



**Ndegwa v Mwangi (Environment & Land Case E15 of 2023)
[2023] KEELC 20985 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20985 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E15 OF 2023
FM NJOROGE, J
OCTOBER 26, 2023**

BETWEEN

JENNIFER WANJIKU NDEGWA PLAINTIFF

AND

PETER MUCHIRI MWANGI DEFENDANT

RULING

1. This ruling is in respect of the defendant's Notice of Motion application dated 19/05/2023 which is expressed to be brought under Order 45 Rule 1, Order 51 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) which sought the following orders:
 - a. Spent
 - b. Spent
 - c. That this honorable court be pleased to review and set aside its orders dated 8/05/2023 as there is an apparent error on the face of the record in that the court makes reference to the suit land as LR 519/361 Grant IR 54340/1 whereas the application by plaintiff subject of the court order dated 8/05/2023 made reference to land reference number 519/301.
 - d. That this honorable court be pleased to review its orders and ruling dated 8/05/2023 as there is an apparent error on the face of the record as the court has concluded that the plaintiff is in occupation of the suit premises by fencing whereas the plaintiff's supplementary affidavit filed on 4/04/2023 and annexure thereto are to the effect that there has not been any occupation of the suit land until 12/01/2023 where the defendant fenced the suit land.
 - e. That the costs hereof be borne by the plaintiff in any event.
2. The application is supported by the affidavit of the defendant sworn on 19/05/2023. The grounds on the face of the application and the supporting affidavit are that there is an error apparent on the



face of the court order and ruling dated 8/05/2023; that it makes reference to the suit property as LR No. 519/361 Grant IR No. 54340/1 whereas the plaintiff in her application dated 16/02/2023 made reference to the suit property as number 519/301; that the order extracted from the said ruling has a similar error; that the title document filed and annexed to the plaintiff's application refers to the suit property as Grant number IR 54340 in respect of LR No. 519/361; that there is another error apparent on the face of the record as the court found that the plaintiff is in occupation of the suit property and yet she annexed a witness statement of John Minwa Ngau to her supplementary affidavit filed on 04/04/2023 that was to the effect that the suit land had been vacant until 12/01/2023 when he fenced it; that he was the one who fenced the suit property and not the plaintiff and that it is only proper that the court order dated 08/05/2023 be reviewed.

3. In response to the application, the plaintiff filed a replying affidavit on 19/06/2023 sworn on the same day by his counsel Lawrence Ngugi Mwangi. He deposed that the defendant's application is erroneous as it was addressed to a non-existent firm; that the defendant was granted 7 days to file a further affidavit which he is yet to file; that the Supreme Court in the case of *Raila Odinga & Others vs The Independent Electoral and Boundaries Commission & 3 Others* (petition 5, 3 & 4 of 2013 (consolidated) held that parties before a court have a duty to ensure they comply with their respective time lines and the court must adhere to its own; that the order which is supposed to be reviewed has not been extracted or attached; that the ruling of the court is correct as it relates to land reference No. 519/361 Grant IR No. 54340/1; that his secretary informed him that she unintentionally typed number 519/301 in the application rather than 519/361 and the error is excusable and correctable; that the plaintiff in her supporting affidavit referred to the rightful land number; that there is nothing to review in the ruling delivered by the court and that the court when dealing with an application for review has unlimited discretionary power to make such orders that it thinks just and fit.

Submissions

4. The defendant filed his submissions on 28/07/2023 while the plaintiff did not file any submissions. The defendant reiterated the grounds on the face of the application under consideration and sought that the court reviews its earlier orders and substitutes the same with an order of maintenance of status quo until the case is heard and determined.

Analysis and determination

5. After considering the application and the response thereto, the only issue that arises for determination is whether the ruling delivered on 8/05/2023 should be reviewed.
6. 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.”
7. Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows:
 - (1) 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...
- (2) A party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate Court the case on which he applies for the review.”
8. The court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR held as follows:
- “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (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 or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
9. The defendant is seeking that the court reviews its ruling delivered on 08/05/2023 on the basis that there is an error apparent on the face of the record as the court described the suit property as LR 519/361 Grant IR 54340/1 and yet the application refers to the property as LR No. 519/301. The plaintiff admits that there was an error in the application dated 16/02/2023 that was determined in the said ruling as the suit property was described as LR 519/301 instead of 519/361.
10. The ruling that was delivered on 08/05/2023 was with respect to the plaintiff’s Notice of Motion application dated 16/02/2023 and the defendant’s application dated 24/03/2023. The plaintiff’s Notice of Motion application dated 16/02/2023 described the suit property as LR No. 519/301 while the defendant’s application dated 24/03/2023 described the suit property as LR No. 519/361. The court in its ruling indicated that the plaintiff instituted the present suit over LR No. 519/361 and allowed the plaintiff’s application in terms of prayer ‘b’ which described the suit property as LR No. 519/301.
11. As was held in the case of *Republic v Public Procurement Administrative Review Board & 2 others* (*supra*), the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
12. Even though the plaintiff’s application referred to the suit property as LR No. 519/301, it is my view that the ruling delivered by the court on 08/05/2023 referred to the suit property as LR No. 519/361 as described in the plaint. The plaint is the pleading upon which the claim will eventually depend. The court began its ruling with an analysis of the contents of the plaint. The application dated 16/2/2023 was meant to serve the claim in the plaint by securing injunctive orders in respect of the suit land mentioned in the plaint. It would be wrong for this court to issue orders in an application in respect of land other than that mentioned in a major pleading such as the plaint whether the application refers to that other land or not. The reply by the plaintiff to the instant application has shown that reference to a different number in the application was erroneous, a typographical error. It is therefore further



my view that there is no error apparent on the face of the record with respect to the description of the suit property.

13. The defendant is also seeking that the ruling be reviewed on the ground that there is an error apparent on the face of the record with regard to the court finding that the plaintiff is in occupation of the suit property and yet in her supplementary affidavit, she had attached a statement that indicated that the suit property was vacant until the defendant trespassed on it and fenced it. Determining occupation was a matter of only weighing the evidence adduced by the plaintiff against that of the defendant. The court's finding that the plaintiff is in occupation of the suit property is therefore based on a substantive finding that the court made on analyzing the available evidence and it can only be subject to an appeal and not a review. No new matter or evidence is relied on by the applicant to seek a review. It is my view that that ground upon which the defendant is seeking that the court reviews its ruling delivered on 08/05/2023 does not fall within the parameters set out by Order 45 Rule 1 as there is no discovery of new evidence and neither is there an error apparent on the face of the record. There is also no other sufficient ground for the proposed review. Consequently, the defendant's application dated 19/05/2023 lacks merit and it is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 26TH DAY OF OCTOBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

