



**Mwangi v Nyota & another; Kungu & another (Third party) (Environment & Land Case 453 of 2017) [2023] KEELC 22055 (KLR) (21 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 22055 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 453 OF 2017  
BM EBOSO, J  
NOVEMBER 21, 2023**

**BETWEEN**

**PAUL KANENE MWANGI ..... PLAINTIFF**

**AND**

**PAUL WATHIKA NYOTA ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL KIHARA MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**EZEKIEL NYAGA KUNGU ..... THIRD PARTY**

**LAND REGISTRAR THIKA ..... THIRD PARTY**

**RULING**

**\*\*\*ARGUMENTS**

1. This suit was heard by Angote J during a backlog clearance programme referred to as “Service Week”. The learned judge subsequently rendered a Judgment in the suit on 3/2/2022 at Machakos. Subsequent to that, the file was returned to Thika Environment and Land Court. A formal decree was issued at Thika Environment and Land Court on 7/4/2022.
2. Seven months after Angote J rendered the Judgment, the plaintiff brought a notice of motion dated 6/9/2022 urging this court to review the Judgment and award him an order decreeing the 2nd defendant to refund him the current market price of the suit land. The application was premised on the following verbatim grounds:
  - a. That judgment was entered against the plaintiff on 3/2/2022 and a decree subsequently issued on 7/4/2022 which decree the plaintiff is aggrieved by the trial court having inexplicably failed to consider the alternative prayer sought in the plaint against the 2nd defendant for refund at the current market price.



- b. That no appeal has been preferred.
  - c. That the said omission of considering the alternative prayer in a mistake/error apparent on the face of the record.
  - d. That the application has been made devoid of unreasonable delay.
3. The above application dated 6/9/2022 is the subject of this ruling. The application was supported by the plaintiff's affidavit sworn on 6/9/2022. It was canvassed through written submissions dated 28/4/2023, filed by M/s Mwhia & Mutai Company Advocates. The 1st defendant did not respond to the application. The 2nd defendant opposed the application through a replying affidavit dated 30/3/2023 and written submissions dated 21/5/2023 filed by M/s Kanja & Njoroge Advocates.
  4. The case of the plaintiff is that, in his pleadings before this court, he sought declaratory orders relating to the suit property and at the same time made an alternative prayer that the 2nd defendant be decreed to refund him the current market price of the suit property. The plaintiff summed up his case in paragraphs 2, 3, and 4 of the supporting affidavit in the following words:
    - “2. That I sought declaratory orders regarding the subject matter and in the alternative refund by the 2nd defendant to me at the current market rates.
    3. That I am exceedingly aggrieved by the judgment of the court that only pronounced itself on the declaration I was seeking whilst inexplicably silent on the alternative prayer sought by myself against the 2nd defendant.
    4. That I am aggrieved by the decree hereto attached and marked “A”.
  5. The plaintiff contends that failure by this court [Angote J] to consider his alternative prayer is a mistake or error apparent on the face of the record and should be rectified through the court's review jurisdiction.
  6. The case of the 2nd defendant is that the application is a clear case of abuse of the court process, adding that the application is meant to re-litigate a matter that is already spent. The 2nd defendant contends that the recourse available to the plaintiff is to lodge an appeal against the Judgment.
  7. I have considered the application, the response to the application and the parties' respective submissions on the application. The two issues to be determined in this ruling are: (i) Whether the criteria for review of a judgment under Order 45 rule 1 of the [Civil Procedure Rules](#) has been satisfied; and (ii) If the answer to issue number (i) above is in the affirmative, whether the relief sought through the review application should issue.
  8. The broad legal framework on a trial court's jurisdiction to review its judgment or order is provided under Section 80 of the [Civil Procedure Act](#) in the following terms:
    - “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.”



9. The jurisdiction is elaborated in details, with clear legislative principles, in Order 45 rule 1 which provides as follows:

“(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.”

10. Review jurisdiction under Order 45 rule 1 of the *Civil Procedure Rules* is exercised on well settled jurisprudential principles. In *Sanitam Services (EA) Limited v Rentokil (K) Limited & another* [2019] eKLR the Court of Appeal outlined the following criteria upon which trial courts exercise review jurisdiction under Order 45 rule 1 of the *Civil Procedure Rules*:

“Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay.”

11. In *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR the Court of Appeal emphasized the principle in the following words:

“Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However as it has been constantly stated this discretion should be exercised judiciously and not capriciously.....”



‘.....The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.’”

12. I have read and considered the pleadings, evidence and submissions that were tendered before Angote J. I have also read and considered the Judgment that was ultimately rendered by Angote J. It is not in contest that in prayer (b) of the plaint dated 17/11/2009, the plaintiff prayed for the following verbatim relief:

“A declaration that land parcel number Thika/ Municipality Block 19/813 belongs to the plaintiff or in the alternative the 2nd defendant be ordered to refund to the plaintiff the current market value of the plot.”

13. Indeed, the Learned Judge acknowledged the above plea in the opening paragraph of the Judgment of the court. Upon considering the evidence placed before the court, the learned Judge made a finding to the effect that there was a scheme by the 1st Third Party who used a purportedly lost title deed to sell the suit land a second time and the Land Registrar who facilitated the fraud by cancelling the title that had already been issued to the 1st defendant and by registering the land in the name of the 2nd defendant.

14. Further, the court made the following finding at paragraph 51 of the Judgment:

51. Having found Ezekiel Nyaga Kungu alias Ezekiel Nyaga Kanuna, the 1st Third Party, did not have a title to pass to the 2nd defendant, it follows that the 1st defendant did not also have a valid title deed to pass to the plaintiff. Indeed the 1st defendant still holds a valid title deed that was issued to him on 16th December 1996. That being so, it is the finding of this court the 1st defendant has proved that the suit property was registered in favour of the plaintiff fraudulent and should be canceled by the court forthwith. The only remedy for the plaintiff and the 2nd defendant is to pursue for the refund for the monies paid for the land.”

15. From the foregoing, it is clear that the Learned Judge was aware of the plaintiff’s alternative prayer directed against the 2nd defendant. In the finding of the Learned Judge, the only remedy available to the plaintiff and to the 2nd defendant was to pursue refund of the monies paid for the land. It cannot therefore be said that the Learned Judge’s failure to grant the plaintiff the alternative prayer was an inadvertent mistake or an error apparent on the face of the record. Contrary to the contention by the plaintiff, this was a considered position taken by Angote J. The merit of that decision cannot be reviewed by the same court.

16. In his own words, the plaintiff contended that he was exceedingly aggrieved by this court’s refusal to grant him the alternative prayer. If the plaintiff was indeed exceedingly aggrieved by the court’s refusal to grant him the alternative prayer, he had every right to pursue the appeal mechanism. Suffice it to state that, review jurisdiction under Order 45 rule 1 of the *Civil Procedure Rules* is not exercised casually or as a substitute for an appeal on the merits of a decision. A party inviting a judge of concurrent status to exercise the review jurisdiction on the merit of a decision must always remember that Kenya’s legal system does not permit a judge of equal jurisdiction to revisit the merits of findings and orders made by a judge or trial court of equal status. Questions relating to the merits of the findings and orders of a trial court are reserved for the appellate court.

17. For the above reasons, it is my finding that the application dated 6/9/2022 does not meet the criteria for review under Order 45 rule 1 of the *Civil Procedure Rules*. Consequently, the review order sought in the application dated 6/9/2022 is unavailable in this court. These are my findings on the two issues.



18. In the end, the application dated 6/9/2022 is rejected for lack of merit. Given the history of the dispute giving rise to the application, there will be no award of costs relating to the application.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF NOVEMBER 2023**

**B M EBOSO**

**JUDGE**

In the presence of: -

Mr Wanyoike for the Plaintiff

Court Assistant: Hinga/Osodo

