Kiriwa & another ((Suing on their own behalf)) v Misoi & others (Environment & Land Case 104 of 2010) [2023] KEELC 21633 (KLR) (17 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21633 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 104 OF 2010

FO NYAGAKA, J

NOVEMBER 17, 2023

BETWEEN

EZEKIEL KIRIWA ..... 1ST PLAINTIFF

MZEE ARAP KITUR ..... 2ND PLAINTIFF

(SUING ON THEIR OWN BEHALF)

AND

MICHEAL KIPRUTO MISOI & OTHERS ..... DEFENDANT

RULING

1. By a Notice of Motion dated 18/11/2022, Plaintiffs moved this Court under Sections 1A, 1B, 3A and 63(e) of the *Civil procedure Act*, Chapter 21 of the Laws of Kenya, article 159(2)(d) of the *Constitution* of Kenya (2010) and order 45 rule 1 and order 51 rule 1 of the *Civil Procedure Rules (2010)* and "all enabling provisions of the law." They sought the following orders:-

    1. ...Spent

    2. That this Honourable Court be pleased to review, vary and/ or set aside its ruling and orders issued on 27th October, 2021 and in its place there be orders that the Amended Plaint dated 2nd July, 2020 and filed on 2nd December, 2020 is properly on record and that the 7th, 8th and 9th Defendants were duly enjoined and are properties to the suit.

    3. That the of this application be borne by the Defendants jointly and severally.

2. The Application was based on twenty-six (26) grounds which this Court summarises here. The first one was that the suit came up for hearing on 27/10/2021 when the suit was bereaved and learned counsel had learnt too that the 4th Defendant, one Joseah Kaptich Kirwa had died and substitution was needed. That on the material date learned counsel Ms. Rutto holding his brief applied

for adjournment. That learned counsel for the Defence and the Attorney-General objected to the adjournment and argued that the 7th-9th Defendants had not been served with pleadings.

3. That the Court ruled that the Amended Plain was improperly on record since the Amendment was effect outside of the time allowed and 7th- 9th Defendants were not parties to the suit. That the matter was simply for an adjournment. The order was issued without a formal application being made for the Plaintiffs to exhaustively respond. That the allegations raised were from the Bar. That the representative of the Attorney-General misled the Court that they were not served yet service was done and there was clear evidence to that effect.

4. That the Ruling issued on 29/05/2020 was delivered via email and learned counsel for the Plaintiffs learnt of it in late June 2020, extracted the order on 01/07/2020 by which time the fourteen (14) days granted to the Applicants, including the date slated for mention, had already passed. That the issue of delay was placed before the Judge on 12/11/2020 on which date the judge extended the time to file and serve the Amended Plaint. By that time the Plaintiffs had placed the Amended Plaint in the Court file and were waiting for its assessment for payment of filing fees hence the order that it be deemed duly filed.

5. That there was an inadvertent mistake on the part of the Advocate as he did not manage to obtain payment for the Amended Plaint until 02/12/2020 due to challenges with the electronic payment system. Thus, the Plaint was finally admitted as part of the record when he paid for it. That the Defendants' learned counsel were served on 3rd and 4th December, respectively. Subsequent to that the firm of Kiarie and Company Advocates participated in the Court proceedings and filed an Amended Defence and Counterclaim after seeking the Court's indulgence on several occasions. Thus, the said law firm acquiesced to late filings hence it was estopped from faulting the Plaintiffs.

6. That it was wrong and improper for learned counsel for the Attorney-General to deny service of the summons without seeking evidence thereof. That the order of striking out the Amended Plaint and the names of the 6th – 7th amounted to not hearing parties and prejudicial to the Plaintiffs. That if the 6th – 7th Defendants were not parties they had no business addressing the Court hence it was unprocedural and the orders therefrom irregular.

7. That to strike out the Plaint yet a Court of equal jurisdiction had made the order amounted to overturning the court's decision through an oral Application from the Bar. That in any event he Court should take judicial notice that since one of the parties had died the matter could not have proceeded hence it was an act of bad faith for the Defense counsel to have introduced extraneous factors without disclosing the death of the 4th Defendant.

8. He deponed further that learned counsel who held brief for the Applicants could not have confirmed or denied service on the Respondents in absence of the office file. The Plaintiffs were condemned unheard. There were thus sufficient reasons to warrant a review of the orders made on the material date hence there be an order deeming the 7th, 8th and 9th Defendants properly enjoined. That the Plaintiffs stood to suffer irreparable harm by locking out the 7th – 9th Defendants from the proceedings to the Detriment of the Plaintiffs and other members of the Farm'

9. Further, that the Amended Plaint was struck out for no fault on the Plaintiffs' part despite an order of extension. That the amendment was in respect of some actions of some Defendants in "cohorts" (sic) with some officers at the Lands Offices who had unscrupulously sold some portions of land and manipulated the List of members to increase them to 583 and causing irregular amendment of the survey map contrary to the consent granted in favour of only 198 members. The Defendants had already filed their Defence and Counterclaim which were properly on record.

10. That the *Constitution* of Kenya, 2010 enjoins the Court to administer justice without undue regard to procedural technicalities, and natural justice and fairness demanded that the Plaintiffs be given a fair hearing. That the Application was brought without undue delay and no prejudice would be occasioned to the Respondents if the Application was granted.

11. The parties who had been sued previously as 7th-9th Defendants in the Amended Plaint struck out vide the order sought to be set aside did not wish to file any response to the Application.

12. However, the rest of the Defendants opposed the Application through a Replying Affidavit sworn by Michael Kipruto Misoi on 24/03/2023 and filed on 28/03/2023.

13. In it, he deponed that the Application was belated having been filed a whole year since the orders were made. That there was no error or mistake apparent on the record. That the Court found rightly on 27/10/2021 that learned counsel could have notified the Defendant on his bereavement in order to avoid expenses. That the Applicants had admitted in the Supporting Affidavit that by 12/11/2020 no Amended Plaint had been filed. Further, that the Applicant had not demonstrated service on the 7th and 8th Defendants. Again, if the Plaintiff was aggrieved by the order of the Court he should have appealed against it rather than seeking a review. That the Application had no merits.

14. After the Replying Affidavit was filed and served, the Court directed the parties to file submissions. The Plaintiff filed theirs on 21/06/2023 while the Defendants did theirs on 27/07/2023.

Plaintiffs'/applicants' Submissions

15. The Applicants began by submitting that there was more than meets the eye in the submission by learned counsel on 27/10/2021. He then summarized the Application stating that the Court issued orders on 27/10/2021 holding that the Amended Plaint was improperly on record and as such the 7th - 9th Defendants were not parties in the suit. He referred to the Supporting Affidavit sworn by learned counsel and the annextures thereto, being AKM -1 the summons to enter appearance and AKM -2 the Eulogy on the 4th Defendant who died on 08/06/2021. He set out four issues for determination. These were whether the 9th Defendant mislead the Court as to service, whether the Applicants demonstrated sufficient reason to warrant the grant of the prayers sought, whether the Court should enlarge time and regularize the pleadings due to electronic/ e-filing problems, and who to bear the costs.

16. Regarding the first issue about service of Summons to enter appearance on the Attorney General, he submitted that the same was served on 3rd and 4th December, 2020 respectively, and that it was the reason why the firm of M/S Kiarie & Company Advocates filed a Defence and Counterclaim. They submitted that the defendants should be estopped from faulting the Plaintiffs over the delay.

17. They relied on section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules, 2010*. They then submitted that of indeed the 7th – 9th Defendants had not been served they ought not to have addressed the Court on 27/10/2021.

18. They then submitted that the 4th Defendant had died on 08/06/2021 hence the learned counsel turned a blind eye to that fact on 27/10/2021 and purported to be ready to proceed without prioritizing the issue of his substitution. They relied on the book "The Art of the Advocate" by Richard du Cann where he explained that as an officer of the Court the Advocate owes allegiance to the cause that is higher than serving the interests of his client. They then submitted that the cause of justice in the matter was truth. They also relied on the case of *Tabelgaa Chepngeno Tele & 2 Others v John Kiprotic Ngetich & 5 Others* [2021] eKLR which explains the jurisdiction of the court regarding review under order 45

of the *civil procedure rules* and the one of *Mbogo v Shah & another* [1967] EA 116 which explains the duty of the court in regard to exercising discretion.

19. Lastly, they submitted that the Applicant's learned counsel had explained that there was an inadvertent mistake on his part as he did not make the payment for the Amended Plaint until 2nd December, 2020 due to challenges in the electronic payment system of the Court. He submitted further that learned counsel had raised the issue before my brother judge on 12/11/2020 when the Court extended the time within which to file the Amended Plaint and serve it. He says that by that time the Applicants had placed the Amended Plaint on the record and were waiting only for payment for it and that the Court had on that date made an order that it be deemed duly filed. They submitted that the delayed payment was inadvertent and beyond the control of learned counsel. They relied on the case of *Bains Construction Co. Ltd v John Mzare Ogowe* [2011] eKLR which addressed the issue of mistake on the part of learned counsel. they also relied on the court of appeal case of *Rajesh Rughani v Fifty Investment Ltd & another* [2005] eKLR on Advocate's Mistake, And *Orix (k) Limited v Paul Kabeu & 2 Others* [2014] eKLR on costs.

Respondents Submissions

20. The Respondents first summarized the Application. They too relied on section 80 of the *Civil Procedure Act* and reproduced order 45 rule 1 of the *Civil Procedure Rules, 2010*. They gave the summary of the events surrounding the order sought to eb reviewed. The argued that since the Applicants failed to extract the order made on 27/10/2021, the Application should fail since it was contrary to the provision. They relied on section 2 of the *Civil procedure Act* and the decisions of *Gulamhussein Mulla Jivanji And Another v Ebrahim Mulla Juvanji And another* (1926 – 1930) 12 EACA 41 and Kitale HCCA No. 7 of 2000 (*Kenya Seed Co. Ltd v Ann Chandai*. it was their submission that on 27/10/2021, the court made several orders hence the applicants ought to have specified which one they was aggrieved with.

21. They also submitted that the application was made with undue delay, being made over a year since the ruling sought to be reviewed was read. They argued that the Applicants had not offered an explanation for the inordinate delay. They relied on the case of *Manjual Dhirajlal Soni v Dukes Investments International Limited & 2 Others* [2018] eKLR where the Court held, "The application for review was brought after a lapse of over one (1) year from the date of the decision sought to be reviewed. The delay has not been explained by the Bank".

22. On whether there was a mistake or error apparent on the face of the record., they relied on the case of *Wanjiru Gikonyo & 2 Others v National Assembly Of Kenya And 4 Others* [2016] eKLR for the definition of such an error. they then submitted that there was no error in the ruling of 27/10/2021: that it was factually correct.

Issue, Analysis And Determination

23. I have considered the Application, the law and the submissions of both counsel for the parties. The only issues that commend themselves for determination herein are whether the Application is merited and who to bear the costs of the Application.

24. Regarding the merits of the Application, it is clear to me that the Applicants seek for a review to set aside only one limb of the ruling made on 27/10/2021. On the 27/10/2021 this Court made orders which would be summarized into three (3). One, the Applicants' learned counsel applied for adjournment on account of bereavement. It was granted. Second, the Court ordered that the Applicants pay costs. Third, the Court perused the Court record and made a finding that the Applicants had not complied

with the orders given earlier about filing an Amended Plaint by a certain date, being the assddds which was seven days from the orders of sdsdsdsd, and serving summons to enter appearance on the 7th to 9th Defendants. It therefore struck out the Amended Plaint that was purportedly on record, thereby effectively removing the 7th – 9th Defendants from the record as the amendment was for the joinder of the said parties, among others.

25. The Applicants seem to be dissatisfied with the order of the Court regarding the last limb. That is why the substantive prayer they made in the instant application was that the order of 27/10/2021 be set aside and the Amended Plaint dated 02/07/2020 and filed on 02/12/2020 be deemed properly on the record and that the 7th, 8th and 9th Defendants were properly enjoined to the suit and are therefore proper parties herein. They relied on Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules, 2010*.

26. The law on review of a judgment, ruling, decree or order of a court is now settled. Section 80 of the *Act* provides that

> " Any person who considers himself aggrieved—
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> (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."

27. Order 45 Rule 1 of the *Rules* gives more details regarding when an application for review may be made, pursuant to the previous provision. It provides that

> " Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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."

28. Therefore, for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, he/she must prove that:

i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge and which could not therefore produce at the time the order was made or,

ii. Some mistake or error apparent on the face of the record or,

iii. Any other sufficient reason

And further, the application has to be brought without undue delay.

28. The starting point is the definition of any other sufficient reason. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 Mativo J. (as he then was) culled out the following principles from a number of authorities: -

    i. A court can review its decision on either of the grounds enumerated in order 45 rule 1 and not otherwise.

    ii. The expression "any other sufficient reason" appearing in order 45 rule 1 has to be interpreted in the light of other specified grounds.

    iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under section 80.

    iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

    v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

    vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

    vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

    viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

    ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in order 45 rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in order 45 rule 1.

    x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in order 45 rule 1.

29. Even as this Court embarks on the determination of the merits of the Application, two issues are worth of mention at this point. One is that this Court will forever remind parties that an unexplained and unsubstantiated phrase “all enabling provisions of the law” is nothing but a hollow meaningless sentence which any serious legal mind should move away from using in drafting documents for consideration. It never avails much to anyone other than wasting the court’s time in reading it. Second, this Court wonders aloud whether in an application of this nature a party can apply to set aside only a part of an order, decision or judgment of the court.

30. That said, in an application an application for review, since one of the requirements for it to be brought successfully is whether it was filed without undue delay, the Court should actually determine that issue first. This is because, irrespective of whether there are merits in the application, the court will dismiss the same where the delay is unexplained to the satisfaction of the court. Thus, in this era of backlog of cases, and in any other sensible situation, it is advisable for the court not to waste time considering the merits if it will still find that the application was brought with undue delay and finally dismiss it.

31. Where time is of essence delay should not be inordinate and even when it is not inordinate any slight lapse in falling within the timelines must be explained. So, it should be where although there is no fixed timeline the statute expressly requires such steps as for applications for review under order 45 rule 1 of the *Rules* that the delay if it be in existence be not unreasonable. Thus, the burden is on the Applicant to discharge as to why he/she moved the Court with the delay, and that even then it is not unreasonable.

32. The term unreasonable means what it is: unreasonable. That implies that when the Court considers all the circumstances of the case none lends to the possibility that the Applicant had the opportunity to move the court at the earliest point when it became apparent that he/she ought to act but for without any explanation he/she exercised inaction. It means that an applicant should, as equity demands, not sleep on his/her right the soonest they discover that there is reason to take a step to remedy the situation.

33. The explanation for the delay should be given to the satisfaction of the court. In the instant case, in regard to whether the Application was brought without undue delay, this Court finds that indeed the Application was brought with undue delay. It took the Applicant one year and twenty days to bring the Application. What explanation did he give for the delay? None whatsoever! They only pleaded fairness and natural justice.

34. Regarding the effect of the death of the 4th Defendant, it is imperative for the Applicants to satisfy the Court as to whether the suit survived the deceased person as to justify a prayer for the Application of order 24 of the *Civil Procedure Rules* regarding abatement or otherwise of the suit. From the Plaint, the reliefs sought against the Defendants were and are a declaration that the suit lands LR No 6431, 5713 and 8416 be subdivided into 198 portions as per the Saboti/Kwanza Land Control Board consent of 1990 and the Area List of 1989 so as to facilitate issuance of titles deeds. The other relief was an injunction against the Defendants and their agents or other persons from subdividing the land otherwise than as per the consent and the Area List. The deceased 4th Defendant was among the six (6) who were sued but whose capacity or cause of action was described simply as persons "unlawfully insisting/alleging that the suit lands (named) be subdivided into 583 portions".

35. I have carefully considered the claim against the deceased Defendant. I do not in any way see how it could survive his demise so as it not to have abated upon his death. The deceased is not going to insist from the grave about the subdivision of the suit lands to 583 plots. I hold so because it is instructive that the Holy Bible (for those who believe in it – see New International Version) is clear in Ecclesiastes 9: 5 that "For the living know that they will die, but the dead know nothing; they have no further reward, and even their name is forgotten." Not even their ghosts, and this Court believes in none existing can take part in our business on earth: only demons which counterfeit the dead take part).

36. Although survival of the cause of action as against the 4th Defendant (deceased) was not an issue that was argued directly before me in the instant application, the Applicants argued before me that for reason of the death of the 4th Defendant this Court should not have proceeded to make any orders as it did. They produced a copy of the deceased's eulogy as annexture AK-2 to buttress their argument. Theirs was that this Court could have simply adjourned the matter and let it lie for the period one year from the time of the death of the party for substitution. Far be it that this Court could take such a step.

37. Therefore, the applicants continued to argue that the knowledge about the death of the having not been brought to the attention of the Court was a sufficient reason now brought before the court vide the instant application as to cause the grant of orders sought. I disagree with them on account of the above finding regarding survival of the action against the deceased party.

38. Be that as it may, this Court wishes to remind the Applicants that what it did in terms of the orders they seek to set aside was nothing but to declare the court record as it was and still is based on their actions regarding the filing of the Amended Plaint. It is clear, and learned counsel who swore the supporting Affidavit admitted on oath in the deposition that indeed no Amended Plaint had been filed when they prayed that my learned brother judge does extend time for the said document in the record to be deemed duly filed. Thus, they misled the learned judge that there was an Amended Plaint on the record. The extension was given on nothing. Actually, they filed the document even way after the extension over "no document" had long expired. Therefore, if they did as indeed the did, was the Amended Plaint properly on record? No. Did they serve a document properly filed? No. Instead they served a nullity. We the other parties bound by law to respond to a nullity or even consider themselves or the 7th – 9th purported Defendant consider to have been properly enjoined through a nullity? No.

39. Regarding whether the Applications have satisfied the requirements of section 80 of the *Act* and order 45 rule 1 of the *Rules*, I find that they have not. They did not give any evidence of any error or mistake apparent on the record, or any sufficient reason to warrant the review sought. If they were dissatisfied with the orders of the court, what they deem to be a sufficient reason herein is a ground that should have been taken properly on appeal and not by way of review.

40. I note that the Applicants wish this Court extend the time to deem the Amended Plaint that was struck out properly filed and therefore find the 7th – 9th Defendants to have been proper parties. I wish the applicants should have taken this route in their argument immediately and as the only one! Perhaps it could have convinced the court and the other parties. But they chose a wrong path. They sneaked in this argument too late and without a sufficient explanation for it. Their argument on that was that the electronic system of the court was not functional for a time as to have the Amended Plaint assessed and they pay for it in time. Granted that there was a system failure, did it take a whole month? Was there any evidence from the system Administrator that indeed the system broke down, and for that long? There was none. Thus, this ground fails.

41. The upshot is that the application is wholly unmerited. It can only find its way to and a resting place in the land of dismissed matters. I commission and send it there and let it lie dismissed. Costs shall be to the Respondents.

42. This matter shall be mentioned on 5th December, 2023 for confirmation as to compliance and fixing of a hearing date.

43. It is so Ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA EMAIL THIS 17TH NOVEMBER, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE