



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KWALE**

**ELC PETITION NO 14 OF 2021**

**MKUPUO NETWORK AWARENESS.....PETITIONER/APPLICANT**

**VERSUS**

**CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING...1<sup>ST</sup> RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT KWALE.....2<sup>ND</sup> RESPONDENT**

**KWALE INTERNATIONAL SUGAR COMPANY LIMITED.....3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....4<sup>TH</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

**RULING**

**THE APPLICATION**

1. The application for ruling was brought under the provisions of Sections 3A & 80 of the Civil Procedure Act, Order 45 Rules 1 & 2 and Order 51 Rule 1 of the of the Civil Procedure rules and all enabling provisions of law for orders;

1. Spent

2. That the ruling delivered by this honourable court on 4<sup>th</sup> February 2022 by the honourable Justice A.E Dena be reviewed and/or set aside.

3. That the order granting conservatory orders and issuing a temporary injunction against the Applicant/3<sup>rd</sup> Respondent ,their officers, employees and or agents from wasting, dissipating, or dealing in any manner whatsoever with LR No 5056 given by this honourable court emanating from the ruling dated February 2022 in ELC Petition no 14 of 2021 be reviewed and set aside on the ground there are new material facts affecting the crux of the subject matter that were not before the court at the time of the ruling.

4. That the honourable court do stay the execution of the ruling and orders dated 4<sup>th</sup> February 2022 pending the hearing and determination of the applicant's application

5. That costs of this application be in the cause

2. The application is supported by grounds on its face and the supporting affidavit of Benson Musili Nzuka sworn on 23<sup>rd</sup> February 2022. He deposes that the ruling dated 4<sup>th</sup> February 2022 was based on documents filed by parties in the year 2020 and that since then a lot of developments had occurred on the suit property which were not taken into consideration by the Court and which prejudice the position of the 3<sup>rd</sup> Respondent. As to the development of the suit property. He stated that the status quo based on the letter dated 18<sup>th</sup> July 2019 from the Ministry of Interior and Coordination of the National Government which the court had quoted had two years later changed and no longer existed. It was also averred that the Court failed to acknowledge the fact that the letter in addition to stopping the 3<sup>rd</sup> Respondent/Applicant to halt operations to facilitate completion of the excision process, had also concluded that once the process was concluded the 3<sup>rd</sup> Respondent would be free to continue with its business. That the said excision process was completed, a new certificate of lease LR. No 5056/6 issued measuring 1519 Hectares on 26<sup>th</sup> August 2019 to the 3<sup>rd</sup> Respondent who then commenced land development and preparation activities, sugar cane growing and related auxiliary activities Including engagement of two contractors to undertake site clearance of the existing

vegetation and mobilization of resources and equipment.

3. It was further stated that the 3<sup>rd</sup> Respondent engaged with various government agencies to review the status of its operation and progress of the developments on the said LR. No 5056/6. That as at 1<sup>st</sup> February 2022 the 3<sup>rd</sup> Respondent had full occupation of the land having undertaken various activities covering 1155.36Ha at a cost of USD 1,826,606. A breakdown was given. That the only unoccupied area in LR. No 5056/6. was 21 Ha at the Nihapu Settlement left out during crop and structure valuation exercise as well as areas that had homesteads a fact which had been brought to the attention of the Chairperson National Lands Commission, the Principal Secretary, Ministry of Lands and the County Commissioner vide a letter dated 13<sup>th</sup> July 2021. A survey plan and current maps of the area were exhibited in this regard.

Other activities undertaken were feasibility studies on reclaiming/construction of dams. That cane planting had been undertaken entailing labor, irrigation infrastructure and maintenance costs.

3. It was stated that the petitioners were undertaking logging activities and had even destroyed power lines on the suit land. That huge resources had been incurred to advance the activities and 3<sup>rd</sup> Respondent stood to suffer irreparable loss if the orders issued were to be interpreted as the status quo before the 3<sup>rd</sup> Respondent entered the land.

4. It was further deposed that the mistake and error on the face of the record stemmed from the issuance of conservatory orders to maintain status quo with reference to the letter dated 18<sup>th</sup> July 2019 from the Ministry of Interior and Coordination of the National Government because material changes had occurred since the petition was filed which had not been presented to the court when the conservatory orders were issued. That there existed sufficient reason, exceptional circumstances to warrant a review of the ruling as the orders given will impede the operations already undertaken on the suit property.

### **RESPONSE TO THE APPLICATION**

5. The application was opposed by a replying affidavit sworn by Bakari Halifani Munge on 2<sup>nd</sup> March 2022. He averred that the lease held by the 3<sup>rd</sup> Respondent was for LR No 5056/6 which was illegally excised from the suit land herein. It was the Petitioners opinion that the ruling subject of the instant application had been made after they proved a prima facie case and referred the court to paragraph 32 of the ruling. That there was no discovery of new evidence and or mistake or an error apparent on the face of the record to warrant grant of the review orders. It was deposed that the ruling by the court had been made with the knowledge that the excision exercise had taken place farming activities commenced which information was contained in the 3<sup>rd</sup> Respondents Replying Affidavit dated 4<sup>th</sup> February 2022. That such information would not be termed as new evidence and or a mistake.

6. Further that the said excision had been carried out without public participation and the two conditions set out by the letter from the Ministry of Interior and Coordination of the National Government were on the excision process and on resettlement of individuals. The latter had not been complied with. It was stated that the 3<sup>rd</sup> respondent had resumed operations without fulfilling all the conditions set out in the letter and the same amounted to an illegality. The deponent further stated that the 3<sup>rd</sup> Respondents actions of commencing development did not legitimize the illegality that had taken place by failure to fulfil the conditions set out by the letter and the results incurred were of their own doing.

7. The court was urged not to entertain the claim of loss. That the destruction of power lines was by the 3<sup>rd</sup> Respondent with the intention to cut power supply to the Petitioners homes and further that the petitioners have not engaged in any destruction of the sugar cane crop planted by the 3<sup>rd</sup> Respondent, neither had they destroyed the farms and had no intention to do so since the issuance of the orders by the court.

8. It was lastly stated that the 3<sup>rd</sup> Respondent had not stated with clarity the error of material facts and had failed to meet the threshold for grant of review orders and hence the instant application ought to be dismissed.

### **SUBMISSIONS**

9. The application was disposed of by way of written submissions and parties were given an opportunity highlight on the same orally. The Respondent did not highlight while the AG supported and adopted the submissions by the Applicant. The 4<sup>th</sup> Respondent did not respond to the application despite service.

### **Applicants Submissions**

10. The Applicant submissions were filed on 16<sup>th</sup> March 2022 and canvassed three (3) issues for determination. 1) Whether the application met the necessary threshold of review/setting aside orders, 2) Whether reliance on the letter from the Ministry of Interior & Coordination of The National Government halting operations of the 3<sup>rd</sup> Respondents as it were in 2019 amounts to an error on the face of record and 3) Costs of the application. The submissions reiterated the depositions made in the Applicants supporting affidavit in respect of this application.

### **Whether the application met the necessary threshold of review/setting aside orders,**

11. Citing the provisions of Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules Prof. Ojienda SC contended that there was an error on the face of the record due to the court's reliance on the letter by the Ministry of Interior and Coordination of National Government instructing the Applicant to halt operations to facilitate completion of excision of the suit property. That the letter was written on 21<sup>st</sup> August 2019 yet by 26<sup>th</sup> August 2019 the excision process had been completed and the applicant issued with a new certificate of lease for LR No 5056/6. On this basis the Applicant moved to undertake the various developments herein (see paragraphs 2 and 3 of this ruling) and it would be prejudicial for status quo to be maintained as was supposed to be vide the said letter. Reliance was placed on

Nyamongo & Nyamongo V Kogo [2001] EA 170 to explain what constituted an error and to urge that the applicant had met the threshold of reviewing the orders on the basis of error apparent on the face of the record which error the applicant had not belaboured to explain.

**Whether reliance on the letter from the Ministry of Interior & Coordination of The National Government amounts to an error on the face of record**

12. Counsel contended that reliance by the court on the letter herein presented an error on the face of the record. That from the face of the same, it was issued as a cautionary measure to avoid conflict between the Applicant and the local community while the government continued with the process of excising certain portions of the subject land. The letter also stated that once the process was concluded the applicant would be free to continue its business operations. According to counsel excision was completed culminating into the issuance of a certificate of lease and the applicant to continue with developments on the land, which they did. That the error by the court was prejudicial on the applicants as they relied on the letter whose directions had already been overtaken by events. The court was referred to the holding of the Court of Appeal in National Bank of Kenya V Ngungu Njau to emphasize 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-evidence and should not require an elaborate argument to be established...’

13. The applicants prayed for the application to be allowed as prayed and costs be in the cause.

**Respondent’s submissions**

14. The Respondent filed its submissions on 22<sup>nd</sup> March 2022 which responded to the issues canvassed by the Applicant. On whether the applicant meets the necessary threshold for review /setting aside of orders it was submitted that this court did not wholly rely on the letter from the Ministry of Interior & Coordination of The National Government in its ruling. That the court’s decision was based on the fact that the Petitioners met the threshold for grant of orders of injunction. It was the Petitioners view that no new evidence had been brought forth by the Applicant and neither was there an error apparent on the face of the record. It was submitted that the error referred to was one that required a process of reasoning and failed the threshold as also pointed in Veleo [K] Limited V Barclays Bank of Kenya Limited [2008] eKLR which cited Nyamongo & Nyamongo V Kogo (2001)EA 179 relied upon by the Applicant. Further that there was no mistake that arose by referring to the said letter as the court was merely trying to guide the parties.

15. It was further contended that the Applicant had not complied with the resettlement of squatters as was intimated in the letter from the Ministry of Interior & Coordination of The National Government. That the excision was done unlawfully as it was marred with fraud and lack of public participation. The Petitioners maintained that no action should be founded on an illegality or immoral conduct and further that no legal action can have its origin in fraud.

16. The court was urged to dismiss the instant application with costs to the Petitioners/Respondents.

**ANALYSIS AND DETERMINATION**

17. I have considered the application, the supporting affidavit, the response thereto, the rival submissions and the authorities placed before this court. I also took time to read the ruling which instigated this application. The right to apply for review is provided for in Section 80 of the Civil Procedure Act and elaborated by Order 45 of the Civil Procedure Rules.

Section 80 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.

**[Order 45, rule 1.] Application for review of decree or order.**

“1. (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.

18. From the foregoing the powers to review is discretionary. However further guidance on the exercise of this discretion is provided under Order 45 which requires the following grounds should exist: -

- (a) Discovery of a new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) Any other sufficient reasons; and
- (d) The application must be made without *unreasonable delay*

19. The key issue for determination is whether the orders sought should issue whose answer lies in establishing if the applicant has met the requirements in 18 above. I will therefore be guided in my analysis by the above requirements. I also point out that this court's understanding is that the said requirements are not conjunctive by dint of use of the word 'or' which connotes they are mutually exclusive and optional. This therefore means that the applicant need not meet all the requirements for the orders to issue except that in addition they must have filed the application timeously or without unreasonable delay. The court must however exercise its discretion within the confines of Order 45. I have taken time to read the authorities cited by counsel for the applicant and I have also read at length other authorities touching on the issue for review. I have gathered that review is not a forum to open the case or application for fresh argument, it is not to bring new arguments and should not be compared at all to an appeal. Together with the law I will be guided by *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR where Mativo J has enumerated the subject of review at length quoting a number of court decisions as follows; -

13. The starting point is 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]

14. In *Nyamogo & Nyamogo v Kogo*[6] discussing what constitutes an error on the face of the record, the court rendered itself as follows:- "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal." 15. The Indian Supreme Court [7] made a pertinent observation that it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. 16. In *Attorney General & O'rs v Boniface Byanyima*, [8] the court citing *Levi Outa v Uganda Transport Company*, [9] held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment." 17. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. [10]

**See also *Republic V Cabinet Secretary for Interior and Co-Ordination of National Government Ex parte Abdullahi Said Salad* [2019] eKLR** where the court stated that; -

'... I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge *applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible*".

### **Unreasonable Delay**

20. I will dispose of the mandatory ground requiring the application to be filed without unreasonable delay. The order the subject of this application was issued on 4<sup>th</sup> February 2022 and this application was filed on 24<sup>th</sup> February 2022. I'm aware that there was an error on the face of the order which was brought to the attention of the court by the Petitioners that necessitated amendment by the court. This court made the amendments on 14<sup>th</sup> February 2022, the order was then extracted and reserved. This court finds the application to have been filed without unreasonable delay.

### **Discovery of a new and important matter or evidence**

21. I will be very brief on this point. This is so because guided by the law, the facts placed before me in the supporting affidavit to this application, annexures thereto and compared to the pleadings there is nothing I can term a new discovery. Both agreements referred herein existed by the time the application for interlocutory orders was filed and at the time the orders of this court were issued - see the Replying affidavit sworn by Benson Nzuki on 4<sup>th</sup> February 2021. The evidence was already in the knowledge of the applicant. The agreement for standard services between the 3<sup>rd</sup> Respondent and Pepco [K] Limited is dated 24<sup>th</sup> February 24/2/2020 and the other one with China Civil Engineering Construction Corporation[K] Limited is dated 16/12/2019 and was annexed then. The only item I will exempt under this head is

the photos for the sugar cane crop that have been exhibited but may not possibly have been exhibited at the time of filing the suit. I will deal with this item from the point of its importance.

**Mistake or error apparent on the face of the record**

22. Counsel for the Applicant contended that reliance by the court on the letter from the Ministry of Interior & Coordination of The National Government presented an error on the face of the record. From the authorities cited by Counsel and by this court the error or omission must be self-evident and should not require an elaborate argument to be established. I'm very clear in my mind the alleged error cited cannot be termed as an error apparent on the face of the record. It is not prima facie discernible at the look of the letter. In fact, it has taken time for Counsel for the Plaintiff to explain the error made by this court. The arguments raised by counsel are in my view matters of appeal.

23. Having expressed the view that the requirements are disjunctive, I'm inclined to exercise my discretion based on the existence of 'any other sufficient reason' which to me is where the actual discretion is conferred. *Mativo J in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (supra)* had this to say; -

'A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Signh and Another* [16] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter..... Where the application is based on sufficient reason it is for the Court to exercise its discretion. 29. I am not persuaded that the reasons offered by the applicant amounts to 'sufficient reason' within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda* [20] where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh...'

24. At the beginning of this analysis I alluded to photos which I observed would be dealt with latter. The photographs produced by the applicant see 'BM4' reveal a sugar cane crop planted on commercial basis. The photos were exhibited to show the extend of the activities already undertaken on the suit property for this purpose. They were not produced at the time of responding to the application and were not available to this court. I take cognizance of the fact that a crop takes time to grow and may not have been available then. However, the importance of this information to this application cannot be overemphasised and in my view serves as a very strong ground for review. Clearly there is a crop which will definitely and as matter of prudence require maintenance and I see no prejudice to the Petitioners if this were allowed to continue. Meanwhile I have also noted that this dispute has been protracted and owing to its sensitivity the court was inclined to accord it priority hearing as requested by the Petitioners. This also resonates with the objectives of the Civil Procedure Act. This matter is scheduled for hearing on 4<sup>th</sup> May 2022 and 5<sup>th</sup> May 2022. The conclusion of this matter at this court's level is now imminent.

25. Based on the foregoing this court finds that there is sufficient reason to warrant the review of the orders herein. I hereby vacate the orders granted vide the ruling dated 4<sup>th</sup> February 2022 and replace the same with the following orders; -

**a. That Pending the hearing and determination of this petition the 3<sup>rd</sup> Respondent their officers, employees and or agents shall have unlimited access to the land under cane growing and the area prepared for cane growing and to carry out activities geared towards maintenance of the crop and that which appertains thereto for purposes of the 3<sup>rd</sup> Respondents business undertaking.**

**b. The Petitioners shall keep the peace to enable compliance with the above orders.**

**c. That Pending the hearing and determination of this petition a temporary injunction be issued against the 3<sup>rd</sup> Respondent, their officers, employees and or agents from wasting, dissipating, in any way land within the Ramisi Phase 1 Block 5056 that has not been prepared for sugar planting, land currently occupied and in physical possession of the Petitioners including the Petitioners crops and subsistence trees within the the said Ramisi Phase 1 Block 5056.**

**d. Costs shall follow the event.**

**e. The Petition shall proceed for hearing on 4<sup>th</sup> May 2022 and 5<sup>th</sup> May 2022 without fail.**

**DELIVERED AND DATED AT KWALE THIS 21<sup>ST</sup> DAY OF APRIL, 2022**

**A.E. DENA**

**JUDGE**

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Matende.....for the Petitioner

No Appearance.....for the 1<sup>st</sup> 2<sup>nd</sup> and 5<sup>th</sup> Respondents

Mr. Ochieng & Mr. Kulecho h/b for Mr. Omamo.....for the 3<sup>rd</sup> Respondent

No Appearance.....for the 4<sup>th</sup> Respondent

Mr. Denis Mwakina.....Court Assistant.