



Lei v Lemako & 3 others (Sued on behalf of the Estate of the Late Lemako kailol Nkana); Land Registrar Kajiado & another (Defendant) (Environment & Land Case E005 of 2020) [2025] KEELC 1146 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE E005 OF 2020
LC KOMINGOI, J
MARCH 13, 2025**

BETWEEN

LEWNANTAI KUSENGE LEI PLAINTIFF

AND

JOSHUA LEMAKO 1ST DEFENDANT

JEREMIAH LEMAKO 2ND DEFENDANT

GEOFFREY LEMAKO 3RD DEFENDANT

SOLOMON LEMAKO 4TH DEFENDANT

SUED ON BEHALF OF THE ESTATE OF THE LATE LEMAKO KAILOL NKANA

AND

LAND REGISTRAR KAJIADO DEFENDANT

LAND SURVEYOR KAJIADO DEFENDANT

RULING

1. This is the Notice of Motion dated 3rd April 2024. The same is brought under Order 45 Rule 1(a), Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 80 of the [Civil Procedure Act](#) and seeks orders;
 - i. Spent.
 - ii. That this Hon. Court be pleased to review its Ruling delivered on 14th December 2023 based on the grounds that:
 - a. The findings that the Land Registrar is supposed to implement were contained in the Ruling dated 13th November 2019 which has already been declared null and void.



- b. The suit can still subsist against the 5th and 6th Respondents against whom the Applicant sought to restrain from implementing the findings in the Ruling dated 13th November 2019.
 - iii. That this Hon. Court do vacate the order contained in paragraph 25(b) of the Ruling delivered on 14th December 2023 directing the Land Registrar Kajiado to proceed to the ground within 30 days to implement his findings in accordance with the official Government registered document RIM dated 23rd January 1996 sheet 173/1, 2, 4, 174/1 and 3.
 - iv. That cost be in the cause.
 2. The grounds are on the face of the Notice of Motion and are set out in paragraphs 1 to 6. The Notice of Motion is supported by the Affidavit of Lewnantai Kusenge Lei sworn on the 3rd April 2024. He seeks a Review of the Ruling dated 14th December 2023 on the grounds that the Court erred in its findings by ordering the 5th Respondent to implement its findings in accordance with the registered RIM dated 1996. This is because in the same Ruling the Court made a finding that the decision of 13th November 2019 by the 5th Respondent was null and void.
 3. The 1st to the 4th Defendants filed a Preliminary Objection dated 6th June 2024 contesting this Application. The grounds are;
 1. That the application offends order 45 of the Civil procedure Rules.
 2. That the application runs against the law as enshrined in the land dispute under Land Registration Act of 2012 and related Act of Parliament.
 3. That the Respondent are non-suited under the Law of Succession Act Cap 160.
 4. That the proceedings contradicts the provision of Government Proceeding Act Section 16.
 5. That the application therefore be dismissed with cost.
 4. The Notice of Motion and the Preliminary Objection were canvassed by way of written submissions.

The Plaintiff/Applicant's submissions

5. On whether the Applicant had established grounds for review of the Court's Ruling, Counsel submitted that Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules provided for review of judgement to the Court that made the Decree/ Order on account of apparent mistake or error on the face of record. With reference to the cases of Omote & another v Ogutu [2022] KEHC 16441 (KLR), Josiab v Nyaga [2023] KEHC 2054 (KLR) and Mumby's Food Products Ltd & 2 others v Cooperative Merchant Bank Ltd [2008] eKLR where the Courts held that a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. Counsel submitted that the Court's error was on the face of the record because in the Ruling the Court declared, the 5th Respondent's decision on the boundary dispute null and void. That by the Court directing the Land Registrar to implement its findings was an error apparent on the record.
6. In his Supplementary submissions, Counsel added that the application was brought following discovery of new evidence which was not within their knowledge being the Surveyor's and Land Registrar's recent Reports dated 21st June 2024 and 9th July 2024. Counsel submitted that according to the said reports, the Registry Index Map of 23rd January 1996 and the original mutation of 4th April 1989 differs immensely and implementing the court ruling of 14th December 2023 (as per the RIM of



1996), parcel number Kajiado Kaputiei South/55, the Plaintiff/Applicant's land, acreage will decrease by 68.25Ha and Kajiado/Kaputiei South /56 of the late Lemako Kailol Ole Nkana acreage will increase by 58.95 Ha from the original acreage in the title deeds. But, implementing the original mutation of 1989 will have both parcels equal in acreage and none of the developments of either party affected. Counsel made reference to the following cases in support of discovery of new evidence: [Turbo Highway Eldoret Limited vs Synergy Industrial Credit Limited](#) [2016] eKLR; [Anwar Ali & another v Monica Muthoni & another](#) [2021] eKLR and [James Mwaniki Kamau v Republic](#) [2018] eKLR.

7. He prays that, the application be allowed with costs to the Plaintiff/Applicant as per Section 27 of the [Civil Procedure Act](#).

The Defendants/ Respondents' Submissions

8. Counsel for the Respondents submitted that this application offended Order 45 of the [Civil Procedure Rules](#) which stipulates that 'any person aggrieved by a decree or order from which an Appeal is allowed but from which no appeal has been preferred,' because the Applicant had filed a Notice of Appeal against the order is seeking to have reviewed.
9. Counsel also submitted that the suit offended [Land Registration Act](#) procedures because a person aggrieved by the Land Registrar's decision could only approach Court through a Judicial Review and not by way of Plaint. Further that the 1st to the 4th Respondents were also not proper parties to the suit because they were not Administrators of the Estate of the late Lemako Kailol Ole Nkana. He urged that, the Application should be dismissed with costs.

Analysis and determination

10. I have considered the Notice of Motion, the affidavit in support, the Preliminary Objection, the rival submissions, and the authorities cited. The issues for determination are:
 - i. Whether the Respondent's Preliminary Objection dated 6th June 2024 is merited;
 - ii. Whether the application to review this Court's Ruling dated 14th December 2023 is merited;
 - iii. Who should bear costs of the Application?
11. It is now settled that Preliminary Objection should be made on a pure point of law. The Supreme Court of Kenya in [Odinga v Independent Electoral & Boundaries Commission & 3 others](#) [2013] KESC 8 (KLR) held:

“The nature and scope of a “preliminary issue” is cogently defined in the statement of Law, JA, in the case of [Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd](#) [1969] EA 696 at 700:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...”

12. The 1st to the 4th Respondents have contested the application on grounds that it offends Order 45 of the [Civil procedure Rules](#) because the Plaintiff/Applicant had filed an Appeal against the orders he was seeking to review. They also objected their locus standi as parties in the suit and that the proceedings are contrary to Section 16 of the [Government Proceedings Act](#).



13. This court in the Ruling dated 14th December 2023 observed thus;

“The Applicants acknowledged that their father Lemako Kailol Nkana was the owner of property Kajiado/Kaputiei-South/56 which is the parcel of land in a boundary dispute with the Respondent’s Kajiado/Kaputiei-South/55. They swore an affidavit where they acknowledged that they did not have locus standi since they were not legal representatives having not taken out Letters of Administration.”

14. This position has not changed. It is clear that the 1st to 4th Defendants/Respondents despite being the sons of the late Lemako Kailol Ole Nkana, are not the legal representatives of the Estate of the Deceased.

15. The Plaintiff/applicant ought to have ensured the four are the Administrators of the said Lemako Nkailol Ole Nkana before instituting this suit against them. Section 2, 45 and 82 of the Law of Succession Act, further buttress the above position. I therefore find the Preliminary Objection is merited to this extent.

16. I now turn to the Plaintiff’s/Applicant’s application for review. Order 45 of the Civil Procedure Rule, 2010 provides that;

“(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.

(2) A party who is not appealing from a decree or order may apply for a 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.”

17. On the question of an error apparent on the face of the record, Justice Mativo (as he then was) in Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR held:

“36. ...A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

37. ... If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of



the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

39. Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.
 40. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.”
18. The Plaintiff/Applicant has sought a review of this Court’s ruling delivered on 14th December 2023 on grounds that it contradicts its earlier decision of 13th November 2019 which is an error apparent on the face of the record. The Applicant argues that in the Ruling, the Court directed the Land Registrar to implement the findings according to the RIM dated 1996 while in the same Ruling it had found that the decision by the 5th Defendant was null and void and thus incapable of being implemented.
 19. In paragraph 24 of the ruling of this Honourable Court dated 14th December 2023 it observed thus;

“I agree with the above decision that any activity concerning a deceased individual’s estate lacking proper authorisation constitutes intermeddling. Such conduct not only prevents the applicants from defending the law suit but also prohibits them from engaging in any form of handling, including representing their father in boundary disputes or attempting to control any part of the properties to which they have no rightful claim. This essentially renders the boundary dispute ruling dated 13th November 2019 null and void, given that the Applicants are legally authorized to engage in any matter related to parcel Kajiado/Kaputiei-South/56.”
 20. In paragraph 25 of the said ruling, this Honourable Court granted the following orders;
 - a. That the suit is hereby struck out.
 - b. That the Land Registrar Kajiado is hereby directed to proceed to the ground within thirty (30) days to implement his finding in accordance with the official Government registered document RIM dated 23rd January 1996 sheet 173/1,2,4, 174/1 and 3
 - c. That each party do bear own costs.I agree that this is an error apparent on the face of the record. I therefore rectify the said orders on paragraph 25 deleting (b).

To this extent I find that the Notice of Motion succeeds.



21. This means that the suit herein remains struck out as per the ruling dated 14th December 2023, until it is confirmed that the 1st to 4th Defendants are the legal representatives of the estate of the late Lemako Kailol Ole Nkana.

It is only then that the Plaintiff can institute any suit against them.

22. In the meantime, nothing prevents the parties, who are neighbours from submitting themselves to any alternative justice system so that the dispute can be resolved once and for all.

I order each party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 13TH DAY OF MARCH 2025.

L. KOMINGOI

JUDGE

In the presence of

Mr. Ochieng for the Plaintiff.

N/A for the Defendants.

Court Assistant – Mutisya.

