



**In re Estate of John Douglas Omondi (Deceased) (Environment & Land
Case 143 of 2021) [2022] KEELC 110 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 143 OF 2021**

LL NAIKUNI, J

MAY 18, 2022

**IN THE MATTER OF
RUTH LINET ANYANGO (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF JOHN DOUGLAS OMONDI (DECEASED) APPLICANT**

RULING

I. Preliminaries.

1. Before the Honorable Court for its determination is the Notice of Motion application dated 9th March, 2022 and filed on 10th March, 2022 by the Defendant/Applicant hereof. It is brought under the provisions of Sections 1A, 1B, 3A, 63 (e) & 80 (a) of the *Civil Procedure Act*, Cap. 21, Order 45 Rules (1), (2) and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*.

II. The Defendant/Applicant's case

2. The Defendant/Applicant from the afore stated application, sought for the following orders:-
 - a. Spent.
 - b. That the Honourable Court be pleased to review and vary the orders granted vide its ruling of 24th January, 2022 to allow the Defendant to continue construction on her property on Sub – division No. 9961/I/MN.
 - c. That in the alternative to (b) above, the Plaintiff provides an acceptable security of Costs to cover and mitigate the damage already incurred by the Defendant and which continue to be incurred.
 - d. That costs of this application be in the cause.
3. The application is founded on the grounds, testimony and averments of the 14 Paragraphed Supporting affidavit of Mercy Wanjira Thuku sworn and dated 9th March, 2021. She affirmed her



ownership to all that property known as the Land Reference numbers Sub - division No. 9961/I/MN as well as to the ongoing construction on her property which is adjacent to that of the Plaintiff/Applicant. She stated that by virtue of the ruling of this Honourable Court delivered on 24th January, 2022 in respect of the Plaintiff/Respondent's application of 26th July, 2021, the construction was stopped pending the hearing and final determination of the suit. The Honorable Court compelled her, at her own costs to erect sufficient safety protective measures including fencing on the construction site to stop the alleged nuisance as complained about by the Plaintiff. She asserted that since the delivery of the said ruling, she had fully complied with the orders of this Court.

4. She averred that despite of her compliance with the court order, there was an order restraining her from continuing in the building on her property. It was her assertion that while this was the case, she continued incurring huge financial loss mainly arising from the construction material stored at the site continued to get wasted and the labour costs onto the permanent employees which includes security personnel engaged. It is her argument that that it had been anticipated that once the construction which comprises of several rental units were complete she would garner some income. The construction had almost been completed prior to the issuance of the Court order.
5. She stated that and based on the advise by her Advocates on record the alleged nuisance complained by the Plaintiff, has since been rectified and the building confirmed to be confined within the boundaries of her property including the road access hence it was only fair and just that she was allowed to proceed on with the construction on her property. Further, and based on the advise by her Advocates on record, she sought as an alternative to being allowed to continue in the construction of the building on her property, for the Plaintiff/Respondent to be ordered to give an acceptable Security of Costs to cover and mitigate the damage already and continued to be incurred. She held that continuing to forestall the construction was detrimental to her.
6. She opined that the application was brought in good faith and that the Court has discretion powers to review and vary its own orders for the ends of Justice to be met as she had fully complied with the court orders a fact which the Plaintiff was not disputing whatsoever. She urged Court to grant the orders as prayed.

III. The Plaintiff/Respondent's Case

7. On 21st March, 2022, the Plaintiff/Respondent while opposing the Notice of Motion Application by the Defendant/Applicant, filed a 16 Paragraphed Replying Affidavit sworn by Ruth Linet Anyango dated on the even date. She averred being the Plaintiff/Respondent herein and to her the said application was frivolous, vexatious and an abuse of the due process of Court and the law. It was brought in bad taste and with unclean hands as the Plaintiff/Respondent was not to blame for the perpetration of the illegalities occasioning the nuisance. The Defendant/Respondent never appealed nor fully complied with the orders of this Court including erecting of barriers/hoarders on the construction site, fencing of the top of perimeter wall. She held that the said nuisance has caused trespassing, real and imminent danger to the Plaintiff/Respondent and her family. She pointed out that on noticing these atrocities and nuisances, the Honorable Court granted the temporary injunctive orders against the Defendant/Applicant which she now wants to delay and interfere her from enjoying the said orders.
8. She averred that the Defendant/Applicant has not portrayed nor demonstrated to this Court how she has stopped trespassing on the suit property known as Land Reference Numbers Sub – division Number 9958/1/MN. Indeed, she held despite written and verbal communication the nuisance still persisted. Further, she stated that the Defendant/Applicant's Survey Report Boundary Relocation on Plot No. MN/1/9961 – Shanzu Area Mombasa County marked as "MWT – 2" in the instant



application had already been annexed and produced before Court previously and therefore could not be a ground for review and varying of its orders. Besides, the Defendant/Applicant had failed to settle the costs awarded to her from the said application for injunction and yet the Defendant was demanding for security of Costs from her.

9. Finally, she urged the honourable Court in the interest of Justice to dismiss the said Notice of Motion application dated 9th March, 2022 with costs.

IV. Submissions

10. On 22nd March, 2022, while all the parties were present in Court, court directed that this application be disposed off by way of written submission. Pursuant to that upon all the parties complying, a ruling date was reserved accordingly.

A. The Defendant/Applicant's Written Submissions.

11. On 4th April, 2022, the Learned Counsel for the Defendant/Applicant through the Law firm of Messrs. Muthee Kihiko Soni & Associates filed their submissions in support of the application. Mr. Kihiko Advocate commenced by providing a brief background of the case. He stated that the main issue for the determination by the Honorable Court was whether the Defendant/Applicant had established that she was entitled to the order of the review. He averred that the application was based on the provisions of Section 80 (a) of the *Civil Procedure Act*, Cap. 21 and Order 45 (1) and (3) of the Civil Procedure Rules, 2010 which he argued they allowed a party to seek for orders of review where there was discovered 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 order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason may cause a review of a Court order.
12. In the instant case, it was the contention of the Learned Counsel that this Honorable Court committed an error at the time of delivering its ruling on two grounds. Firstly, it failed to consider the fact that each party had aligned themselves to their own property. Thus, there was no encroachment of the Plaintiff/Respondent's by the Defendant/Applicant to begin with. Secondly, it ordered the Defendant/applicant to stop the construction without providing security of costs in the alternative. To buttress its point, he relied on the decision delivered by the Uganda High Court of "*Edison Kanyabwera – Versus – Pastori Tabwaze*, (2005) UGSC1 and the one from the high Court of Kenya "*Kenya Orient Insurance – versus – Zachry Nyambane Omwengwa* (2021) eKLR".
13. The Learned Counsel further argued that after the delivery of the ruling, the Honorable Court conducted a site visit on 4th March, 2022. According to him the Court was able to establish that the Defendant/Applicant had fully complied with its orders as she had been compelled to erect sufficient safety protective measures including fencing the construction site to stop the alleged nuisance complained of by the Plaintiff/Respondent. In support of his point, he cited the decision of "*Patel – Versus – E.A Cargo Handling Services Limited* (1974) and "*David Bundi – Versus – Timothy Mwenda Muthee* (2022) eKLR" essentially whereby the Courts held that the Judges had no limitations on invoking their own discretion on varying its own Judgement only that when doing so it had to be on such terms as would be fair and just. In so doing, the Court ought to be fair to all parties. The Learned Counsel by and large attacked the responses made by the Plaintiff/Respondent and the contents of her Replying Affidavit particularly Paragraphs 5, 7, 11 and 18 for being out of context and not in tandem to the issues raised in the instant application. For these reasons, he urged court to allow the Defendant/Applicant to continue the construction on the property pending the hearing and determination of the case. Finally, the Learned Counsel urged court to allow its application.



B. The Plaintiff/Respondent's Written Submissions

14. On 21st April, 2022, the Learned Counsel for the Plaintiff/Respondent, the law firm of Messrs. Mburu Nyamboye & Co. Advocates filed their written submissions dated 20th March, 2022 opposing the application dated 9th March, 2022 by the Defendant/Applicant. Mr. Nyamboye Advocate submitted that the Defendant/Applicant had not met the threshold for the grant of the orders for the review or varying of the Court order delivered vide the ruling of 24th January, 2022 in favour of the Plaintiff/Respondent as founded under the provisions of Section 80 (a) of the Civil Procedure Act, Cap 21 and Order 45 Rules (1) and (2) of the Civil Procedure Rules, 2010. In support of this fundamental legal propositions, he cited the decisions of "Republic – Versus – Advocates Disciplinary Tribunal Ex – parte Appollo Mboya (2019) eKLR, "Attorney General & Boniface Byanyima" and "Levi Outa – Versus – Uganda Transport Company". He submitted that the Defendant/Applicant had failed to fully comply with the orders of this court to avert the nuisance complained of by the Plaintiff/Respondent. The Defendant/Applicant has not put up the pre - cautionary measures including the hordes and raising a high wall in order to permanently separate the two plots belonging to the Plaintiff/Respondent and the Defendant/Applicant as ordered by this court through its ruling of 24th January, 2022. He referred Court to the written submissions by the Defendant/Applicant particularly the contents of Paragraph 13 where she alleged to have fenced of the construction site as being a novel matter that was not considered by court at the time of making its ruling and which clearly clashed and induced a fresh hearing or arguments.

15. In essence, according to him, the Defendant/Applicant was actually introducing new evidence to the matter by annexing other documents marked as "MWT - 1 and 3" . Certainly, to him these new evidence was not sufficient grounds to warrant this court to grant an order for the review and setting aside.

On whether the Plaintiff/Respondent should provide an alternative Security of Costs, the Learned Counsel relied on the legal Maxim of "*Ex Turpi Causa Non Orpitur Action*" (meaning no legal right can flow from an illegal act) in relation to the suit property and the issues at hand. He held that the Defendant/Applicant should be unable to pursue legal relief and damages as it arose from and in connection from her own tortious act whereby she is the cause of the nuisances complained off by the Plaintiff/Respondent. The Defendant/Applicant had already been found to be on the wrong side of the law and was compelled to take up precautionary measures but which it had to date failed to comply. Clearly, he argued, the Defendant/Applicant came to this court with unclean hands claiming for costs to cover and mitigate the costs incurred by her due to her own wrongs and negligence. He urged court to dismiss the application wit costs which follow the events.

III. Analysis And Determination

16. I have read and considered all the filed pleadings by the parties, the written submissions, cited authorities and the relevant provisions of Law with regard to the Notice of Motion application by the Defendant/Applicant dated 9th March, 2022. In order to arrive at an informed just and fair decision. I have frame the following issues for determination. These are:-

- a. Whether the Notice of Motion application dated 9th March, 2022 by the Defendant/Applicant meets the threshold for a grant of review and/or varying of the Court Ordered delivered through a ruling on 24th January, 2022 as provided for under the Provisions of Section 80 (a) of the Civil Procedure Act, Cap. 21 and Order 45 Rules (1), (2) and (3) of the Civil Procedure Rules 2010.



- b. Who will meet the costs of the Application dated 9th March, 2022.

ISSUE No. a).

Whether the Notice of Motion application dated 9th March, 2022 by the Defendant/Applicant meets the threshold for a grant of review and/or varying of the Court Ordered delivered through a ruling on 24th January, 2022 as provided for under the Provisions of Section 80 (a) of the Civil Procedure Act, Cap. 21 and Order 45 Rules (1), (2) and (3) of the Civil Procedure Rules 2010.

17. It is imperative that I spend a little bit of time on the substratum and the legal position regarding review, varying and setting aside of Court orders. This jurisprudence is founded under the Provisions of Order 40 Rule 7 if its an injunction order, Order 45 (1) (2) & (3) of the Civil Procedure Rules, 2010 and Section 80 (a) & (b) of the Civil Procedure Act, Cap. 21. 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 Judgement to Court which passed the decree or made the Order and the Court may make such order thereto.

Order 45 (1). States as follows:- Any person considering 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, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the 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 review of Judgement to the Court which passed the decree or made the order without unreasonable delay”.

Order 40 (7) “Any Order for Injunction may be discharged, or varied or set aside by the Court on an application made thereto by any party dissatisfied with such order.

18. From the afore stated provisions, it is quite clear that the orders for review, varying or setting side Court orders are discretionary in nature. Thus, the unfettered discretion must be exercised judiciously, not capriciously and reasonably by the Honorable Court. To qualify for being granted the orders for review, varying and/or setting aside a Court order for the above provisions to be fulfilled, the following ingredients, jurisdiction and scope are required:-

- a. There should be a person who considers himself aggrieved by a Decree or order;
- b. The Decree or Order from which an appeal is allowed but from which no appeal has been preferred;
- c. A decree or order from which no appeal is allowed by this Act;



- d. There is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made; or
 - e. 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.
 - f. The review is by the Court which passed the decree or made the order without unreasonable delay.
19. The power of review is available only when there is an error apparent on the face of the record discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by him at the time when the decree was passed or the order made. Indeed, this Court emphasizes that a review is 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 permissible.

Discussing the scope of the review, the Supreme Court of India in the case of “ *Ajit Kumar Rath – Versus – State of Orisa*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“The power can be exercised on application of a person on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier; that is to say the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule...”

20. In the case of “*Nyamongo & Nyamongo – Versus – Kogo*” (2001) EA 170 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 or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on 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 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 is certainly no ground for review though it may be one for appeal.....”

In the instant case, undoubtedly there exists a dispute of the owners to two Plots which are adjacent to each other. The two plots are only separated by a perimeter wall constructed by the Plaintiff/Respondent. Based on the filed pleadings and the site visit conducted on the ground, it is evident that some nuisance was caused onto the Plaintiff/Respondent’s portion of the land. Undoubtedly, this were mainly by the debris and waste material emanating the four story building being constructed the Defendant/Applicant herein.



As a stop gap, the Honorable Court made numerous suggestions on the quickest safety measures to be effected in the meantime by the Defendant/Applicant. Indeed, some of these measures were visibly undertaken by the Defendant/Applicant though still to the chagrin of the Plaintiff/Respondent if her opposition to this application and the orders sought are anything to go by. For this reason, though the court fully concurs with the Learned Counsel for the Plaintiff/Respondent to the effect that there are still more to be done to ameliorate the grievous situation. Therefore, this Court holds that the Defendant/Applicant has failed to demonstrate with empirical documentary self or evidence and detection or otherwise that there exists any error apparent to be treated as an error apparent on the face of the record for the purposes or as envisaged under Section 80 (a) of CPA and Order 45 (1) (2) of CPR. It appears from the submissions by the Defendant/Applicant, it wishes to be stating that there were new facts which were discovered and has annexed them under annexures “MWT 2 and 3” of its supporting affidavit. To court, these are rather new sets of evidence being introduced after the ruling had been delivered on 24th January, 2022 and not errors nor facts overlooked. In all fairness, I strongly believe that all these issues can be canvassed effectively during a full trial and not at the inter locutory stage.

21. It is trite law that while reviewing its orders, this Court cannot sit over its judgement and/or ruling. The orders of this Court were in form of temporary injunction granted under Order 40 (1) (2) and (3) of the Civil Procedure Rules, 2010. Thus, I opine that the Defendant/Applicant ought to have approached this court under the proper citation would have been the provision of Order 40 Rule 7 of the Civil Procedure Rules, 2010.

On whether or not the Plaintiff/Respondent should provide an alternative Security of Costs, the Learned Counsel relied on the legal Maxim of “Ex Turpi Causa Non Orpitur Actio”. He held that the Defendant/Applicant should be unable to pursue legal relief and damages as it arose from and in connection from her own tortious act whereby she is the cause of the nuisances complained off by the Plaintiff/Respondent. The Defendant/Applicant had already been found to be on the wrong side of the law and was compelled to take up precautionary measures but which it had to date failed to comply.

22. For these reasons, the application by the Defendant/Applicant fails. Nonetheless, all facts remaining constant including but not limited to the fact finding held during the site visit conducted by this Court on 4th March, 2022, its report thereof which was shared with all the parties hereof, the inconveniences caused to the Plaintiff/Respondent by the continuous alleged nuisances, the economic burden being incurred by the Defendant/Applicant arising from the stoppage of the constructions on her property among other issues, the Court feels it incumbent and for expediency sake that this matter be heard and determined on a priority basis.

ISSUE b). Who will bear the Costs.

23. The Courts have discretionary powers of this Court to grant Costs or not. The provisions of Section 27 of the Civil Procedure Act, Cap. 21 holds that Costs follow the events. The events are the results or outcome of any litigation process. In this case, the application by the Defendant/Applicant dated 9th March, 2022 fails. Thus, the Plaintiff/Respondent is entitled to costs of the application. Being at the interlocutory stage, I direct that the same be in the cause.

III. CONCLUSION & DISPOSITION

24. The upshot of this elaborate and indepth analysis, this Honorable Court is not satisfied that the Defendant/Applicant has proved her case on preponderance of probability. Consequently, I do



proceed to dismiss the Notice of Motion dated 9th March, 2022 and for avoidance of any doubts specifically make the following orders:-

- a. That the order of temporary injunction issued in favour of the Plaintiff/Applicant restraining the Defendant/Respondent by herself, her agents, servants, employees and/or persons acting under their instructions or any other person whomsoever and whatsoever from trespassing on the property known as Land Reference Numbers Sub - division No. 9958/I/MN and continuing with the ongoing constructing on the property known as Subdivision No. 9961/I/MN (Original No. 9617/12 Section/MN) on 24th January, 2022 still subsists pending the hearing and determination of this suit.
- b. That pursuant to the Site Visit of 4th March, 2022, the parties herein be and is hereby urged to make efforts to adhere with the recommendations made from the said Site Visit report which has been shared accordingly.
- c. That for expediency sake this matter be heard and determined within the next One (1) month from the date of this ruling. Therefore, it should be fixed for hearing on 7th June, 2022 and Judgement delivered by 9th July, 2022.
- d. That the costs of the application are awarded to the Plaintiff/Respondent to be borne by the Defendant/ Applicant herein.

It Is Ordered Accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OFMAY 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:

M/s. Yumna Court Assistant.

Non - Appearance for the Plaintiff/Applicant.

Mr. Daniel Kihiko Advocate for the Defendant/Respondent.

