



**Karungu & 2 others v Ng'anga (Environment & Land Case
649 of 2011) [2023] KEELC 19213 (KLR) (20 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19213 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 649 OF 2011**

J OMANGE, J

JULY 20, 2023

BETWEEN

SAMUEL NGUGI KARUNGU 1ST PLAINTIFF

ESTHER WAMBUI NGUGI 2ND PLAINTIFF

DAVID NGINYI NGU 3RD PLAINTIFF

AND

ESTHER WANGECI CHEGE NG'ANGA DEFENDANT

RULING

1. In the Notice of Motion application dated 10th June 2022 the plaintiffs seek the following orders:
 - a. That judgement entered in this matter on 24th October 2019 in favour of the plaintiffs be reviewed.
 - b. That judgement delivered by the Hon. Lady Justice Komingoi on the 24th October 2019, decree dated and issued on 1st November 2019 be reviewed.
 - c. Costs of the application.
2. The Application is supported by an Affidavit by the 3rd plaintiff who deponed on behalf of the 1st and 2nd plaintiffs.
3. That they had filed a plaint on 15th November 2011 where the prayers sought inter alia were;
 - i. A declaration that the Defendant always held half of plot No Dagoreti/Waithaka 562 in trust for the Plaintiffs and therefore the plaintiffs are entitled to the said half of the said land.



- ii. An injunction do issue restraining the Defendant by herself, servants, employees and/or her agents from interfering with the quiet enjoyment of the portion of land the Plaintiff's occupy on plot No Dagoreti/Waithaka/562.
 - iii. Costs of the suit.
4. He deponed that the Honourable court on the 24th October 2019, having heard the suit delivered a Judgement in their favour wherein the prayers listed above as sought in the plaint were given.
5. He further deponed that they extracted orders and a decree was issued on the 1st November 2019. He further stated that the said orders have not been executed as the Judgement delivered was not clear and specific on what portions of the said land had been awarded to them as plaintiffs and thus what portion in measurements should then be exercised out of the suit property they were entitled to.
6. He further averred that the court had given orders on 5th March 2012 pursuant to an Application they had filed dated 29th November 2019 that the District Land Surveyor do visit the property to ascertain what portion was to be allocated to them and that the surveyor visited the site on 27th May 2021.
7. He went ahead to depone that having extracted the orders and decree, they had made several efforts to execute the same but had been met with great opposition from the defendant.
8. That based on the resistance and difficulty from the Defendant to allow execution, it is their view that the Honourable court delivered a judgement that is not clear, ambiguous and incapable of execution and hence they seek that the orders and decree be reviewed on the following issues;
 - i. What portion, in size of land are the Plaintiffs entitled to?
 - ii. What portion in size of land are the Plaintiffs awarded?
 - iii. What potion in size in land should be excised out of the suit property?
9. He further deponed that they believe if the issues listed above are addressed, then the Judgement will be clear and unambiguous and they will be able to enjoy fruits of the Judgement by exercising execution of the orders and decree.
10. In addition, the Applicants deponed that it will be in the interest of justice that the Judgement and decree be reviewed and that no loss will be occasioned upon the Defendant.
11. The Defendant /Respondent opposed this Application by filing a notice of preliminary objection dated 11th August 2022 on grounds that;
 - i. The Application is defective and premised on the wrong Civil Rules of Procedure.
 - ii. That the claim made by the Applicants offends the provisions of order 45 Rule (1) of the *civil procedure rules* by virtue of excessive delay.
 - iii. The application is incompetent, null and void and should be dismissed with costs
12. The Plaintiffs/Applicants filed submissions dated 10th July 2022 which submissions contained the brief facts of the case that led up to the judgement and reiterated the contents of the Application dated 10th June 2022 that were seeking orders to review the said judgement and decree.



13. Counsel submitted that the courts judgement awarded the Plaintiffs a portion of the land they are occupying a portion of the land in question and therefore the land they are entitled to but failed to spell out sizes of the land the plaintiffs are entitled to
14. The Plaintiffs further submitted that the High Court has power to review but such power must be exercised within the framework section 80 of the *civil procedure Act* and Order 45 (1) of the civil procedure rules which state as follows:-
 80. 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

Order 45 Rule 1 of the civil procedure Rules 2010 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, 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 judgment to the court which passed the decree or made the order without unreasonable delay.
15. They submitted the review is limited to the following grounds listed in order 45 rule 1;
 - i. Discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the Applicant.
 - ii. On account of some mistake or error apparent on the face of record.
 - iii. For any sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
16. They placed reliance on the cited case of Republic vs public procurement Administrative Review Board & 2 others where the court insisted on application of Section 80 and Order 45(1).
17. Counsel for the Plaintiff submitted that in the current case they will dwell on one ingredient listed under order 45 rule 1 and that is the error apparent on the face of Judgment in record and that the final orders did contradict the findings of the court making it difficult to execute orders. It was further stated that the discrepancy on the judgement had put the local authorities in a difficult place in attempts to execute the orders and met with great opposition from the Defendant.



18. It was further submitted that they would wish to rely on case law that is Attorney General vs Boniface Byanyima where the “court held that the expression mistake or error apparent on the face of the record refers to an evident error which does not require extraneous matter to show its correctness. It is an error so manifest and clear that no court would permit such an error of law but law must be definite and capable of ascertainment.”
19. Counsel further submitted issues for determination as follows
 - i. Is the Judgment ambiguous and unable to be executed?
 - ii. Is the Judgment reviewable?
20. Lastly, the plaintiffs submitted that although they are aware that litigation has to come to an end, the Judgment and decree in this case cannot be executed and therefore renders the Judgment incapable of meeting its obligations and for the said reasons they pray that review be given.
21. The Defendants on their part submitted on brief facts of the case. They further stated that they had raised a Preliminary objection dated 1st November 2019 on the following grounds;
 - i. The Application is defective and premised on the wrong Civil Rules of Procedure.
 - ii. That the claim made by the Applicants offends the provisions of order 45 Rule (1) of the civil procedure rules by virtue of excessive delay.
 - iii. The application is incompetent, null and void and should be dismissed with costs.
22. The defendants submitted on two issues for determination:-
 - i. Whether the judgement was ambiguous.
 - ii. Whether the application is fatally defective.
 - iii. Who should bear the costs.
23. The Defendant submitted that the Judgment had been written in accordance with order 21 rule 4 which states that a Judgment in defended suits shall contain a concise statement of facts, the points for determination, the decision thereon and the reasons for the decisions. It was further submitted that the decision by Lady Justice Komingo had met all the elements as per order 21 Rule 4 and the claim that the Judgment was ambiguous is false from the face value of the Judgment and that any person with a reasonable sound mind could easily interpret it. Furthermore, it was submitted that in paragraph 11(a) of the judgment which reads “a declaration is issued that the defendant has always held a portion of Plot Number Dagoretti/Waithaka/562 in trust of the plaintiffs and therefore the plaintiffs are entitled to the said half out of the suit land was clear to the exact portion that the plaintiffs were entitled to”.
24. Counsel for the Respondent submitted that on the issue of the Applicants seeking to have an injunction to restrain the defendant/servants/employees/agents from interfering with the quiet enjoyment of the land portion the plaintiffs occupy, it was expressly stated that the land the plaintiffs were entitled to was the land Dagoretti/ Waithaka/562 that they were already in possession of and there was no interference whatsoever from the Defendant .
25. In summary, the defendants submitted that the issue of the judgment being ambiguous was false as the term half in the judgment gave the exact portion that the Plaintiffs were entitled to and in this case



the Plaintiffs were already in occupation of the half that was entitled to them and that the injunctive order stated that they should enjoy quiet enjoyment of the said half already in their possession.

Whether the application is fatally defective and premised on the wrong rules of civil procedure

26. The Defendant through its advocate submitted that the application did not meet the threshold as per the elements listed in order 45 rule 1 one of the civil procedure rules as read together with section 80 of the *civil procedure Act* which contents have already been enumerated above. The placed reliance on the decision of the High court in *Republic vs Advocates Disiplinary Tribunal Ex parte Apolo Mboya* (2019) eKLR where the judge brought out the following issues
- i. A court can review its decision on either grounds enumerated in order 45 rule 1 and not otherwise. The expression “any other sufficient reason” appearing in order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - ii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under section 80.
 - iii. An erroneous order/decision cannot be corrected in the guise of exercise of power⁴ of review.
 - iv. Mere discovery of new or important matter or evidence is not sufficient reason for review. The party seeking review has to show that the matter or evidence was not within its knowledge and even after due diligence it could not be produced before the court/tribunal.
 - v. The court must confine adjudication with reference to the material which was available at the time of the initial decision.
 - vi. An error apparent on the face of record means a mistake or an error which is prima facie visible and does not require any detailed explanation.
27. Finally, the Defendant submitted that the applicants failed to point out any error apparent on the face of record as that was the limb they were dwelling on as per order 45 Rule 1. The Defendant therefore prayed to the court to dismiss the application as it had no grounds to support the orders sought.
28. On the issue of costs the defendant paced reliance on the case of Ritter vs Godfrey (1920)
- “A successful defendant in a non-injury case has no doubt in the absence of special circumstances a reasonable expectation of obtaining an order for the payment of his costs by the plaintiff but has no right to costs unless and until the court awards them to him and the court has an absolute unfettered discretion to ward or not to award this”.
- Based on this they prayed that costs of the application be awarded to the Defendant.
29. Having looked at pleadings from both parties and submissions from both counsel the following issues emerge for determination by the court; Whether the court should review the Judgement Who should pay the costs
30. The court is allowed to review a Judgement or Order if there is an error on the face of the record that is self evident or if there is new material that could not with due diligence have been before the court or if there is just and sufficient cause.



31. The applicants contend that the failure to indicate the portion that the applicants are entitled to is not only an error on the face of the record but also renders the decision unenforceable.
32. I have looked at the Judgement and I note that contrary to the allegations by counsel for the respondent, the Judgement did not indicate that the plaintiffs were allocated half the suit land. Paragraph 11 (a) of the Judgement states “ A declaration is issued that the defendant has always held a portion of Plot number Dagoretti/ Waithaka/ 562 in trust for the plaintiffs and therefore the plaintiffs are entitled to the said portion.”
33. As correctly indicated by counsel for the applicant the Judgement does not indicate the portion. Is this an error that would fall within the parameters of Order 45? Having looked at the Judgement I find this finding was a considered one by the Honorable Judge. In paragraph 7 the Court considered the plea for 0.49 Ha but refused this plea.
34. In paragraph 9 the court resolved that the plaintiffs were only entitled to the portion they are occupying. For this court to declare the portion would mean reopening the case for parties to give evidence again and sitting on appeal over the decision of a court of concurrent jurisdiction.
35. The ground raised for seeking a review is that there was an error apparent on the face of the Judgement in record. I find this not to meet the definition of what an error on the face apparent is as per order 45 Rule 1. I would place reliance on Attorney General & O’s v Boniface Byanyima(8) the court citing Levi Outa v Uganda Transport held that a mistake or error apparent on the face of record refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record.
36. Regarding the allegation that the prayers cannot be executed the applicant is referred to the courts directions in the application dated 29th November 2019. The orders issued on the said application on 25th February, 2021 were that:-
- i. The local chief Kibria area and the officer in charge station Dagoretti/Waithaka do assist the parties in keeping peace when subdivision of the land is executed.
 - ii. The district land surveyor Nairobi be the one to carry out the survey works to apportion the portion of land under question between the parties.
37. Given that the plaintiff knows the portion of land they are occupying, with the assistance of the above officers the courts Judgement can be executed.
38. Litigation has to come to an end at some point and to have the trial court adjudicate on the same again will be an abuse of the court process and a waste of the courts time. This position is informed by the principle of finality which is hinged on the public interest policy as illustrated in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2007] which describes the principle as follows:-
- “ This doctrine which enables the courts to say litigation must come to an end at a certain point regardless of what the parties think the decision has been handed down”.
39. I therefore find that the application has no merit and is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF JULY 2023.

JUDY OMANGE

JUDGE

