



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AD LAND COURT AT NAIROBI

CIVIL SUIT NO. 2484 OF 1994

FRANCIS WAKAHIU.....PLAINTIFF

VERSUS

MONICAH NJERI1ST DEFENDANT

ESTHER WANGUI.....2ND DEFENDANT

CATHERINE MUTHONI.....3RD DEFENDANT

FRANCIS NJURU NGUGI T/A

WAWAGE INVESTMENT COMPANY.....4TH DEFENDANT

AND

JOSEPH GITUMA NDEGWA.....1ST APPLICANT

JOSEPH KAMUNDI KIRONJI.....2ND APPLICANT

PATRICK MACHARIA.....3RD APPLICANT

GEORGE CHEGE.....4TH APPLICANT

NJIRIRI KURIA.....5TH APPLICANT

MATHEW MUTHIMA.....6TH APPLICANT

SIMONPETER WAITHAKA KIRAGU.....7TH APPLICANT

FRANCIS MBURU NJOKI.....8TH APPLICANT

GEORGE WANYOIKE WAIGANJO.....9TH APPLICANT

BERNARD KANYI NJOGU.....10TH APPLICANT

JOHN NJUGUNA NJOROGE.....11TH APPLICANT

JOHN KINYANJUI KIARIE.....	12 TH APPLICANT
OWEN KIBUGI MUIGAI.....	13 TH APPLICANT
DAVID GITHAIGA MAINA.....	14 TH APPLICANT
JOSEPH THUO NJOROGE.....	15 TH APPLICANT
SIMON WAITHAKA WANJOHI.....	16 TH APPLICANT
MARGARET WAMBUI THIONGO.....	17 TH APPLICANT
ALICE WANJIKU MAINA.....	18 TH APPLICANT
PETER KIHARA IKABA.....	19 TH APPLICANT
GRACE WACHINGA MUCHIA.....	20 TH APPLICANT
JAMES MWANGI.....	21 ST APPLICANT
MISHECK MICHUKI.....	22 ND APPLICANT
PAUL MBATHI.....	23 RD APPLICANT
ROSE MUIGAI.....	25 TH APPLICANT
JOHN KIRIBA.....	26 TH APPLICANT
ROBERT KIBE.....	27 TH APPLICANT
JOHN KIMANI MBURU.....	28 TH APPLICANT
MRS NANCY WANDIA.....	29 TH APPLICANT
PAUL MUOKA.....	30 TH APPLICANT

RULING

There are two applications before this court for determination. The first is a Notice of Motion dated 16th January 2013 brought by the Applicants, and the outstanding substantive orders sought in the application are as follows:

1. That this Court be pleased to review set aside, vary and/or discharge the orders made in the Judgment delivered on the 14th December 2012.
2. That the Court be pleased to declare that the suit herein had abated by the year 2012 when the hearing was conducted, and as such there was no suit in existence and the Judgment was made in error.

The application is supported by affidavits sworn by the 1st Applicant on 16th January 2013 and 12th February 2013, and submissions filed in court dated 10th April 2013. In summary the Applicants case is that they represent over 300 plot owners in the BTL Town centre which was affected by the court's decision, and they attached a bundle of certificates of ownership of various plots as evidence. The

grounds for their application are two. Firstly that there was an obvious error apparent on the face of the record when the matter was heard and judgment entered, as the initial Defendants died, and that as no substitution was made within the prescribed period the suit had abated when the 4th Defendant was joined in 2010. The Applicants attached copies of the death certificates of the 1st and 2nd Defendant as evidence.

Further, that the courts finding that the sale was void on the basis that there was no consent of the Land Control Board, yet there was consent granted to subdivide the larger part of the land since there was no title deed by the time the Applicants bought their portions of land. It was also contended that the Court did not consider the purport and strength of the court order made by Oguk J. (as he then was) on 21st October 1998 which lifted any restrictions on the land, and that no proof of postage of the letter of rescission produced by the Plaintiff in evidence was produced and it was therefore not proved as required by law.

The second main ground for the Applicants' application is that there is sufficient reason to warrant the review of the judgment and the Orders by virtue of the fact that the Applicants and numerous others stand to suffer irreparable harm, yet they were not given an opportunity to be heard. Further, that they were condemned unheard contrary to the rules of natural justice. They have attached a valuation report of their properties as evidence.

The Applicants' counsel in his submissions relied on section 80 of the Civil Procedure Act and the court decisions in **Njoroge vs Mbiti (1986) KLR 519** and **Mbogoh vs Muthoni & Another (2004) 1 KLR 1999** for the position that the Applicants as aggrieved persons had locus to apply for review of the judgment delivered herein. He also relied on the procedure set out in Order 24 Rule 4 of the Civil Procedure Rules on the substitution of one or several deceased defendants.

The Plaintiff opposed the Applicants' Notice of Motion in replying affidavits he swore on 29th January 2013 and 13th March 2013, and in submissions filed by his counsel in court dated 19th April 2013. He stated that the Applicants had a right to apply to be made a party to this suit, which they failed to do. Further, that the Applicants' rights were properly represented by the Defendants in this suit. The Plaintiff also stated that the Applicants are trespassers and illegally on his land.

On the ground raised of abatement of the suit against the Defendants, the Plaintiff averred that he had made an application filed on 24th August, 2010 for the Defendants' Defence to be dismissed and judgment entered in his favour. However, that Rawal J. (as she then was) ordered that the 4th Defendant be instead enjoined in the case. Further, that the effect of the abatement of the suit against the first and second Defendants meant that their defence was dead and it was proper to have it struck out.

The Plaintiff contended that this Court heard this case and determined it properly as required by law and there are no grounds for it to review, set aside or vary the same. Further, that this court did not sanction an illegality by issuing the orders of 21st October, 1998. His counsel argued in the submissions filed in court that the Applicants have no *locus standi* to bring the application and ought to have applied to be made parties to the suit, but they left it to the Defendants to take care of their interests. Further, that their Advocate also ought to have sought leave of the court to come on record pursuant to the provisions of Order 9 Rule 9 of the Civil Procedure Rules.

It was also argued by the counsel that the Applicants have no valid structures on the suit property, as there was no transfer of the property to the Defendant and no legal sub-divisions undertaken thereon. The counsel argued that the lifting of the development restrictions by Oguk J. (as he then was) did not validate the contract between the Plaintiff and the Defendants. Lastly, it was argued that there was no error in the hearing of this suit as the 3rd and 4th Defendants are still alive, and the Plaintiff is also alive and the suit has not abated against him.

The Defendants did not oppose the Applicants' application.

The second Notice of Motion before the court is by the Defendants dated 1st February 2013 seeking

orders that the execution of the judgment delivered herein on 14th December 2012 and any consequential decree and/or orders arising therefrom be stayed pending the lodging, hearing and determination of the Defendants' appeal in the Court of Appeal. It is supported by an affidavit sworn by the 4th Defendant on 4th February 2013 and submissions dated 10th April 2013 filed in court by the Defendant's counsel.

The Defendants argue that they have filed a Notice of Appeal against the whole of the Judgment delivered herein on 14th December 2012, and that substantial loss will result to the Defendants and to all those who have built permanent residential houses on the property and have been residing on the property for many years with the authority of the order issued on 21st October, 1998, unless an order of stay is issued. Further, that Oguk J. (as he then was) in the said order issued on 21st October 1998 removed and/or lifted any limitations which had been imposed upon the Defendants as regards the user and/or developments of the suit land by third parties. The Defendants also stated that the judgment is illegal and against public policy since it was made against some defendants who are deceased, and that evidence was produced during the hearing that the 1st and 2nd Defendants are deceased, but the court did not address its mind to this issue.

The Defendants also averred that they have an arguable appeal with high chances of success and their appeal will be rendered nugatory if stay of execution is not ordered. Further, that they are willing to abide by any order for security for the due performance of the decree as may be ordered by the court, and that there is sum over Kshs.4 million in a joint deposit account at Standard Chartered Bank Kenya Ltd in the name of the advocates of the parties herein that is sufficient security for the due performance of such decree as may ultimately be binding on them. They attached as evidence a Notice of Appeal filed in court on 18th December 2012, a draft memorandum of appeal, a copy of a valuation report valuing the developments on the suit property to be Kshs 205,000,000/=, and photographs of the said developments.

The Defendant's counsel in his submissions argued that the conditions stated in Order 42 Rule 6 of the Civil Procedure Rules as to sufficient cause had been fulfilled, as they had shown that the decree involves a substantial sum of money in terms of the value of the developments on the suit property, and its performance would therefore occasion them substantial loss. He relied on various judicial decisions in this regard, including **National Industrial Credit Bank Limited vs Barclays Bank of Kenya Limited & Another (2005) e KLR** and **Charles Otiso G. Otundo vs Ramesh Chander Dhingra (2006) e KLR**.

The Defendant's counsel also relied on the latter judicial decision to argue that the condition of security has been fulfilled since the balance of the purchase price for the property is currently held in a joint interest earning account, and the title document for the suit property is in the name and possession of the Plaintiff. Lastly, the counsel submitted that the application has been made without unreasonable delay as the Notice of Appeal was filed on 18th December 2012, four days after judgment was delivered.

The Plaintiff opposed the Defendant's Notice of Motion in a replying affidavit he swore on 21st March 2013 and submissions filed in court by his counsel dated 19th April 2013. He argued that the order by Oguk J. (as he then was) was for preservation of the *status quo* pending the determination of the suit, and did not give legal right in the suit premises to the Defendants. Further, it is only after hearing the evidence and applying the law that the Court delivered a judgment on 14th December 2012. The Plaintiff also averred that the Defendants do not have an arguable appeal as the transactions were in breach of statutory requirements and void *ab initio*, and it is in the interest of justice to bring this long standing litigation to an end.

The Plaintiff's counsel in his submissions argued that the Defendants will not suffer any monetary loss as they do not have developments on the suit property, as the said developments belong to third parties. Further, that the balance of the purchase price was still in the bank for them to collect, and that the Plaintiff refunded them the payments they paid to him on 20th December 2012 as ordered by the court. Consequently, that there will be no loss suffered by the Defendants.

I will start by addressing two preliminary issues raised by the Plaintiff. The first is on the *locus standi* of

the Applicants to bring their Notice of Motion. I find that they do have *locus standi* and I am guided in this respect by section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules which allow any aggrieved person to apply for an order or decree to be reviewed. I am also guided by the Court of Appeal's decision in **Ngororo V Ndutha & Another [1994] KLR 402** that any person, though not party to a suit, whose direct interest is affected by a judgment is entitled to apply for review.

On the second preliminary issue of whether the Applicants' Advocate needed to seek leave of the court to come on record, the Plaintiff relied on Order 9 Rule 9 of the Civil Procedure Rules provides as follows in this regard:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

It is clear that the rule envisages a situation where a party was previously represented by an Advocate and either wants to change that Advocate or to represent himself or herself in person after judgment is passed. This rule is therefore inapplicable in the circumstances of the Applicants who were not parties herein, and have not previously been represented by any Advocates in this suit.

I will now proceed to determine the substantive issues raised by the two Notices of Motion before the court. The main issue to be decided in the Notice of Motion by the Applicants dated 16th January 2013 is whether the judgment delivered on the 14th December 2012 is amenable to review, and if so, secondly whether this court can declare the Plaintiff's suit to have abated when the hearing of this suit commenced. I am guided in this regard by Order 45 rule 1 of the Civil Procedure Rules which provides the circumstances under which an order or decree of a court can be reviewed. The said provisions state that:

“ any person considering himself aggrieved by:

- a. a decree or order from which an appeal is allowed but from which no appeal has been preferred or**
- b. a decree or order from no appeal is hereby allowed**

and 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 my apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

The Applicants have argued that some of the errors on the face of the record were on the lack of consent of the Land Control Board, the import of the court order made by Oguk J. (as he then was) on 21st October 1998, and the findings of this court as to the rescission of the contract entered into between the Plaintiff and Defendants. These were issues that were fully canvassed on their merit during the hearing of this suit, and this court made a decision on the same after it had applied its mind to the arguments and evidence presented by the parties. An error on the face of the record exists if the record of the order or decree being challenged contains legal mistakes that are plain on its face and without the need to resort to any other supporting evidence and should be distinguished from an erroneous decision.

The Applicants have not demonstrated what plain error or mistake there was with regard to the aforementioned issues they raised, and there argument seems to be that the decision made on these issues was wrong in light of the evidence presented to the court. If the Applicants opinion is that the judgment

was an erroneous, then their remedy is in an appeal not in review.

I am in this regard guided by the Court of Appeal's decision in Muyodi vs Industrial And Commercial Development Corporation And Another E.A.L.R[2006] 1 E. A. 243 wherein the Court described an error or mistake apparent on face of the record as follows at pages 246-247 :-

“There is real distinction between a mere erroneous decision and an error apparent on the face of 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....”

The Applicants also raised the issue of some of the Defendants having died, and the suit having abated as another error on the face of the record. This court has also been asked to declare this suit as abated. The Plaintiff on the other hand submitted that this issue was heard and determined by Rawal J. (as she then was) pursuant to his application to have the Defendants' Defence struck out as a result of the abatement of their suit. I have perused the court record and find that the 4th Defendant was added as a party to this suit upon an application by way of Chamber Summons filed by the Defendant's own counsel and dated 23rd July 2010. The Plaintiff and Defendants advocates were both present when a consent was recorded in court on 28th September 2010 by Rawal J. (as she then was) allowing the said application.

The main ground for the application to join the 4th Defendant was that the first and second Defendants were deceased, and he was the only remaining proprietor of Wawage Investment Company which had entered into the sale agreement to buy the suit property from the Plaintiff. The Defendants were also allowed in the said consent to file an amended Defence and Counterclaim which they duly did on 30th September 2010 before the commencement of the full hearing of this suit on 19th October 2011.

I also note from the court record that the Plaintiffs Chamber Summons dated 24th August 2010 seeking to have the Defendants Defence and Counterclaim struck out on the grounds that the Defendant's suit had abated was never prosecuted, having been presumably overtaken by the consent entered into on 30th September 2010. It is therefore the case that the issue and effect of the 1st and 2nd Defendants' death was considered by this court and 4th Defendant added a party to the suit to sustain the Defendant's Defence and Counterclaim upon consent by the parties. This issue is therefore *res judicata* and cannot be reopened at this stage. I am guided by the provisions of section 7 of the Civil Procedure Act on the doctrine of *res judicata*, and also by the doctrine of issue estoppel in this respect.

Lastly, it was submitted that the Applicants and numerous others stand to suffer irreparable harm yet they were not given an opportunity to be heard in this suit. The fact of third parties being on the suit property was known to the Defendants and was indeed raised during the hearing of the suit. It was incumbent upon the Defendants to join the third parties or inform them about the suit involving their investments on the suit property. However, since the Applicants were not joined this court will only review or set aside its judgment if sufficient cause has been shown by the Applicants.

I have perused the evidence the Applicants have produced, and indeed it is not disputed that they have undertaken developments on the suit property, which issue was also addressed in the judgment. The basis of their entitlement to the suit property and therefore to be heard by the court are various plot ownership certificates they exhibited, which they state were issued to them by the Defendants and other agencies. They have not produced any title they have to the suit property, or that the Defendants and the other agencies have to the suit properties.

While this court sympathises with the Applicants' predicament, it would be inappropriate to reopen the

hearing of a case that has been in this court since 1994, on the basis of plot ownership certificates issued to the Applicants by a party which this Court has found had no title to or authority to subdivide the suit property, and also issued by other agencies who are strangers to this court. This court therefore finds that sufficient reason has not been shown by the Applicants in this regard to review the judgement delivered herein. The upshot of the foregoing is that the Applicants' Notice of Motion dated 16th January 2013 fails. The Applicants shall bear the costs of the said Notice of Motion.

Before I proceed to determine the Defendants, Notice of Motion, I must comment that I sincerely do empathise with the Applicants and the situation they find themselves in, and would urge them to follow the available legal mechanism in seeking the appropriate redress. The Applicants also have the option of exploring alternative dispute resolution mechanisms with the Plaintiff and Defendants herein. I would also urge members of the public to inform themselves of the legal processes that apply to the purchase and disposition of land, particularly the due diligence that needs to be carried out by purchasers before committing themselves to buying land, including verifying the title of the vendor. This will avoid the many instances and risks of innocent purchasers losing their hard earned investments at the hand of unscrupulous land brokers.

Coming to the Defendants' application for stay of execution pending appeal, the applicable provisions are Order 42 Rule 6(1) and (2) of the Civil Procedure Rules which provide as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

The Defendants argue that substantial loss may result to them as they and their agents have made substantial developments on the suit property. They have brought evidence of a valuation report of the improvements on the suit property which are valued at Kshs 205,000,000/=. The Defendants also submit that the amount of Kshs 4,000,000/= deposited by orders of this court in in an interest earning account is sufficient security for the due performance of this judgment against them.

I find it difficult to appreciate the logic and justice in the Defendants' argument that a deposit of Kshs 4,000,000/= is sufficient security for land valued at 205,000,000/= by their own valuation, and which by the judgement delivered by this court they are to vacate and give possession to the Plaintiff who is the registered owner. The least security that the Defendants can provide is the market value of the said land without the improvements thereon. The said land is about 20 acres and this court has found it belongs to the Plaintiff and was irregularly sold to third parties by the Defendants.

I will therefore only grant a stay of execution upon provision of adequate security by the Defendant, and accordingly order that the execution of the judgment delivered herein on 14th December 2012 and any consequential decree and/or orders arising therefrom be stayed pending the lodging, hearing and determination of the Defendants' appeal in the Court of Appeal only on condition that the Defendants deposit in court as security the amount of Kenya Shillings Eighty Million (Kshs 80,000,000/=) within thirty days of the date of this ruling. In default the stay of execution orders shall automatically lapse.

The Defendants shall meet the costs of the Notice of Motion dated 1st February 2013.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____25th____ day of

____September____, 2013

P. NYAMWEYA

JUDGE