



25. The Applicant must establish that there is an error apparent on the face of the record. In the case of *Nyamogo & Nyamogo Advocates Vs 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.”
26. 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.”
27. The Applicant contends that there is an error apparent on the face of the record to review the ruling of this Court.
28. The basis of this argument is that the Court made mistakes or errors apparent on the face of the record that swayed it to rule against him. In a nutshell, the Applicant is of the view that the ruling is full of contradictions and was allowed against the weight of the evidence in the matter.
29. 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 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 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.”
30. The Applicant has not pin pointed the errors that are apparent on the face of the record.
31. The Court finds no error apparent on the face of the ruling delivered on 22nd March, 2022. It is apparent that the Applicant is dissatisfied with the ruling of the Court. It is my view that the Applicant ought to have filed an appeal against the ruling.
32. The Court is also mandated to consider if there are sufficient reasons to review the Court’s ruling. 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.”
33. The Applicant has not demonstrated any sufficient reason to warrant a review of the Court’s ruling.



34. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.
35. The ruling sought to be reviewed was delivered on 22nd March, 2022. The instant Application was filed on 4th May, 2022. That duration though not explained is not unreasonable.
36. In the end, I find that the application is devoid of merit and the same is dismissed with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 17TH DAY OF MAY, 2023.

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HON. T. MURIGI

JUDGE

In The Presence Of :-

Court assistant - Mr. Kwemboi

Dennis Mungáta for the Respondent.

