



**Kangatta Properties Ltd v Kagotho & 2 others; Mimemia & another  
(Interested Parties) (Environment & Land Case E059 of 2023)  
[2023] KEELC 22454 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22454 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E059 OF 2023  
JO MBOYA, J  
DECEMBER 13, 2023**

**BETWEEN**

**KANGATTA PROPERTIES LTD ..... PLAINTIFF**

**AND**

**PETER KAGOTHO ..... 1<sup>ST</sup> DEFENDANT**

**JENIPHER MUNJIRU KARANJA ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**FREDRICK KIMANI MIMEMIA ..... INTERESTED PARTY**

**LUSIKI HOLDINGS LTD ..... INTERESTED PARTY**

**RULING**

**Introduction and Background**

1. The plaintiff/applicant herein had hitherto filed an Application dated the 14<sup>th</sup> August 2023; and in respect of which same sought for various reliefs touching and/or concerning the property known as Nairobi/Block40/526 [formerly L.R 209/3531/2], ( hereinafter referred to as the suit property).
2. Subsequently, the Application beforehand was heard and disposed of vide the Ruling of the Honourable Court rendered on the October 26, 2023; and wherein the Honourable court found and held that the Application under reference was devoid and bereft of merits.
3. Pursuant to the foregoing, the Honourable court proceeded to and dismissed the Application with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Instructively and for the avoidance of doubt, it is the Ruling under reference that has provoked the filing of the instant Application.



4. For coherence, vide the Application dated the November 20, 2023, the plaintiff/applicant has now sought for the following reliefs;
  - i. The Ruling made on the October 26, 2023 in respect of the applicant's Application dated the August 14, 2023 and all consequential orders thereto be reviewed.
  - ii. Such further reliefs be granted to the applicant as thus Honorable Court deems fit and expedient in the circumstances.
  - iii. Costs of the Application to be in the cause.
5. The instant Application is premised and/or anchored on various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the affidavit of one, namely, Ben Ongeri Oyugi, sworn on even date and to which the Deponent has annexed three [3] sets of documents.
6. Upon being served with the instant Application, the 2<sup>nd</sup> respondent filed a Replying Affidavit sworn on the November 28, 2023; and in respect of which same has contended, inter-alia, that the applicant has neither established nor demonstrated the existence of an error and/or mistake apparent on the face of record to warrant the review sought or at all.
7. Suffice it to point out that the instant Application came up for mention on the November 22, 2023; when the advocates for the respective Parties covenanted to canvass and dispose of the Application by way of written submissions. Consequently and in this regard, the Honourable court proceeded to and set the timelines for the filing and exchange of the written submissions.
8. Notably, the plaintiff/applicant thereafter proceeded to and filed written submissions dated the November 30, 2023; whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed written submissions dated the December 8, 2023.
9. For coherence, both sets of written submissions are on record.

#### **Parties' Submissions:**

##### **a. Applicant's Submissions:**

10. The applicant herein adopted the grounds enumerated at the foot of the Application and also reiterated the contents of the Supporting affidavit sworn on the November 20, 2023; and thereafter same proceeded to and highlighted two [2] salient issues for due consideration and determination by the Honourable court.
11. Firstly, Learned counsel for the applicant has contended that the court herein made an error in terms of paragraphs 17 and 20 of the Ruling, when court found and held that the plaintiff's suit had not been accompanied by the requisite Resolutions of the plaintiff company under seal.
12. Furthermore, Learned counsel for the applicant has contended that by the time the Honourable court made the proclamation that the suit was not accompanied by the Resolution under seal, the applicant herein had filed a Further affidavit sworn on the September 26, 2023; and in respect of which same had availed a copy of the Resolution of the plaintiff company under seal.
13. Owing to the foregoing, Learned counsel for the applicant has therefore contended that the finding and holding that the applicant's suit was not accompanied by the requisite Resolution, constitutes and/or amounts to an Error apparent on the face of record.



14. Secondly, Learned counsel for the applicant has further submitted that the Honourable court also made an error in terms of paragraphs 30 and 31 of the Ruling, where the court referred to the prayers alluded to at the foot of the original Plaintiff dated the August 14, 2023; instead of the prayers contained at the foot of the amended Plaintiff dated the September 26, 2023.
15. In particular, Learned counsel for the applicant has contended that the Honourable court made an error in finding and holding that the applicant herein had sought to have the Lease in respect of its own title/ Certificate of Title canceled.
16. Based on the foregoing, Learned counsel for the applicant has thereafter contended that based on (sic) the errors and mistakes alluded to, there is reasonable basis to warrant a finding that the Ruling under reference ought to be reviewed and/or set aside.
17. In support of the foregoing submissions, Learned counsel for the applicant has cited and relied on, inter-alia, the decision in *National Bank of Kenya Ltd versus Ndungu Njau* (1997)eKLR; and *John Mathenge Gichubi versus Cyrus Ndungu & 2 Others* (2016)eKLR, respectively.
18. In a nutshell, Learned counsel for the applicant has thus contended that the applicant has satisfied the requisite test as laid down vide the provisions of Order 45 Rule 1 of the *Civil Procedure Rules*, 2010; and hence the subject Application is meritorious.

**b. 1<sup>st</sup> And 2<sup>nd</sup> respondents' Submissions:**

19. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed written submissions dated the December 8, 2023; and in respect of which same has reiterated the averments contained in the Replying affidavit and thereafter same has raised, canvassed and highlighted two [2] salient issues for due consideration and determination by the Honourable court.
20. First and foremost, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent has submitted that when the instant suit was filed and/or lodged, the plaintiff/applicant did not tender and/or avail to court the requisite Resolution of the company under seal either as required by law or at all.
21. Additionally, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents has therefore contended that having failed to avail the requisite Resolution at the onset, the Honourable court cannot be faulted for having found and held that the applicant had not placed before the court the requisite Resolution to confirm that the suit was duly authorized at the onset.
22. Secondly, Learned counsel for the said respondents has submitted that even though the applicant contends that same availed a copy of the Resolution under seal vide the supporting affidavit sworn on the September 26, 2023, it is still worthy that the purported resolution has not been attached to the Plaintiff and/or the amended Plaintiff, whatsoever.
23. Lastly, Learned counsel for the said respondents has also pointed out that the Ruling of the court, which is the subject of review considered various perspective of the dispute and/or controversy and thus the finding of the Honourable court contained therein cannot be the subject of an Application for Review or at all.
24. Premised on the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondent has therefore contended that the impugned Application is not only misconceived and devoid of merits but same is also Legally untenable and hence, ought to be dismissed with costs.



25. Other than the foregoing, Learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents has cited and relied on the decision in the case of *Nyamogo & Nyamogo versus Kogo* (2001) 1EA 173, to anchor the contention that the applicant herein has neither met nor satisfied the requisite threshold for review.

### **Issues For Determination:**

26. Having reviewed the Application dated the November 20, 2023; and the Response thereto and upon taking into consideration of the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy for determination;
- i. Whether the applicant herein has been able to establish and demonstrates an error and mistake apparent to the face of record; and if so, whether the Error or Mistake [if any], warrants review.
  - ii. Whether the applicant herein has established a basis to warrant the setting aside of the impugned Ruling.

### **Analysis and Determination**

#### **Issue Number 1**

#### **Whether the applicant herein has been able to establish and demonstrates an error and mistake apparent to the face of record; and if so, whether the Error or Mistake [if any], warrants review.**

27. Before venturing to address and resolve the issue hereinbefore mentioned, it is imperative to state and observe that the instant suit was filed on the basis of the Plaintiff dated the August 14, 2023, which was accompanied by a verifying affidavit sworn by one, namely, Peter Kimani Kangata, on the August 14, 2023.
28. It is instructive to note that even though the original Plaintiff was accompanied by a verifying affidavit, [details in terms of the preceding paragraph herein], nevertheless, the Deponent of the verifying affidavit did not annex nor attached a copy of the [sic] Resolution of the company authorizing and/or mandating the filing of the suit.
29. Suffice it to point out that the suit in question was originated vide the Plaintiff and therefore it was incumbent upon the Deponent to avail and/or tender to court a copy of the Resolution under seal, at the onset or with leave of the court, authorizing the filing of an appropriate/suitable verifying affidavit accompanied with the resolution under seal.
30. Be that as it may, there is no gainsaying that the original Plaintiff remained supported by the verifying affidavit which was neither accompanied by nor indorsed with the requisite Resolution under seal. [ See the Provisions of Order 4 Rule 1(2) of the *Civil Procedure Rules*, 2010].
31. First forward, the plaintiff herein sought for and obtained Leave of the court, which was clearly intended to strike out and/or expunge the names of the 3<sup>rd</sup> defendant, namely, the Registrar of Titles. For good measure, the name of the 3<sup>rd</sup> defendant/respondent as contained in the body of the original Plaintiff was thereafter struck out and/or expunged from the proceedings.
32. On the other hand, it is also important to note that the plaintiff/applicant herein thereafter proceeded to and filed an amended Plaintiff dated the September 26, 2023, albeit without Leave of the court.



- Nevertheless, the said amended Plaintiff is also supported/verified by a verifying affidavit sworn by Peter Kimani Kang'atta sworn on (sic) August 2, 2023.
33. Curiously, it is worthy to point out that the verifying affidavit, which is attached to (sic) the amended Plaintiff is sworn prophetically on the August 2, 2023, long before the purported Resolution under seal, which is alluded to in terms of the preamble of the said verifying affidavit. For coherence, the impugned resolution is said to have been dated on the August 12, 2023.
  34. Despite the evident contradiction, [that I have alluded to in terms of the preceding paragraph], what is important for the purpose of this Application is to the effect that even the amended Plaintiff [filed without leave], is also [similarly] not accompanied by the verifying affidavit indorsed with the Resolution under seal.
  35. Having reproduced the foregoing factual position, it is now appropriate to venture forward and consider whether there is an Error or mistake apparent on the face of the Ruling rendered on the October 26, 2023, either has contended by the applicant or at all.
  36. In a bid to discern/ decipher whether or not there is an Error or mistake in terms of paragraph 17 and 20 of the Ruling under reference, it is appropriate to reproduce the contents of the named paragraphs.
  37. Same are reproduced as hereunder;
    17. However, it is not lost on the Honourable court that the current suit has not been accompanied by any such resolution under seal and hence it is difficult to authenticate and/or verify whether the suit has been sanctioned by the applicant.
    20. Clearly, there is an apparent conflict as to who are the lawful Directors of the applicant company and for as long as the conflict pertaining to the Directorship remains, it is difficult to discern who therefore has the mandate to authorize the transactions for and on behalf of the applicant company.
  38. Having reproduced the foregoing paragraphs, the question then is whether there is an Error or mistake that is discernable from the conclusion alluded to at the foot of the said paragraphs, either as contended by the applicant or at all.
  39. To start with, there is no gainsaying that neither of the verifying affidavits, which have been filed by and on behalf of the plaintiff/applicant herein, have exhibited a copy of the impugned Resolution under seal, either in accordance with the provisions of Order 4 Rule 1(2) of the Civil Procedure Rules, 2010 or at all.
  40. For the avoidance of doubt, this court consciously found and held that the suit has not been accompanied by the requisite Resolution under seal and the same position remains. Instructively, the suit can only be accompanied by the requisite Resolution under seal, where the verifying affidavit is duly indorsed with the Resolution.
  41. To my mind, the position that was adverted to and/or espoused by this Honourable court continues to hold sway to date. Consequently and in my humble view, I do not discern/ decipher any Error or mistake, either as contended by the applicant or at all.
  42. Furthermore, there might arise a debate as to whether (sic) the attachment, if at all, of the Resolution under seal to a Further affidavit [which is not the case herein], can suffice for purposes of the provisions of Order 4 Rules 1(2) of the Civil Procedure Rules 2010.



43. Nevertheless, the position shall remain that if the finding of the court that the suit [read the plaint], has not been accompanied by the requisite verifying affidavit indorsed with the resolution under seal, [is not correct], then such an issue cannot be deemed to be an Error or mistake to warrant a review.
44. Conversely, such a position, would then constitutes an erroneous finding by this court, [which is contra-distinct from an Error apparent], which can only be corrected upon appeal and not on review.
45. In respect of the contents of paragraph 20, which has also been alluded to by the applicant, it is explicit that the court took cognizance of the factual controversies espoused in the rivaling affidavits and thereafter made a conscious and deliberate finding that there was an apparent conflict as pertains to the Directorship of the applicant.
46. Furthermore, the finding and holding that there was a conflict as pertain to who are the bona fide Directors of the applicant and thus the persons authorized to transact the affairs of the applicant, remains outstanding and same can only be resolved, [if at all], by production of evidence, albeit during a plenary hearing.
47. Yet again and without fear of contradiction, I am at pains to discern and decipher how the conscious and deliberate finding that there is apparent conflict as pertains to Directorship, can be termed to amount and/or constitutes an Error on record, to warrant to invocation and application of Review.
48. Quiet clear, Learned counsel for the applicant does not seem to appreciate the dichotomy between what constitutes an error or mistake, which can found an Application for review; and an erroneous decision, the latter which ought to premise an appeal to the Honourable Court of Appeal, where so advised.
49. Be that as it may, I hold the firm opinion that the conscious and deliberate finding espoused in paragraph 20 of the Ruling of the Honourable Court, which is alluded to by the applicant herein, cannot be the basis of review.
50. Further and in any event, what the applicant herein seems to procure/ [intent to do], is an invitation for this court to sit on appeal on own decision.
51. In respect of the foregoing exposition of the law, it is sufficient to adopt and reiterate the ratio decidendi in the case of *National Bank of Kenya Ltd versus Ndungu Njau* (1997)eKLR, where the court held as hereunder;

“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. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

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.



52. Furthermore, the distinction between a mere Error and an Error apparent in the face of record was also adverted to and highlighted by the Court of Appeal in the case of *Nyamongo & Nyamongo Advocates v. Kago* (2001) I EA 173, where the court stated and held thus;

“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 a real distinction between mere errors in decision and an error apparent on the face of the 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 a 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 face of the record. Again, if a view adopted original record is a possible one, it cannot be an error on the face of record even though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal.”

53. In view of the foregoing, it is my finding and holding that the contents of paragraphs 17 and 20, which have been highlighted by the applicant to reflect an error worthy of review, do not fall within the parameters envisaged under the provisions of Order 45 Rule 1 of the *Civil Procedure Rules* 2010, to warrant review or at all.

## Issue Number 2

### **Whether the applicant herein has established a basis to warrant the setting aside of the impugned Ruling.**

54. Other than the contention that there was an Error on the face of Record, the applicant herein has also adverted to the facts that the Honourable court found and held that the applicant was seeking to have a Certificate of title registered in her own name canceled.

55. Furthermore, the applicant has also made a Complaint that the court proceeded to highlight the reliefs sought at the foot of the original Plaintiff and not the reliefs contained at the foot of the amended Plaintiff (sic) dated the September 26, 2023.

56. In my humble view, the complaint by Learned counsel for the applicant herein amounts to semantics and splitting hairs; and in any event, same is devoid of any meaningful substance.

57. Instructively and for good measure, the applicant herein has curiously sought to have the Certificate of Lease dated the May 26, 2023; in respect of the suit property to be declared null and void.

58. For the sake of brevity, what was sought for at the foot of the original Plaintiff stated as hereunder;

- i. Permanent injunction restraining the defendants, their agents, employees, workers or persons claiming under them from acting on their behalf and by whatever name called from in any way interfering with or entering onto, transferring, taking possession, dealing with, occupying or in any way seeking occupy the suit property known as Nairobi/Block 40/526 [formerly L.R 209/3531/15] situated at park road, Nairobi.
- ii. A declaration that the issuance of certificate of lease dated the May 26, 2023 in respect to the suit property the suit property known as Nairobi/Block 40/526 [formerly L.R 209/3531/15]



situated at park road, Nairobi and all procedural steps leading thereto are null and void and of no effect and that same be canceled forthwith.

iii. Costs of this suit.

59. As pertains to (sic), the amended Plaintiff dated the September 26, 2023; which in any event was filed without Leave, the applicant has sought for the following reliefs;

i. Permanent injunction restraining the defendants, their agents, employees, workers or persons claiming under them from acting on their behalf and by whatever name called from in any way interfering with or entering onto, transferring, taking possession, dealing with, occupying or in any way seeking occupy the suit property known as Nairobi/Block 40/526 (formerly L.R 209/3531/15) situated at park road, Nairobi.

ii. A declaration that the issuance of certificate of lease dated the 26<sup>th</sup> May 2023 in respect to the suit property the suit property known as Nairobi/Block 40/526 its transfer to the 4<sup>th</sup> defendant and all procedural steps leading thereto are null and void and of no effect and that same be canceled forthwith.

[Underlining in red supplied]

iii. Costs of this suit.

60. From the prayer sought at the foot of the amended Plaintiff, which substantially replicates what was hitherto sought at the foot of the original Plaintiff, there is no debate that the applicant herein is seeking, inter-alia, a declaration to invalidate the Certificate of Lease issued on the May 26, 2023; in her own name and not otherwise.

61. Additionally, once the Certificate issued in her [ plaintiff/ applicant's] own name is declared null and void; then logically any transfer, [if any], would similarly collapse.

62. It is from the foregoing foundation that the court expressed itself that the applicant herein was [sic] curiously seeking an order whose net effect was to negate the very title that the applicant is (sic) claiming to own.

63. In my humble and considered view, the positions espoused at the foot of the impugned Ruling, [which is the subject Application for review], continues to hold sway and the conclusions therein can only be impeached on Appeal and not otherwise.

64. Instructively, Learned counsel for the applicant herein appears to have misapprehended and misconstrued the import, meaning and tenor of the elaborate and explicit findings adverted to by the Honourable court in the Ruling under reference.

65. Nevertheless, it is my humble conclusion that the Ruling that was rendered by this court, objectively evaluated the issues that were alluded to at the foot of the Application by the applicant; as well as the response by the respondents and hence the conclusions thereunder do not lend themselves to review.

66. In a nutshell, I similarly find and hold that no circumstances has been ventilated, nay, espoused to warrant the Review either as sought or at all.

### **Final Disposition:**

67. Before venturing to render the final orders in respect of the subject Application, it is worthy to underscore that when the instant matter came up for mention on the 11<sup>th</sup> December 2023, Learned



counsel for the applicant conceded that no Summons to Enter Appearance have ever been extracted and served in respect of the subject matter.

68. Owing to the said concession, the Honourable court drew the attention on the respective advocates to the provisions of Order 5 Rule 1 of the Civil Procedure Rules, 2010; and which technically connotes that the suit appears to have abated.
69. Be that as it may, the question of abatement or otherwise of the suit is a potent issue that the Parties, [didn't address]; can be able to address at the opportune time for due calibration and ultimate determination by the court.
70. Nevertheless and having pointed out the foregoing, I beg to state and underscore that the Application dated the November 20, 2023; is certainly devoid and bereft of merits.
71. In short, the Application under reference; be and is hereby Dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
72. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF DECEMBER 2023.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Benson - Court Assistant.

Mr. Ongeru for the plaintiff/applicant.

Mr. Gakaria for the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents.

Mr. C.N Menge [Deputy Chief Litigation Counsel] for the 3<sup>rd</sup> defendant/respondent.

