



**Lua & 3 others (Suing as administrators of the Estate of James Lua
Maia (Deceased)) v Maingi (Environment & Land Case 40 of 2017)
[2023] KEELC 20181 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20181 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 40 OF 2017
TW MURIGI, J
SEPTEMBER 27, 2023**

BETWEEN

**EDWARD MALELU LUA 1ST PLAINTIFF
STANLEY KYOVO LUA 2ND PLAINTIFF
DANIEL KYALO LUA 3RD PLAINTIFF
GEOFFREY WAMBUA LUA 4TH PLAINTIFF
SUING AS ADMINISTRATORS OF THE ESTATE OF JAMES LUA MAIA
(DECEASED)**

AND

PETER NAITI MAINGI RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 11th October 2022, brought under Sections 3, 3A and 80 of the *Civil Procedure Act*, Order 9 Rule 9, Order 45 Rule 1(c) of the Civil Procedure Rules, Article 159 of *the Constitution* of Kenya and all other enabling provisions of the law in which the Applicants seek the following orders:-
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to review and set aside the ruling and subsequent orders dated 20/12/2018 by Justice Mbogo C.G and issued on 26/12/2018.
 4. That in the event the Honourable Court directs that the matter be heard inter-parties, interim orders do hereby issue staying the Court's ruling dated 26/12/2018 and directing the OCS



Kilome and OCPD Kilungu to enforce all final judgments and decree that were in force before 26/12/2018.

5. Any other orders that are just and expedient in the circumstances for the course of justice.
 6. 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 Geoffrey Wambua Lua sworn on even date.

The Applicants' Case

3. The Applicant averred that they commenced this suit in Machakos Civil Case No. 63 of 2002 to recover the suit properties belonging to the Estate of James Lua Maia. He further averred that the suit was heard and determined by a judgment delivered on 08/04/2004 in their favour.
4. That after delivery of the judgment, the Defendant filed the application dated 8th April 2004 seeking to stay the execution of the judgment pending the hearing and determination of the intended appeal. That the application was thereafter heard and dismissed by a three judge bench thereby paving way for the execution process.
5. The deponent averred that on 27/09/2018, the High Court sitting in Machakos declared the grant issued in Succession Cause No. 150 of 1992 now Makueni Succession Cause No. 30 of 2018 as null and void thereby nullifying all the legal acts carried out on the strength of that grant. He further averred that the Respondent filed an application seeking to declare the judgment made on 10th March, 2004 by Justice R.V. Wendoh as null and void. He asserted that the ruling on the application was made on 20/12/2018.
6. He argued that the orders issued on 26/12/2018 are irregular since the Court was *functus officio* and proceed to sit on appeal on its own decision. He further averred that the Applicants did not Appeal against the orders issued on 26/12/2018 because they did not have the legal capacity to file the appeal. The deponent contended that the Applicants were granted letters of administration on 17th February, 2020. It was argued that the properties in dispute are in peril of waste and can only be preserved by setting aside the order so as to enable the Administrators to administer the Estate. Lastly it was argued that the Applicants will be highly prejudiced if the orders sought are not granted since they will not be able to undertake their mandate as the administrators of the Estate. He urged the Court to grant the orders sought.

The Respondent's Case

7. In opposing the application, the Respondent vide his replying affidavit sworn on 11th January, 2023 averred that the Applicants have not given any reason to warrant the review or setting aside of the ruling made on 20/12/2018.
8. He further averred that there has been inordinate delay in filing the instant application which has not been explained. He argued that an order of review cannot be allowed at the execution stage. He further averred that the grant issued to the Applicants to institute this suit was nullified because the letters of administration were obtained fraudulently by the Applicants.
9. He further averred that his application to nullify the proceedings and judgment was granted because the Applicants did not oppose the same. That subsequently, he filed a bill of costs which was taxed at Kshs 401,000/=. He asserted that the execution process was frustrated by the Applicants who hid their properties.



10. He argued that the Applicants cannot challenge the order since they did not appeal against the same. He asserted that there is no new evidence that can be used to reinstate the judgment that was done before the nullification.

The Response

11. In a supplementary affidavit filed on 17th April 2023, the deponent averred that there is no provision in law for extension of time to apply for leave to review out of time. He argued that the Court is only called upon to determine whether there has been unreasonable delay in presenting the application.
12. The parties were directed to canvass the application by way of written submissions.

The Applicants' Submissions

13. The Applicants submissions were filed on 21st March, 2023.
14. On their behalf, Counsel gave a brief background of the case and outlined the issues for determination as follows:-
 - i. Whether the Plaintiff/Applicant has made out a good case to justify the grant of orders for review.
 - ii. Who shall bear the costs of the suit.
15. In answer to the first issue, Counsel submitted that Section 80 of the *Civil Procedure Act* grants this court the power to make orders for review while Order 45 of the Civil Procedure Rules sets out the jurisdiction and scope of the review.
16. Counsel submitted that the orders sought to be reviewed were issued on 20/12/2018 while the Applicants were issued with fresh letters of Administration on 29th March, 2020.
17. Counsel submitted that the discovery of the letters of administration is new and important evidence that was not available during the pendency of the application. Counsel submitted that orders sought are discretionary in nature and urged the court to invoke the provisions of Section 1A and 1B of the *Civil Procedure Act* to ensure that justice is done to the parties herein. Counsel contended that if the orders sought are not granted the parties will have to litigate again. Counsel submitted that the dispute herein involves properties belonging to the deceased and it would be in the interest of justice to shield the beneficiaries of the estate from litigating afresh.
18. Lastly it was submitted that the Respondents will not suffer any prejudice if the orders sought are granted.

The Defendant's Submissions

19. The Defendant filed two sets of submissions, the first dated 11/01/2023 and the second 12/04/2023. On his behalf, Counsel argued that the instant application should be disallowed on the basis that the delay of three years is unreasonable. Counsel argued that the Applicants have not given any reasons to review and set aside the ruling that was made by Hon. Justice Mbogo on 20/12/2018. It was argued that the application contains grounds of appeal and not of review.
20. Counsel added that no review can be allowed when the matter is at the stage of execution. Counsel submitted that the proceedings herein were commenced by the Applicants who had no authority from families of the Deceased. He further submitted that the Applicants fraudulently obtained the letters of administration since the other members of the family had not given their consent. That the



Court eventually nullified the Grant and gave directions as to how the Grant was to be applied and determined.

21. Furthermore, Counsel submitted that the Respondent filed an application to nullify the previous proceedings and judgment that were made without valid letters of administration. That the Applicants never opposed the application and the same was allowed and the Court declared all the previous proceedings and judgment a nullity. That subsequently, the Respondent filed a bill of costs which was assessed at Kshs 401,000/= as shown execute on the warrants of attachment.
22. Counsel submitted that the execution was frustrated by the Applicants when they hid their properties and at the moment, they are being pursued with a Notice to Show Cause why they should not be arrested and committed to civil jail. Counsel added that if the order issued by the Court on 20/12/2018 was not appealed against the orders are not challengeable now. In addition, Counsel submitted that the order is not irregular and that it applies retrospectively. Counsel contended that since the Defendant is in possession of the suit premises, no order of injunction can be made as to do so would amount to eviction using a non-existent judgment and ruling. Counsel urged the Court to dismiss the application with costs.

Analysis and Determination

23. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the issues that arises for determination is whether the court should review the ruling delivered on 20/12/2018.
24. The Applicant is seeking a review of the Court's ruling delivered on 20th December, 2018. Before delving into the application it is important to give a background of this matter. The record shows that vide a Plaint dated 13/05/2002, the Plaintiffs filed this suit against the Defendant in their representative capacity as the legal administrators of the Estate of James Maia Lua seeking the following orders:-
 1. A perpetual injunction do issue stopping the Defendant by himself, agents or servants from occupying, using or in any way dealing with Plot No. 19 Kilome Market.
 2. An order of eviction.
 3. General damages and costs of the suit and interest.
25. The matter was heard and determined by the Judgment delivered on 8th April, 2004 in the following terms:-
 1. The Court does order that the Defendant be evicted from the suit premises.
 2. An injunction do issue restraining the Defendant, his servants, agents from occupying, using or in any way interfering with Plot No. 19 Kilome Market.
 3. The Plaintiffs will be entitled to mesne profits at the rate of Kshs 2,000/= per room per month for 42 rooms from the date of filing this suit till the defendant vacates the suit premises.
26. Subsequently, the Defendant filed Civil Application No 248 of 2004 before the Court of Appeal seeking an order of stay of execution of the decree pending the hearing and determination of the intended Appeal. The application was heard and eventually dismissed by the ruling delivered on 08/06/2007.
27. The Defendant thereafter filed a Notice Motion dated 16th October, 2018 seeking the following orders;



1. That this application be given priority to be heard first before the Court takes directions to hear all pending applications in this suit filed by the Applicant/Defendant and the Respondent/Plaintiffs.
 2. That all the proceedings started by way of a Plaint from 13/05/2002 and the judgment delivered by Justice Wendoh on 08/04/2004 and the subsequent proceedings initiated by the Plaintiffs and judgment and rulings made by different judges and Deputy Registrar be declared null and void since the Plaintiffs lacked capacity to sue or act on behalf of the Estate of the late James Maia Lua since the grant of letters of administration was revoked in HC Succession Cause No. 150 of 1992 by Justice Kimei on 27/09/2018.
 3. That the costs of all proceedings done be paid to the Applicant/Defendant.
28. When the application came up for mention on 18th October 2018, the Plaintiffs were granted 21 days to file and serve their response to the application. The matter was fixed for mention on 20/11/2018 for directions. On 20/11/2018, Mr Masika was present for the Defendant while Mr Malanga was present holding brief for Ms Kyalo for the Plaintiffs. Mr Masika urged the court to allow the application noting that it was not opposed. The court noted that the date was taken by consent and that the Plaintiffs and their Advocate were absent. The court also noted that the application was not opposed. The application was allowed as prayed and the matter was marked as closed.
29. Later on the same day, the Court by consent vacated the order allowing the application in the presence of Ms. Kyalo Advocate for the Plaintiffs/Respondents and Mr. Masika Counsel for the Defendant/Applicant. The Plaintiffs were granted 7 days to file and serve the replying affidavit together with their submissions. The Applicant was granted corresponding leave to file and serve a supplementary affidavit. The parties were directed to canvass the application by way of written submissions. Each party was granted 7 days to file and serve its submissions. The court further directed that in the event the Plaintiff failed to comply with the directions, the Defendant's application would stand allowed. The matter was fixed for mention on 20/12/2018 to confirm filing of submissions.
30. When the matter came up for mention on 20/12/2018, the Respondents had not complied with the directions issued on 18th October, 2018. No response or submissions had been filed on their behalf. Ms Kyalo, Counsel for the Respondents informed the court that they failed to comply with the directions issued by the court because their client was indisposed. She requested the court to allow their submissions and replying to be deemed as duly filed. The application was opposed by Mr. Hassan who was holding brief for Mr. Masika for the Applicant on the grounds that the court had directed that in the event the Plaintiff failed to file the replying affidavit and submissions within 21 days, the application would stand as allowed.
31. In allowing the application, the learned Judge stated as follows;
- “Arising from what I have heard, I agree with the Defendant's Counsel that there were timelines within which parties were expected to comply with the requirements of filing replying affidavit and submissions. The Default clause was that failure by the Plaintiff would render the Defendant's application to be allowed. As observed by the Defendant's Counsel, there is no evidence to show that the Plaintiff's inability to file his replying affidavit/submissions within the set time was due to illness. The Defendant's application stood allowed on the lapse within which the Plaintiff was required to comply.”
32. The Applicants are seeking a review of this order.



33. 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*.
34. 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.
35. 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.
36. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjob Amalgamated Limited & Another v 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.”
37. The Applicant alleges that there is discovery of new or important evidence which was not available during the hearing of the application. They argued that they were issued with the letters of administration on 29th March, 2020 while the orders sought to be reviewed were made on 20/12/2018. He contended that the grant of letters of administration were not available during the hearing of the application have now been discovered. The Applicants did not have the letters of administration on 20th December, 2018 when the orders were made. They acquired the grant after the judgment and all the proceedings were nullified. This does not amount to discovery of new or important evidence.
38. 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.



39. 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 *Nyamogo & Nyamogo v 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.”
40. 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.”
41. The Applicant contended that there is an error apparent on the face of the record to review the orders of this Court.
42. The basis of this argument is that the Court was *functus officio* sat on appeal on its own decision. The Applicant has not pin pointed the errors that are apparent on the face of the record.
43. 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.
44. In the case of *Abasi Belinda v 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.”
45. 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 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.”
46. The Applicant has not demonstrated any sufficient reason to warrant a review of the Court’s order.
47. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.



48. The Applicant averred that there was no delay in presenting the application since they were seeking judicial recourse in Succession Cause No 30 of 2018. The order sought to be reviewed was made on 20th of December, 2018. The instant application was filed on 11th October, 2022. That duration is far from reasonable and the same has not been explained.

49. In so finding, I am persuaded by the holding in the case of *John Agina v Abdulswamad Sharif Alwi* C.A 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.”

50. I find that the application dated 11th October, 2022 is devoid of merit and the same is dismissed with costs to Respondent.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27th DAY OF SEPTEMBER, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Masika for the Defendant/Respondent.

