



REPUBLIC OF KENYA



Mbugua & another v Muraya & 2 others (Environment & Land Case 367 of 2012) [2022] KEELC 2528 (KLR) (18 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 367 OF 2012
SO OKONG'O, J
JULY 18, 2022**

BETWEEN

FRAYSHYA NJERI MBUGUA 1ST PLAINTIFF

NAOMI NYAMBURA MWANGI 2ND PLAINTIFF

AND

GEOFFREY MACHARIA MURAYA 1ST DEFENDANT

JORETH LIMITED 2ND DEFENDANT

THOME FARMERS NO.5 LIMITED 3RD DEFENDANT

RULING

1. Through a mended plaint dated 28th June 2013 that was amended further on 22nd June 2017, the plaintiffs sought the following reliefs against the defendants;
 - (a) A permanent injunction restraining the defendants from selling, alienating, disposing, constructing on, developing and/or interfering with the suit property.
 - (b) A declaration that the plaintiffs are the sole owners and are entitled to sole possession of the suit property.
 - (c) An order for the rectification of the register of the suit property by cancellation of the registration of the 1st defendant as the owner of the suit property and registration of the property in the name of the plaintiffs as the proprietors.
 - (d) A declaration that the plaintiffs are entitled to compensation by the defendants for the current value of the suit property being Kshs. 30,000,000/-.
 - (e) Costs of the suit.



2. The suit was defended by the 1st and 2nd defendants. The defendants denied the plaintiffs' claims in their entirety. At the trial, the parties tendered evidence in support of their respective cases and made closing submissions in writing. The court framed the following issues for determination;
- 1) Whether the plaintiffs are the owners of the suit property and are entitled to possession thereof.
 - 2) Whether the transfer of the suit property by the 2nd defendant to the 1st defendant was illegal and fraudulent.
 - 3) Whether the 1st defendant was a bona fide purchaser of the suit property for value without notice of any defect in the title thereof.
 - 4) Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
 - 5) Who is liable for the costs of the suit?
3. In a judgment delivered on 24th September 2020, the court made the following orders;
1. The plaintiffs' claim against the 1st defendant is dismissed with each party bearing its own costs.
 2. Judgment is entered for the plaintiffs against the 2nd and 3rd defendants jointly and severally for;
 - (i) Kshs. 10,000,000/- as general damages.
 - (ii) Costs of the suit.
4. While considering the issue whether the plaintiffs were entitled to the reliefs that they had sought, the court stated as follows:

“The plaintiffs sought several reliefs against the defendants. From the findings that I have made above, the plaintiffs have not proved their case as against the 1st defendant who is now the registered proprietor of the suit property and who is in possession thereof. The plaintiffs are therefore not entitled to prayers (a) and (b) of the amended plaint that are directed against the 1st defendant. I am satisfied however that the plaintiffs have proved their case against the 2nd and 3rd defendants. The plaintiffs proved that the deceased were shareholders of the 3rd defendant and were allocated the suit property by the 3rd defendant after paying the full purchase price. The 3rd defendant however failed to transfer the property to the deceased. The plaintiffs also established that after the 3rd defendant failed to deliver on its promises and vanished from the scene, the 2nd defendant who was the registered owner of the suit property came up and promised to facilitate the transfer of the property to the plaintiffs on payment of Kshs. 200,000/-. The plaintiffs tendered evidence showing that even after paying over Kshs. 200,000/- to the 2nd defendant, the 2nd defendant failed to transfer the suit property to the plaintiffs but instead sold the property to the 1st defendant without even refunding the payments that had been made by the plaintiffs.

I am satisfied that the plaintiffs have proved that the 2nd and 3rd defendants breached the agreements that they entered into with the deceased and that the plaintiffs have suffered loss and damage. Since the suit property is now beyond the reach of the plaintiffs the same having been sold to the 1st defendant who has taken possession and developed the same, the court will award the plaintiffs general damages for loss of the suit property. The plaintiffs have claimed compensation in the sum of Kshs. 30,000,000/- being the current value of the suit property. The valuation report that was put in evidence by the plaintiffs was not challenged by the defendants in any material respect. There is no doubt that the plaintiffs have lost a



bargain. The plaintiffs would not be able to get similar property in the neighbourhood of the suit property at the price at which the 2nd and 3rd defendants had agreed to sell the same to the deceased. The plaintiffs are entitled to general damages for loss of bargain. I will award the plaintiffs Kshs. 10,000,000/- as general damages.”

5. What is now before me is the plaintiffs’ Notice of Motion dated 14th December 2020 brought under sections 3A and 80 of the Civil Procedure Act and Order 45 Rules 1, 2, 3, 4 and 5 and Order 50 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking the following orders;
 1. That this honourable court does review the judgment delivered on 24th September 2020.
 2. That the costs of this application be provided for.
6. The application was brought on the grounds set out on the face thereof and on the affidavit of the applicants’ advocate, Ms. Ruth Muthui sworn on 14th December 2020. The applicants have contended that there is a mistake or error apparent on the face of this court’s judgment sought to be reviewed. The applicants have contended that the applicants had sought as part of the reliefs, special damages in the sum of Kshs. 30,000,000/-. The applicants have contended that the court had in its judgment made a finding that the suit property that the applicants’ had purchased was beyond their reach and that the applicants had lost a bargain. The applicants have averred further that the court made a further finding that the value of the suit property that had been assessed by the applicants’ valuer as Kshs. 30,000,000/- was not contested. The applicants have contended that in its judgment, the court awarded the applicants Ksh.10,000,000/- as general damages and omitted to award special damages of Kshs. 30,000,000/- that was pleaded and proved. The applicants have contended that in awarding the applicants Kshs. 10,000,000/- as general damages instead of special damages of Kshs. 30,000,000/-, the court had committed an inadvertent error which is apparent on the face of the record. The applicants have contended that there is good and sufficient cause for the review of the said judgment. The applicants have averred that the application for review has been brought without unreasonable delay.
7. The application is opposed by the 2nd defendant through a replying affidavit sworn by David Karanja on 6th July 2021. The 2nd defendant has contended that it intends to appeal against the entire judgment of the court sought to be reviewed. The 2nd defendant has contended that it has filed an application for extension of time to file and serve a Notice of Appeal out of time. The 2nd defendant has contended that it intends to challenge the award of Kshs. 10,000,000/- to the applicants as general damages. The 2nd defendant has contended that the issue of the award of general damages should be the subject of an appeal and not an application for review. The 2nd defendant has contended that the application by the applicants has been brought in bad faith, is misconceived and amounts to an abuse of the court process.
8. The application was argued orally. In his submissions in support of the application, the applicants’ advocate reiterated the contents of the affidavit in support of the application. The applicants submitted that the court awarded the applicants general damages in the sum of Kshs. 10,000,000/- for loss of bargain and forgot to award special damages in the sum of Kshs. 30,000,000/- that had been pleaded and proved. The applicants submitted that in their application, they are seeking a review of the judgment to include an award of special damages that was omitted by the court. In response to the 2nd defendant’s objection to the application, the applicants’ advocate submitted that the applicants were not aware of the intended appeal by the 2nd defendant.
9. In its submissions in reply, the 2nd defendant similarly reiterated the contents of its replying affidavit in opposition to the application. The 2nd defendant reiterated that the issues raised by the applicants as grounds for review should have been raised on appeal. The 2nd defendant submitted that there is



no error apparent on the face of the judgment of the court. The 2nd defendant submitted that the applicants are calling upon the court to change its mind on the award that it had made to the applicants. The 2nd defendant submitted that before making the award, the court considered all the issues. The 2nd defendant submitted that the award can only be reviewed on appeal.

Determination:

10. Section 80 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya provides as follows:

80. Review

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.

11. Order 45 Rule 1 (1) of the Civil Procedure Rules provides as follows:

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 judgement to the court which passed the decree or made the order without unreasonable delay.

12. Rule 3(2) of the same Order provides that:

Where the court is of the opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

13. In [Francis Origo & another v Jacob Kumali Mungala](#) Eldoret CA No. 149 of 2001, [2005] eKLR the court stated as follows:

“...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.



14. Similarly, in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints* Nairobi CA 132 of 2014, [2016] eKLR the requirements for review were set out as follows:

“To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.”

15. In *John Kamau Rubangi v Kenya Reinsurance Corporation*, Civil Appeal No. 208 of 2006, [2012]eKLR the court stated that:

“It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal.”

16. The applicants’ application for review has been brought on the ground of an alleged apparent error on the face of record. The apparent error is said to be the court’s failure to award special damages in the sum of Kshs. 30,000,000/-. In the present application, the court is being called upon to review its judgment and award the applicants a sum of Kshs. 30,000,000/- in addition to the sum of Kshs. 10,000,000/- that the court had awarded as general damages.

17. In *National Bank of Kenya Limited v Ndungu Njau* [1997]eKLR it was 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 ground for review. In the instant case, the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

18. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR, the Court of Appeal stated that:

“The High Court is presumed to know the law. That is why *the Constitution* has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law.



But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly. Njagi, J. was not well served. He seems to have made an error of law. The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all."

19. I have considered the applicants' application, the response thereto by the 2nd defendant and the submissions by counsels. I am in agreement with the 2nd defendant that the issues raised by the applicants as grounds for review should have formed grounds of appeal. There is no doubt from the excerpt of the judgement of the court that I reproduced earlier that the court was alive to the applicants' claim of Kshs. 30,000,000/- and that the court applied its mind to it. It is also clear that the court did not award the said amount of Kshs. 30,000,000/- to the applicants but instead awarded general damages in the sum of Kshs. 10,000,000/- for loss of bargain. It is not necessary for me to explain in these proceedings why I awarded general damages of Kshs. 10,000,000/- for loss of bargain instead of Kshs. 30,000,000/- that was claimed. If there was an error in the award of Kshs. 10,000,000/- to the applicants instead of Kshs. 30,000,000/- or in the alleged omission on the part of the court to award Kshs. 30,000,000/- as special damages to the applicants in addition to the general damages of Kshs. 10,000,000/-, it is not an error which is apparent on the face of the record. The same can therefore be corrected only by the Court of Appeal and not by this court. The decision by the court to award the applicants less damages than what they claimed as their actual loss if wrong is an error of law that cannot form a ground for review but appeal.

Conclusion:

20. The upshot of the foregoing is that I find no merit in the application dated 14th December 2020. The same is dismissed with costs to the 2nd defendant.

DELIVERED AND DATED AT NAIROBI THIS 18TH DAY OF JULY 2022

S. OKONG'O

JUDGE

Ruling read through Microsoft Teams Video Conferencing platform in the presence of;

Ms. Munene h/b for Mr. Kihara for the Plaintiffs

Ms. Njuini h/b for Ms. Koech for the 2nd defendant

N/A for for the 1st and 3rd defendants

Ms. C. Nyokabi-Court Assistant

