



Lua & another (Suing as administrators of the Estate of James Lua Maia – Deceased) v Muindi (Environment & Land Case 58 of 2019) [2023] KEELC 21467 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 58 OF 2019
TW MURIGI, J
OCTOBER 25, 2023**

BETWEEN

DANIEL KYALO LUA 1ST PLAINTIFF

GEOFFREY WAMBUA LUA 2ND PLAINTIFF

**SUING AS ADMINISTRATORS OF THE ESTATE OF JAMES LUA MAIA –
DECEASED**

AND

RICHARD MANTHI MUINDI DEFENDANT

RULING

1. By a Notice of Motion dated 11th October, 2022 brought under the provisions of Sections 3, 3A and 80 of the *Civil Procedure Act*, Order 9 Rule 9 and Order 45 Rule 1 of the *Civil Procedure Rules*, 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 consequential orders made by Justice Mbogo C.G. on the 29/05/2020 and reinstate this suit to allow a determination on its merits.
4. That if order number three above is granted then this Court determines whether the Ruling of this Court on 26th day of July, 2019 setting aside the Judgment of this Court dated 13th March, 2015 and directing the Defendant put in a defence was complied with. In the event the Court finds that the Defendant did not comply with the 14 days' timeline, this Honourable Court:

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- a. Sets aside the Judgment of this Court dated 26/07/2019; and
 - b. Gives a declaration that the Judgment of this Court dated 13th March, 2015 is valid on its merits since the plaint dated 24th August, 2012 wasn't defended by the time this Court gave its orders on 29/05/2020.
 - c. Gives a declaration that the Decree and order issued by this Court dated 13/03/2017 and issued on 17/05/2017 and further enforcement orders dated 20/03/2018 and issued on 21/03/2018 are still valid.
 - d. Issues an order to the Applicant to attach the Respondent's immovable and any other movable properties belonging to the Respondent.
5. That in the event the Honourable Court directs that the matter be heard inter partes, interim orders do hereby issue staying this Court's ruling and orders of 29/05/2020 and directing the OCS Kilome and the OCPD Kilungu to enforce all final judgments orders and decrees in suits against the estate's inter meddlers including Richard Muindi that were in force before 29/05/2020.
 6. That in the alternative, this Honourable Court do order that no activity with regards to transfer or utilization of interest in and over the subject matter should be taken pending hearing and determination of this suit.
 7. That this Honourable Court do grant any other orders that are just and expedient in the circumstances for the course of justice.
 8. 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 ELC Case No. 321 of 2012 to recover the suit properties belonging to the Estate of James Maia Lua (Deceased). He further averred that the Defendant/Respondent failed to enter appearance resulting in the entry of default judgment in the Plaintiffs' favour.
4. The Applicant averred that on 27/09/2018, the High Court sitting in Machakos declared the grant that was issued in Machakos Succession Cause No. 150 of 1992 (now Makueni Succession Cause No. 30 of 2018) as null and void. That it was on the strength of the said grant that the Applicants had been able to file the suit herein. He further averred that the Respondent herein filed an application dated 17/10/2019 seeking to strike out this suit despite having knowledge that the Plaintiffs had re-acquired capacity to sue and consequently, a ruling was made on 29/05/2020 which struck out the suit with costs to the Defendant.
5. The Applicant contended that the suit was struck out irregularly because the Respondent had not filed a defence before he went ahead to file the application dated 17/10/2019. He further averred that the suit property was never sold or transferred by James Maia Lua (Deceased) and has now been registered



in the Defendant's name as land Parcel No. Makueni/Kilome/2163. The Applicant argued that it is necessary to reinstate the suit for determination of the dispute at the full trial.

6. The Applicant averred that the properties in dispute are in peril of waste and can only be preserved by setting aside the ruling and order issued on 29/05/2020 so as to allow the Applicants to administer the Estate of James Maia Lua (Deceased). He further contended that no prejudice will be occasioned to the Respondent if the suit is reinstated. He asserted that the application has been brought without unreasonable delay. He urged the Court to grant the orders sought.

The Respondent's Case

7. The Defendant/Respondent filed a replying affidavit on 14th November, 2022 in opposition to the application. He averred that the Applicants have not demonstrated any substantive reasons to warrant the review of the ruling made on 29/05/2020. He further averred that the Applicants were guilty of an inordinate delay of two and a half years.
8. The Respondent maintained that the revocation of the grant which had enabled the Plaintiffs to file the suit herein meant that the Plaintiffs' capacity to continue with these proceedings was extinguished because they lacked the legal capacity to represent the estate of the deceased. That subsequent thereto, the beneficiaries of the estate of the deceased Plaintiff obtained a fresh grant on 17/02/2020 and by this date, the suit herein was pending before the Judge for ruling.
9. The Respondent averred that the orders sought under paragraphs 4, 5 and 6 of the application cannot issue at the same time with an order for review. The Respondent further averred that the 2nd Plaintiff has not been reappointed as an administrator. The Respondent contended that the suit herein having been dismissed for lack of legal capacity, the only option available to the current administrators is to file a fresh suit.
10. The Respondent averred that subsequent to the suit herein being struck out with costs, he filed a bill of costs which was taxed at Kshs. 1,181,950/= and that the same was a court process which cannot be wished away. He urged the Court to dismiss the application with costs.
11. The application was canvassed by way of written submissions.

The Applicants' Submissions

12. The Applicants' submissions were filed on 24th January, 2023. In his submissions, Counsel reiterated the contents of the Applicants' supporting affidavit. Counsel further contended that the Applicants have demonstrated that a review of the ruling delivered on 29/05/2020 was merited as per Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010.
13. To buttress his submissions, Counsel relied on the following authorities:-
 - i. [*Khalif Sheikh Adan vs Attorney General*](#) [2019] eKLR.
 - ii. [*Wachira Karani vs Bildad Wachira*](#) [2016] eKLR.

The Respondent's Submissions

14. The Respondent's submissions were filed on 8th March, 2023. Counsel reiterated the contents of the Respondent's replying affidavit. In addition, Counsel submitted that there has been an inordinate delay in the filing of the instant application of about two and a half years.



15. Counsel contended that the Applicants have not satisfied the conditions for review as entrenched under Order 45 Rule 1 of the Civil Procedure Rules, 2010.
16. That contrary to the Applicants' averment that the Defendant had not filed a defence in the instant suit, the firm of Nathan Mbullo & Co. Advocates had indeed filed a defence on behalf of the Defendant.
17. Counsel for the Respondent contended that the application herein has been overtaken by events due to the fact that a bill of costs was taxed at Kshs. 1,181,950/= in favour of the Respondent after the suit was struck out. Counsel submitted that the application is unmerited and urged the court to dismiss the same with costs.

Analysis and Determination

18. Having considered the application, the replying affidavit and the rival submissions, the primary issue for determination is whether the Court should review the ruling delivered on 29/05/2020.
19. The Applicants are seeking to review the Court's ruling and order delivered 29/05/2020. The record shows that vide a Plaint dated 3rd August 2012, the Plaintiffs instituted this suit against the Defendant in their capacity as the legal administrators of the Estate of James Maia Lua seeking the following orders:-
 - a. A declaration that Land Parcel N0. 12 Kilome Land Adjudication Section forms part of the Estate of James Lua Maia (deceased) and that the Defendant is an inter meddler in the estate.
 - b. An order of eviction of the Defendant from Land Parcel No. Kilome Adjudication Section.
 - c. A permanent injunction restraining the Defendant, his agents, servants and/or any other person acting on his behalf from occupying, using or in any way interfering with the said suit land.
 - d. Compensation for the felled trees at the value of Kshs. 555, 349.
 - e. Mesne profits.
 - f. Costs of this suit and
 - g. Interest of (d) and (e) above.
 - h. Any other or further relief as this Honourable Court may deem fit and just to grant.
20. The matter proceeded for formal proof on 11/11/2014 and judgment was delivered on 13/03/2015 in the following terms:-

“The following prayers in the Plaint are granted (a), (b), (c), (d), (f) and (h).”
21. Subsequently the Defendant filed an application dated 14th April 2015 seeking the following orders:-
 - a. That the court be pleased to set aside its judgment dated 13/03/2015
 - b. That the court does enlarge the time allowed by the law to enable the Applicant to defend the suit and the Draft Defense be admitted as the Defendant's defense.
 - c. That the costs of this application be in the cause.
22. The application at the heart of this matter is dated 17th October, 2019 in which the Defendant/Applicant sought the following orders:-



- a. That the court do strike out the suit herein.
 - b. That cost of this application be granted.
23. The application was canvassed by way of written submissions. The court in its ruling struck out the suit with costs to the Defendant. In allowing the application, the learned Judge stated as follows in part:-
- “I do agree with the Defendant/Applicant that indeed this suit is a non starter, frivolous, vexatious and an abuse of the court process. This is compounded by the fact that the Plaintiff/Respondents did not even bother to file submissions. Accordingly, this suit is hereby struck out with costs to the Defendant/Applicant.”
24. The Applicants are seeking a review of this order. 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](#).
25. 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.
26. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 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 judgment to the court which passed the decree or made the order without unreasonable delay.
27. 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 range 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.”



28. The Applicants alleged that there is a discovery of new or important evidence which was not available during the hearing of the application dated 17/10/2019. They argued that they were issued with a grant of letters of administration on 17/02/2020 and that the Respondent concealed the said information from the Court before the impugned Ruling was delivered.
29. The Applicants contend that the grant of letters of administration was not available during the hearing of the application and since they have now been discovered, the Ruling dated 29/05/2020 is eligible for review.
30. The fact of the matter is that the Applicants did not have the said grant of letters of administration on 17/10/2019 when the Respondent made the application for striking out of the suit. The Applicants were issued with the grant of representation while the Respondent's application was pending before the Court for determination. It is after the present suit was struck out that the argument of discovery of new evidence has been brought up. This does not amount to discovery of new or important evidence as per Order 45 Rule 1 of the *Civil Procedure Rules*.
31. The Respondent could not be at fault for making the application to strike out the suit when indeed it was made accurately based on the fact that the Plaintiffs' grant of representation, on which the suit herein was based, had earlier been revoked on 27th September, 2018. That fact has been conceded at paragraph 5 of the Applicants' supporting affidavit. The Applicants have not shown that there is discovery of new and important matter of evidence that they could not have placed before the court during the hearing of the application.
32. As regards the second requirement, the Applicants must establish that there is an error apparent on the face of the record. In the case of *Nyamogo & Nyamogo Vs 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 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.”
33. 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.”
34. The Applicants have not pin pointed the errors that are apparent on the face of the record. As pointed out by the Respondent, the Applicants' remedy lies in filing a fresh suit or appealing the impugned Ruling. The grounds laid by the Applicants do not disclose an error on the face of the record but in view these are grounds for an appeal.



35. In the case of *Abasi Belinda Vs Frederick Kangwamu and Another* [1963] EA 557 Bennett J. aptly held as follows: -

“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *functus officio* and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts.”

36. 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 Limited* [2000] eKLR held as follows: -

“Indeed, 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 without at times running counter to the interests of justice “be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record.”

37. The Applicants have not demonstrated any sufficient reason to warrant a review of the Court’s order.

38. Finally, the Applicants must demonstrate that the application has been made without unreasonable delay.

39. The Applicants contended that there was no delay in presenting the application since they were seeking judicial recourse in Makueni High Court Succession Cause No. 30 of 2018. The order sought to be reviewed was made on 29/05/2020. The instant application was filed on 11/10/2022. That duration is far from reasonable and the same has not been explained satisfactorily.

40. In so finding, I am persuaded by the holding in the case of *Job Agina Vs Abdulsamad 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.”

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

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 25TH DAY OF OCTOBER, 2023.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.



Waweru holding brief for Ngaira for the Applicant.

Ms Gichuki present for the Defendant.

