



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Teja & 5 others v Munga & 12 others (Environment & Land Case 62 & 109 of 2013
(Consolidated)) [2025] KEELC 334 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 334 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 62 & 109 OF 2013 (CONSOLIDATED)
SM KIBUNJA, J
JANUARY 29, 2025

BETWEEN

HAIDERALI POPAT TEJA PLAINTIFF

AND

ALPHONCE MUNGA 1ST RESPONDENT
MORRIS DZUYA 2ND RESPONDENT
KASSIM ABDALLA 3RD RESPONDENT
BARASA WESONGA 4TH RESPONDENT
KAKUCHA CHENGO 5TH RESPONDENT
KALUME CHEA 6TH RESPONDENT
SULUHI KAHINDI 7TH RESPONDENT
SAMMY KULUMBA 8TH RESPONDENT
THOYA KAVIHA 9TH RESPONDENT
BAKARI SAFARI 10TH RESPONDENT
KENYA POWER & LIGHTING CO LTD 11TH RESPONDENT
MOMBASA WATER SUPPLY & SANITATION CO LTD 12TH RESPONDENT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 109 OF 2013

BETWEEN

FESTUS CHARO GONA 1ST APPLICANT



SULUBU MWAVITA NGOMBO 2ND APPLICANT
MRS RECHO MWALEKWA 3RD APPLICANT
GONA CHONDO GONA 4TH APPLICANT
JULIUS OKUMU 5TH APPLICANT
SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE SQUATTERS/
RESIDENTS OF KAJIWENI ESTATE, RESIDING UPON THE SUIT
PROPERTY/PLOT NO 380/11/MN, TITLE NO CR 1921 NUMBERING
120 PEOPLE WHOSE NAMES APPEARS IN THE SCHEDULE OF LIST OF
MEMBERS OF KAJIWENI DEVELOPMENT GROUP ATTACHED TO THE
ORIGINATING SUMMONS

AND

HAIDERALI POPAT TEJA RESPONDENT

RULING

[notice of Motion Dated 14th February 2024]

1. The plaintiffs/applicants in ELCC No. 109 of 2013, filed the notice of motion dated the 14th February 2024, that is brought under sections IA, 1B, 3, 3A, 63(e), 80, 95, 100 of the *Civil Procedure Act*, Order 42 Rule 6(2) & (3), Order 45 and Order 50 Rules 1, 2, 3, 4, 5, 6 & 7, Order 51 Rule 1 of the Civil Procedure Rules, sections 3 & 13(7) of the *Environment and Land Court Act*, Articles 19, 47, 50(1) & 159 of *the Constitution*, seeking for the following orders:
 1. That this honourable court be pleased to issue an order for a stay of the execution of the Judgment of this honourable court delivered on the 15th of November 2023 and all the consequential orders pending the hearing and determination of this application inter-parties and ostensibly issues an order for status quo pending the determination of the application herein.
 2. That this honourable court be pleased to set aside, review and or/vary the judgment and decree of this honourable court delivered on the 1st of November, 2023.
 3. That the Certificate of Death Number 673871 of one Haiderali Popat Teja be put on forensic to ascertain; its authenticity.
 4. That the cost of the application be in the cause.”
2. The application is premised on the sixteen (16) grounds on its face and supported by the affidavit of Festus Charo Gona, the 1st applicant, sworn on 14th February 2024, in which he inter alia deposes that their suit commenced through the originating summons dated 27th May, 2013 was dismissed on 1st November 2023 on account of being a nullity which is an apparent error on the face of the court record; that the court did not consider the fact that the evidence placed before it was not ascertained nor was it corroborated by the Respondent which by doing so could have made the court rule otherwise; that the production of the original death certificate of the Respondent, was not put under scrutiny, and the applicants’ fundamental evidence in rebuttal to it was not considered by the court; that the



court did not consider their Originating Summons in its entirety and did not pronounce itself on whether it had met the threshold required; that the two suits were consolidated vide the ruling dated 14th March 2018, with the lead file being ELC No. 62 of 2013, and the other ELC No. 109 of 2013 as a counterclaim; that during the pre-trial directions, the counsel for the Respondent informed the court that his client had died, without adducing any evidence; that the court gave the counsel of the ample and reasonable time to adduce evidence of the death of the Respondent, but did not do so, and the court on the 7th of February 2023, dismissed ELC No. 62 of 2013 for non-attendance; that the court in its Judgment relied on a death certificate that was neither adduced in court by the petitioner nor served upon the applicants, thereby occasioning an apparent mistake and omission; that the court in its judgment differentiated from its earlier decision on the fact that the Respondent failed to appear in Court hence having the suit ELC No. 62 of 2013 dismissed, to reviving the same on account of a document that was seen upon drafting the judgment, thereby occasioning an apparent mistake on the record of admission of documents after a suit is dismissed; that even if the respondent is dead as acknowledged by the court in its judgment, the orders of the court in favour of the Respondent will irreparably cause injury to the applicants, and infringe their inalienable right to fair hearing as articulated by Articles 50 and 159 (2)(d) of *the Constitution* that enjoins the court to administer substantive justice without undue regard to technicalities, and also to accord every party fair hearing in terms of scrutiny of vital documents not brought to their attention; that the court should find there were material errors on the face of the court record that warrant it to review the earlier orders as prayed.

2. On 4th June 2024 the court directed the applicants to serve the respondents through advertisement in one English and Swahili newspaper with a national coverage in 30 days, and fixed the application for hearing on the 29th July 2024. The applicants filed an affidavit of service dated 19th July 2024 confirming that on 18th July 2004, their advocate, Hithcliff Oyas, served the defendants/respondents by way of substituted service, and noting that there were no replies filed, a ruling date was fixed for today.
3. The issues for determinations by the court in the application are as follows:
 - a. Whether the applicants have met the threshold for review of the judgement delivered on 1st November 2023, in the manner prayed.
 - b. Whether the applicants have made a reasonable case for the court to order forensic investigations on death certificate number 673871 of Haiderali Popat Teja.
 - c. Who pays the costs?
4. The court has considered the grounds on the notice of motion, affidavit evidence, the pleadings, record and come to the following conclusions:
 - a. The court has power to review its orders under section 80 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, and Order 45 of the Civil Procedure Rules. Section 80 provides as follows: -

“ 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.

3. Order 45 Rule 1 & 2 of the Civil Procedure Rules sets out the grounds for review 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 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, without unreasonable delay.”
- b. The applicants herein seeks to review the judgement of this court delivered on 1st November 2023 that inter alia ordered as follows:
- a. That as it is apparent Haiderali Popat Teju, the defendant, had died in 2002, about eleven (11) years before the filing of this suit, ELC No. 109 of 2013, the same is hereby struck out for being a nullity.
 - b. That the court on its own motion reviews and sets aside the order made on the 7th February 2023 dismissing ELC No. 62 of 2013 for non-attendance and in its place orders that the said suit be struck out for being a nullity.
 - c. That the ELC Deputy Registrar to urgently ensure a certified copy of this judgement together with certified copies of the pleadings and affidavits filed for and signed by the said Haiderali Popat Teju, and any other necessary documents in ELC No. 62 of 2013 and 109 of 2013, are forwarded to the Directorate of Criminal Investigations [DCI] Mombasa County for necessary investigations and action as ordered in 9 (e) and (f) above.”



4. It is the applicants case that the court in its judgement relied on a death certificate that was neither adduced in court nor was served upon the applicants to scrutinize. The applicants urged the court to find that amounted to an apparent error on the face of the court's record, and prayed for the judgement to be reviewed as sought.

d. I have perused the court's proceedings and I do note that the court was first informed by Mr Amadi, counsel for the plaintiff in ELC 62 of 2013, that the plaintiff was deceased on 18th January 2022. Mr. Hayanga, the then counsel for the defendants/applicants in ELC 109 of 2013 was present, and he told the court that he had received an email from Mr. Amadi to that effect. The court directed Mr Amadi to apply for substitution of the deceased party. However, that was never done, and on 7th February 2023 the court dismissed the plaintiff's claim in the consolidated suit for non-attendance. On 27th March 2023 Mr. Amadi informed the court that he had forwarded the plaintiff's death certificate to the court on 22nd March 2023, which showed that he died on 12th March 2002. In its judgement dated 1st November 2023, the court by its motion reviewed its earlier order issued on 7th February 2023, which dismissed ELC No. 62 of 2013 for non-attendance, in appreciation that a dead party could not have been expected to present himself to court, and its place ordered for the suit to be struck out for being a nullity.

e. The question that comes to the mind of the court is what qualifies as a mistake or error apparent on the face of the record. The Court of Appeal defined what an error apparent on the face of the record in the case of National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR where it held that;

“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.”

5. An error or omission must be self-evident on the face of the record, without there being a need for additional arguments, and must not be one that can be subject to an appeal. The Court of Appeal in the case of Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] KECA 809 (KLR) held that;

It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:

“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.”

6. In *Nyamogo and Nyamogo Advocates v. Kogo* [2001]1 E. A. 173 this Court further explained an error apparent on the face of the record as follows:

“An error apparent on the face of the record cannot be defined precisely and 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 a mere erroneous 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 record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

7. The applicants herein are simply asking the court to sit on the appeal of its decision and reverse it since they believe that the court should have reached a different conclusion.

f. The fact that applicants believe that the court should have reached a different conclusion, if it had considered the evidence placed before it, their originating summons is a matter fit for appeal rather than review. The process of and determinations of the court on the law and facts as presented before it, cannot be treated as an error apparent on the face of the court record, that would justify the court's exercise of the power of review. The jurisdiction of review is limited and does not extend to the argument that the court would have reached a different decision had it considered any specific evidence before it. In my view, a perceived error of the reasoning of a judge/judicial officer on the law and facts presented cannot be said to be a mistake or error apparent on the face of the record, that can be subject matter of review.

g. The applicants may be aggrieved with the court's reasoning concerning the finding that their suit against the respondent/defendant was a nullity upon the consideration of the death certificate of one Haiderali Popat Teja. That however, does not in my view, qualify for the applicants to approach the court through a review application on the ground of error apparent on the face of the record, as there is no such error established. The applicants' issue with the court's judgement of 1st November 2023 is essentially a perceived error of law, or better still, a dissatisfaction with the court's exercise of its discretion, which is a ground of appeal, rather than a ground for review. The applicants appear to have shunned their right to appeal against the judgement of this court, and instead sought to invoke the court's jurisdiction of review under the guise of an error apparent on the face of the record. This court declines the invitation by the applicants to as it were, to sit on appeal over its own decision. The court finds no merit in the Notice of Motion dated 14th February 2024.

h. That in accordance with section 27 of the *Civil Procedure Act* on costs following the event, unless where for good cause ordered otherwise, the applicants will bear their own costs, as they have been unsuccessful in their application, and none of the respondents participated in its hearing.



8. Flowing from the foregoing determinations on the notice of motion dated the 14th February 2024, the court finds and orders as follows:

a. That the said application has no merit and is hereby dismissed.

b. The applicants to bear their own costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF JANUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

IN THE PRESENCE OF:

Applicants : Mr Oyas

Respondents : No Appearance.

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

