



**Ngilai & 282 others v National Land Commission & 220 others; Kivae Residents Farmers Association (Interested Party) (Environment & Land Case 13 of 2017) [2023] KEELC 21705 (KLR) (22 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21705 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 13 OF 2017  
CA OCHIENG, J  
NOVEMBER 22, 2023**

**BETWEEN**

**DAVID NDOLO NGILAI & 282 OTHERS ..... PLAINTIFF**

**AND**

**NATIONAL LAND COMMISSION & 220 OTHERS ..... DEFENDANT**

**AND**

**KIVAE RESIDENTS FARMERS ASSOCIATION ..... INTERESTED PARTY**

**RULING**

1. What is before the court for determination is the applicant’s chamber summons application dated the July 24, 2023 and the 5<sup>th</sup> to 221<sup>st</sup> defendants’ notice of preliminary objection dated the November 8, 2023. The applicant has sought the following orders in their application;
  1. That the orders issued by the honourable O Angote judge on September 19, 2019 striking out the defence and counter-claim filed by the 222<sup>nd</sup>, 223<sup>rd</sup> and 224<sup>th</sup> defendants be reviewed and set aside and the applicant be granted leave to defend this matter.
  2. That the applicant be granted leave to be joined in these proceedings as a defendant and be allowed to file a defence, a counter-claim and other proceedings in order to ventilate its case herein.
  3. That the hearing of this matter do start afresh in order to enable the applicant prosecute its case.
  4. That costs of this matter be in the cause.



2. The application is supported by the affidavit of Daud Matuna Kinyati, the vice-chairperson of the applicant herein who stated that the applicant consists of 500 members who reside on LR No 339/4 (hereinafter “the suit propert”). He contends that factions of other parties have produced title documents and filed court cases with the sole aim of evicting the applicant’s members who have genuinely resided on the said suit property for a considerable amount of years. He stated that they had filed a prior suit being ELC No 39 of 2018 which was withdrawn by their counsel on record on November 13, 2018, effectively withdrawing all their interests in this matter. He averred that the first time the 222<sup>nd</sup> to 224<sup>th</sup> defendants were mentioned was when the suit had already been withdrawn therefore the defence and counter-claim dated the May 20, 2019 was erroneous. He argued that the previous title holders had their titles revoked and it is in the interest of justice that this application be allowed to enable the applicant pursue its case.
3. The 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> plaintiff’s advocate Nzilani Muteti filed a replying affidavit, in opposition to the instant Application where she argued that the applicant’s members were fully present throughout the proceedings in ELC No 38 of 2018 until their defence and counter-claim was struck out as a result of default on timelines. She contended that the applicant had not come to court with clean hands and the issues in the instant application had already been dealt with.
4. The 5<sup>th</sup> to 221<sup>st</sup> defendants’ herein filed a notice of preliminary objection on points of law premised on the following grounds:
  1. The application is incompetent, incurably defective and bad in law;
  2. The Interested Party is an incorporated body lacking capacity to sue or be sued in its own name therefore has no locus standi.
  3. The application is in violation of the clear directions of the court on April 13, 2023 forbidding the filing of further applications in the suit.
5. Both the notice of preliminary objection and instant chamber summons application were canvassed by way of written submissions.

## Submissions

### Applicant’s Submissions

6. The applicant submitted that it had never been part of these proceedings since there is no record indicating how they became parties without being mentioned in the amended plaint filed on June 8, 2017. Further, that as at December 19, 2017 there were only 221 defendants on record. It contended that this court has jurisdiction to review its orders as set out under section 80 and order 45 rule 1 of the *Civil Procedure Act* and *Rules*. He stated that the basis of this application is that there was a glaring clerical error on the record occasioned by the counsel which was never brought to the attention of the court since the said counsel did not clearly inform the court that there had never been 22<sup>nd</sup> to 224<sup>th</sup> defendants especially when the orders dated the September 19, 2019 were issued rendering the matter to be heard without realizing this mistake. The applicant explained that it has interest in this suit, are in possession of the suit property and it is necessary that they are joined as a party in these proceedings so as to ventilate its claim. To buttress its averments, it relied on the following decisions: *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR; *re Pinochet* [1999] UKHL 1; *Cassell & Co Ltd v Broome* (N0 2) [1972] AC and *AG v David Ndii & 73 others* (2021) KESC 17 (2021) eKLR.



## 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Plaintiffs' Submissions

7. They submitted that this matter was ordered to proceed for hearing *vide* the order dated the September 19, 2019 and insisted that the instant application is irregularly before court since an applicant in an application for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. They argued that the applicant herein did not annex the same. They stated that there has been an inordinate delay in filing the instant application since the orders were issued on September 19, 2019. To support their averments, they relied on the following decisions: *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR; *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR; *Ajmit Kumar Rath v State of Orisa & others*, 9 Supreme court cases 596 at page 608; *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR; *Evan Bwire v Andrew Aginda* Civil Appeal No 147 of 2006; *Suleiman Murunga v Nilestar Holdings Limited & another* (2015) eKLR and *Stephen Gitbua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* (2016) eKLR.

## 5<sup>th</sup> to 221<sup>st</sup> Defendants' Submissions

8. They submitted that the instant application is a non-starter as the Applicant lacks the capacity to sue or be sued in its own name. They argued that the court had already directed that parties should not file any further applications in this suit therefore the instant Application is an abuse of the court process and should be struck out with costs. To support their averments, they relied on the following decision: *Islamia Madrassa Society v Zafar Niaz & 8 others* [2021] eKLR; *Republic v Registrar of Societies ex parte Narok Muslim Welfare Association* [2017] eKLR and *Veronica Wanjira Maringa & 26 others v C K Buxton Diocese of Taita Taveta & another* [2022] eKLR.

## Analysis and Determination

9. Upon consideration of the instant chamber summons application, the Notice of preliminary objection, affidavits and rivaling submissions, the following are the issues for determination: Whether the notice of preliminary objection dated the November 8, 2023 is merited Whether the orders of the court issued on September 19, 2019 should be reviewed and or set aside

### As to whether the Notice of Preliminary Objection dated the 8<sup>th</sup> November, 2023 is merited.

10. The defendants insist that the instant application is incompetent, incurably defective and bad in law as the interested party is an incorporated body lacking capacity to sue or be sued in its own name therefore has noloocus stand. Further, that the application is in violation of the clear directions of the court issued on April 13, 2023 forbidding the filing of further Applications in the suit. I note on the April 13, 2023, this court directed that no parties should file any further applications and the suit was set down for hearing.
11. On raising a preliminary objection, the court in the case of *Independent Electoral & Boundaries Commission -v- Jane Cheperenger & 2 others* [2015] eKLR held that:-

"The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of



dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits."

12. On a manner that a society can institute a suit, the Court in the case of *Trustees Kenya Redeemed Church & anor v Samuel M'Obiya & 5 others* [2011] eKLR stated *inter alia*

"It is trite law that a society under the *Societies Act* is not a legal person with capacity to sue or be sued. A society can only sue or be sued through its due officers' orders. It has not been pleaded that the 2nd defendant has been sued in the capacity of an official of Kenya Redeemed Church nor has it been pleaded that he has been sued in his personal capacity."

13. See also the case of *Free Pentecostal Fellowship in Kenya vs Kenya Commercial Bank* Nairobi HCCC No 4116 of 1992.

14. Order 1 rule 8 (1) of the *Civil Procedure Rules* provides that:-

1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."

15. I note the applicant herein has filed the instant application in the name of Kivae Residents Farmers Association. It has not indicated the members nor officials of the said Association. In relying on the legal provisions quoted and associating myself with the decisions cited, I find that the applicant has failed to comply with the provisions of Section 18 of the *Societies Act* and order 1 rule 8(1) of the *Civil Procedure Rules*. In the circumstances, I find that the Applicant lacks the capacity to sue or be sued in its own name therefore has no *locus standi*.

**As to whether the Orders of the Court issued on 19<sup>th</sup> September, 2019 should be reviewed and or set aside**

16. On review section 80 of the *Civil Procedure Act* provides that:-

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."

17. Further, order 45 rule 1(1) of the *Civil Procedure Rules* provides as follows:-

"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."

18. In the case of *Nyamogo & Nyamogo v Kogo* (2001) EA 17 the Court held that:-

"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 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 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 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."

19. While in the case of *Asset Recovery v Charity Wangui Gethi and 3 others* (2020) eKLR the Court of Appeal held that:-

"In an application for review, as envisaged under order 45 of the *Civil Procedure Rules*, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a 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 made; that there has been a mistake or error apparent on the face of the record or: any "other sufficient reason". The ground "other sufficient reason" has been held to be consonant with the first two grounds: See *Kuria v Shah* [1990] KLR 316. Additionally, the applicant must exhibit that he acted expeditiously."

20. I note the applicant has sought for review of the impugned order more than three (3) years later. Apart from claiming there is an error apparent on the face of record, it has not demonstrated sufficient cause for the delay. I find that the delay is inordinate and inexcusable. Further, this court had already made an order on April 13, 2023 that no party should file any other interlocutory applications. In the foregoing while relying on the legal provisions quoted and associating myself with the decisions cited, I will decline to review the orders issued on September 19, 2019.

21. In the circumstances, I find the notice of preliminary objection dated November 8, 2023 merited and will allow it. I however find the chamber summons application dated the July 24, 2023 unmerited and will disallow it.

22. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**CHRISTINE OCHIENG**

**JUDGE**

