Republic v Deputy Commissioner Matungulu Sub-County & 4 others; Muinde (Suing as the legal representative of the Estate of Daniel Muinde Mutiso alias Muinde Mutiso) (Exparte Applicant); Kiselu & 3 others (Interested Parties) (Environment and Land Judicial Review Case E007 of 2022) [2023] KEELC 21632 (KLR) (20 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21632 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E007 OF 2022

CA OCHIENG, J

NOVEMBER 20, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE DEPUTY COMMISSIONER MATUNGULU SUB-COUNTY .... 1ST RESPONDENT

THE LAND REGISTRAR, MACHAKOS COUNTY ..... 2ND RESPONDENT

THE COUNTY SURVEYOR, MACHAKOS COUNTY ..... 3RD RESPONDENT

THE ATTORNEY GENERAL ..... 4TH RESPONDENT

THE CABINET SECRETARY FOR LANDS ..... 5TH RESPONDENT

AND

MICHAEL KITHUKA MUINDE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL MUINDE MUTISO ALIAS MUINDE MUTISO) ..... EXPARTE APPLICANT

AND

PAUL KILONZO KISELU ..... INTERESTED PARTY

BONIFACE MUSEMBI WAMBUA ..... INTERESTED PARTY

NZAVILA NZAU ..... INTERESTED PARTY

MAKAU NZAU ..... INTERESTED PARTY

RULING

1. What is before Court for determination is the Ex parte Applicant's Notice of Motion Application dated the 10th May, 2023 brought pursuant to Order 45 Rules 1, 2 and 3, Order 51 Rules 1, 3, 4 and 10 and Order 21 Rule 3(1) of the *Civil Procedure Rules* as well as Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*. The Ex parte Applicant seeks the following Orders:

    1. Spent

    2. Spent

    3. That the Court do review/and vary its Ruling delivered on 19th April, 2023 dismissing the Application dated 20th June, 2022.

    4. That the Honourable Court does make a declaration that the Minister's Judgment cannot be enforced by execution or otherwise as the same is barred under the provisions of Section 4(4) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.

    5. That the costs of this Application be provided.

2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Michael Kithukawhere he confirms the Court delivered a Ruling dated the 19th April, 2023, dismissing his Application seeking leave for Judicial Review. He explains that he was seeking leave to issue an order of Certiorari against the Ministerial Judgment in Appeal Case No. 106 of 1994 that was certified as a true copy of the original on 2nd February, 2022. He avers that he received a letter from the County Survey Office dated the 2nd May, 2023 stating that the County Surveyor would be visiting his land on 30th May, 2023 for the implementation of the Minister's decision in Appeal Case No. 106 of 1994. He states that the matter was before the Land Adjudication sometime in September, 1993 where a decision was delivered on 1st September, 1993 and as per Section 29 of the *Land Adjudication Act*, one has to lodge an appeal in sixty (60) days failure of which one has to seek leave to do so. He contends that the time to lodge the Appeal to the Minister lapsed in November, 1993 and from the case No. 106 of 1994, the Appeal was lodged in 1994. He insists that the parties appearing on the face of the Judgment were all deceased. He argues that the Judgment the Court relied on to deliver its Ruling was ambiguous and undated. Further, that the said decision is time barred and not implementable. He claims parties have already developed the suit land and they will suffer irreparably if the decision is implemented. He reiterates that this is a clear case for review and the Application has been filed without unreasonable delay.

3. The 3rd Interested Party opposed the instant Application by filing a Replying Affidavit sworn by Nzavila Nzau where he deposes that he has authority of the 1st and 4th Interested Parties to swear it. He avers that the instant Application does not satisfy the threshold for grant of orders of review and the Applicant is merely inviting court to sit on an Appeal of its own decision. He contends that the Application is defective as the issues raised therein can only be determined in an Appeal or substantive application for Judicial Review. He insists that the Application does not indicate a mistake or error apparent on face of record but the Applicant is delving into the merits of the impugned Ruling. Further, all matters raised by the Applicant are not new, were within his knowledge and could have been produced at the time the Chamber Summons dated 20th June, 2022 was determined. He reiterates that the Applicant seeks to relitigate the previous Application through the instant Application. He argues that the Applicant has not adduced the Land Adjudication Officer's decision in court as evidence to

show that the period between it and lodging of the Appeal to the Minister was more than sixty (60) days and he is merely inviting the court to be speculative. He states that the decision of the Minister has since been implemented by the Director of Surveys and therefore its implementation cannot be challenged through the instant Application.

4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. I have perused the instant Notice of Motion Application including the respective Affidavits and rivalling submissions and the only issue for determination is whether this Court should review or vary its Ruling delivered on 19th April, 2023.

6. The Applicant in his submissions reiterated his averments as per the Supporting Affidavit and relied on the provisions of Section 29 of the *Land Adjudication Act*, Article 50 of *the Constitution*, Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. He argued that he has satisfied the threshold for Judicial Review as there were irregularities, deficiencies and legal shortcomings in the Ministerial Judgment coupled with passage of time. To buttress his averments, he relied on the following decisions: *Gilbert Mwangi Njuguna v Judicial Service Commission & Another [2020]* eKLR; *Donald O. Raballa v udicial Service Commission & Another [2018]* eKLR; *Sylvester Nthenge v Johnstone Kiamba Kiswili [2021]* eKLR; *Peter Biwott v Samuel Biwott & 3 Others [2015]* eKLR and *Ndagara W/O Kauthumbu Substituted by Peter Muriithi & Muriuki Kaumbuthu v Mbogo Katharangushu Substituted by Nyaga S/O Mbogo (Deceased) & 4 Others [2021]* eKLR.

7. The Respondents' in their submissions insisted that the Applicant had not met the threshold for review as set out in the *Civil Procedure Rules*. They argued that the Applicant had failed to demonstrate how there was an error apparent on the face of record or that he had come into new information that was not available to him at the time of the court proceedings or there is sufficient reason to review the decree or order. They contend that the fact that the decision of the 1st Respondent is not dated does not infer new information or create an error on the face of the impugned Ruling. Further, that the proceedings before the 1st Respondent was quasi-judicial in nature and therefore not required to strictly comply with the rules of evidence or the *Civil Procedure Rules*. They reiterate that the grounds raised by the Applicant do not amount to orders for grant of review as to what he proposes to challenge is the incorrect Application of law. Further, that the grounds raised in the current Application cannot stand as what was before the court was an Application for Judicial Review. To support their averments, they relied on the following decisions: *Hosea Nyandika Mosagwe & 2 Others v County Government of Nyamira [2022*] eKLR cited in the case of *Republic v Public Procurement Administrative Review Board & 2 Others [2018]* eKLR; Evans Bwire v Andrew Aginda Civil Appeal No. 147 of 2006 cited in *Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016]* eKLR; *Republic v Public Procurement Administrative Review Board & 2 others [2018]* eKLR and *Commissioner of Lands v Kunste Hotel Limited [1997]* eKLR.

8. The 1st, 2nd and 3rd Interested Parties in their submissions contended that the orders sought by the Applicant are akin to the Court sitting on Appeal of its decision. They insist that there is no error apparent on the face of record as claimed by the Applicant. Further, that the matters raised by the Applicant are not new matter and were within the Applicant's knowledge. They aver that the proceedings before the Minister under the *Land Adjudication Act* are not akin to proceedings under the Civil Procedure Rules and are therefore not challengeable under the latter. On whether the Minister's Judgment is irregular, they argue that this cannot be dealt with in an Application for review but at a different forum. To support their averments, they relied on the decision of *Paul Mwaniki v NHIF Board of Management [2020]* eKLR.

9. The Applicant has sought to review this Court's Ruling dated the 19th April, 2023 on the ground that there was an error apparent on the face of the record and proceeded to highlight the anomalies of the Judgment from the Minister.

10. On review, Section 80 of the *Civil Procedure Act* provides:

> " 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."
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> While Order 45, Rule 1(1) of the *Civil Procedure Rules* stipulates thus:-
>
> 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."

11. First and foremost, I note the Applicant vide his Application dated the 20th June, 2022 sought for leave to issue, to commence Judicial Review Proceedings of an order of Certiorari against the Ministerial Judgment in Appeal Case No. 106 of 1994 that was certified as a true copy of the original on 2nd February, 2022. In the said Application, the Applicant alleged that the Minister's Judgment was illegal and incapable of being enforced as it awarded land to people not parties to the Appeal; it was over plot number 422 while the land subject of the appeal was Plot number 1422 making the Judgment ambiguous and unenforceable. Further, that, the Minister failed to record his testimony and that of his witnesses thus arriving at an unjust finding and determination. He claimed the proceedings were scanty and not a true reflection of his evidence which was lengthy and detailed and the Minister failed to read his verbatim statements and those of his witnesses or allow them to sign them as required by law and also prevented him from producing documentary evidence in support of his case which shows the ownership by the various brothers or even visit the land. This Court after analyzing the facts presented proceeded to decline to grant leave to the Applicant on the grounds that he was properly granted audience by the Minister. Further that since a Respondent Nzau Mulwa, was deceased, the Minister was not wrong in dealing with representatives of his Estate Nzavila Nzau and Makau Nzau. This Court noted that the issues raised by the ex parte Applicant did not fall within the purview of Judicial Review and dismissed the Application for leave. The Applicant in this instance has proceeded to give a long drawn argument on the legality and ambiguity of the impugned decision of the Minister, blames the court for relying on it and insists that the Court committed an error apparent on face of record by relying on it, hence the need for review. He argues that the Ministerial Judgment the Court relied on to deliver its Ruling was ambiguous and undated. Further, that the said decision is time barred and not implementable. He claims parties have already developed the suit land and they will suffer irreparably if the decision is implemented. The Respondents and Interested Parties opposed the instant Application insisting there was no error apparent on the face of record and claimed the decision of the Minister had since been implemented.

12. In the case of Nyamogo & Nyamogo v Kogo (2001) EA 174 the Court held while dealing with an issue of review 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."

13. Further, in the case of *National Bank Of Kenya Limited v Ndungu Njau [1997]* eKLR, the Court of Appeal held that:-

> " In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."(Emphasis mine)
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> See also the case of *Paul Mwaniki v NHIF Board of Management [2020]* eKLR.

14. In associating myself with the three decisions cited above and applying them to the current scenario, I opine that the alleged errors cited by the Applicant which I have stated above, have been drawn from a long process of reasoning on the Ruling of this Court and opinion of the Applicant. It seems to me the Applicant wants this Court to reappraise its evidence and arrive at a different conclusion. It is my considered view that the Applicant seeks the Court to conduct an Appeal of its impugned decision, which cannot be. To my mind, I find the grounds and the arguments provided by the Applicant form a good basis for Appeal and it is my finding that they do not meet the threshold for review. Further, I note the Applicant is delving into the merits of the impugned Ruling and has not raised any new matters as everything had been within his knowledge when he filed the Chamber Summons dated 20th June, 2022 which this court dismissed.

15. I further note that the Applicant already lodged a Notice of Appeal and has also sought to pursue a review of this Court's Ruling and this is contrary to the provisions of Order 45 Rule 1 (1) (a) of the *Civil Procedure Rules* as a party is required to take only one option.

16. It is against the foregoing that I find the Notice of Motion Application dated the 10th May, 2023 unmerited and will proceed to disallow it.

Costs are awarded to the Respondents and Interested Parties.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE