Lolchoki v Ololoso & 3 others (Environment and Land Miscellaneous Application E003 of 2022) [2022] KEELC 12663 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12663 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2022

CG MBOGO, J

SEPTEMBER 27, 2022

BETWEEN

MARY NAITU LOLCHOKI ..... APPLICANT

AND

MARGARET NAISIANOI OLOLOSO ..... 1ST RESPONDENT

JOSHUA MORANA OLOLOSO ..... 2ND RESPONDENT

LAND REGISTRAR NAROK NORTH/ SOUTH DISTRICT 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

RULING

1. What is before this court for determination is an originating notice of motion(sic) dated April 22, 2022expressed to be brought under Section 18 (b) (iii) & 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* seeking the following orders: -

    1. That this court be pleased to review and or set aside its orders issued on the October 6, 2017and September 25, 2018in ELC No. 372 of 2017.

    2. That MCELC No. 158 of 2018 be withdrawn from the subordinate court and tried before the Environment and Land Court.

    3. That the costs of this application be in the cause.

2. The application is premised on the grounds inter alia that the magistrate's court is not a court of competent jurisdiction to try and dispose ELC 158 of 2018 which originated from ELC 372 of 2017 as there exists an error apparent on the face of the record as the decision sought to be enforced emanates from the Provincial Appeals Committee under the repealed Land Disputes Tribunals Act which barred the magistrate court from determining issues reserved for the land dispute tribunal.

3. The application is supported by the affidavit of the applicant sworn on even date. The applicant deposed that on October 6, 2017a ruling was passed in her absence which ruling prevented any dealings with property known as Cis -Mara/Enabelbel/221 and as at 6th October, 2021 the said land was no longer in existence as it had been subdivided in Cis-Mara/Enabelbel/Enengetia/1227,1228 and 1229 in which she is the registered proprietor of Cis-Mara/Enabelbel/Enengetia/1228 and 1229 hence a necessary party to this suit.

4. Further that on August 25, 2018, this court issued an order transferring the suit to the magistrates' court for hearing and determination and that this court made an error by transferring the matter to the magistrates' court which lacks jurisdiction to hear and determine the matter. Further that subsequent to the matter being heard and determined by the provincial appeals committee it can only be tried by this court in case of further grievance arising out of the orders given and that the magistrates court was ousted by law leaving this court as the only court capable of adjudicating the dispute. As such all the decisions made in the provincial appeals committee and this court were made in breach of rules of natural justice since despite having an interest, she was never made a party to the dispute and further that his predecessor had a registrable interest but his estate was never represented in the entire proceedings and having been enjoined as the 4th defendant in ELC Case No. 158 of 2018 it is evident that this court made an error apparent on the face of record which requires the setting aside of all orders that affect her interest.

5. The application is opposed by the replying affidavit of the 1st respondent sworn on May 17, 2022.The 1st respondent deposed that the application is a complete misapprehension of the law having been brought after a period of more than 3 years the same being an attempt by the applicant to have this court act as an appellate court against its own commands. Further that the court in reaching its own decision, carried out its own investigation and the orders issued were not merely reliant on the decision by the appeals tribunal. In addition, the interests claimed by the applicant ought to be determined by the magistrates' court which she admits has pecuniary jurisdiction.

6. The 1st respondent filed preliminary objection in the form of a sworn affidavit by Mary Wanjuhi Muigai-Advocate dated May 17, 2022.In the said preliminary objection, Ms Mary Wanjuhi Muigai deposed that she objects to the manner and form applied by the applicant as it is unknown in law and not provided in the sections of law relied upon to bring the application the same being devoid of merit for the reason that the applicant was never a party in the appeals tribunal and the substantive matter in this suit is not the decision of the tribunal but the interests and rights of the 1st respondent which are embedded in the constitution.

7. Further that the suit before the chief magistrates' court is not an appeal from the appeals tribunal decision but a question of whether fraud was executed by the applicant and the 2nd,3rd and 4th respondents. Finally, that the instant application being brought after a period of over 3 years amounts to unreasonable delay besides this court's best practice rule to conclude matters within 3 years.

8. The 3rd and 4th respondents filed grounds of opposition dated June 16, 2022 challenging the application on the following grounds:-

    1. That the application alleges that the lower court does not have jurisdiction to hear and determine Narok MCELC No. 158 of 2018 is therefore a suit filed in a court without jurisdiction and as such the said suit is nullity ab initio and for that very reason it cannot be transferred to a court of competent jurisdiction because there is in effect, nothing to transfer in the first place.

2. That the applicant ought to seek review and setting of the orders issued October 6, 2017and September 25, 2018in the court that is handling Narok MCELC No. 158 of 2018.

3. That this application is mischievous, misconceived, unmerited an abuse of the court process and ought to be dismissed forthwith.

9. The applicant filed written submissions dated 6th June, 2022.The applicant raised two issues for determination as follows: -

a. Whether the court should review and or set aside its orders issued on the October 6, 2017and September 25, 2018in ELC No. 372 of 2017.

b. Whether MCELC No. 158 of 2018 be withdrawn from the subordinate court and be tried before the Environment and Land Court.

10. On the first issue, the applicant submitted that where there are nullities, time does not run and therefore it cannot be said that an application for review would be defeated on account of time. The applicant relied on the case of *Stephen Kibowen versus Chief Magistrate's Court Nakuru & 2 Others* [2017] eKLR. The applicant submitted that the proceedings in the decision of the Land Dispute Tribunal never considered the interest of the late Koileken Ole Kirokorr who was deceased by the time the Provincial Appeal Committee was being moved and that after the decision of the Provincial Appeals Committee and before the proceedings in ELC 372 of 2017, the property known as Cis-Mara/Enabelbel/Enengetia/221 had been subdivided.

11. The applicant while relying on the case of James Kanyiita Nderitu & Another versus Marios Philotas Ghikas & Another [2016] eKLR submitted that the right to a fair hearing encompasses a party being given an opportunity to present their side of the story or challenge the case against them and that being a successor in title she ought to be given a chance and the orders issued have far reaching consequences.

12. On the second issue, the applicant submitted that this court has power to retransfer the suit in question for trial or disposal for the reason that Section 3 (9) of the Land Disputes Tribunal Act barred the magistrate court from determining issues reserved for the Land Dispute Tribunal. The applicant submitted that her claim deals with the issue of ownership of land and trespass which should be determined by this court and that whereas the chief magistrate has jurisdiction, it lacks the subject matter jurisdiction to hear and determine the dispute at hand. As such, the various decisions in the course of trial having been made in the absence of the applicant, the same were nullities.

13. The 1st respondent filed written submissions dated June 22, 2022.The 1st respondent raised two issues for determination which is whether this court should be pleased to review and or set aside its orders issued on the October 6, 2017 and September 25, 2018 in ELC No. 372 of 2017 and whether MCELC No. 158 of 2018 be withdrawn from the subordinate court and tried before the ELC court.

14. On the first issue, the 1st respondent submitted that the application has been filed in total disregard of Order 45 (1) of the Civil Procedure Rules which provides that such an application must be made without unreasonable delay. Further that the review orders sought by the applicant on the grounds that the orders of this court were issued after the alleged closure of the title fails and is unmerited and if the court is to allow the application then it would be sitting on appeal contrary to the law. The 1st respondent further submitted that the applicant has not met the conditions set out by the court of appeal in *Kamau James Gitutho & 3 Others versus Multiple Jed (K) Limited & Another* [2019] eKLR.

15. On the second issue, the 1st respondent submitted that this court suo moto transferred this matter to the chief magistrate and the court in its own wisdom saw it proper to do so. Further, there is no prejudice that would be suffered by the applicant if the matter is heard before the magistrate's court.

16. The 3rd and 4th respondents filed written submissions dated February 16, 2022 (sic). The 3rd and 4th respondents raised one issue for determination which is whether this honourable court can withdraw and transfer Narok MCELC No. 158 of 2018 to itself for determination.

17. The 3rd and 4th respondents submitted that the main ground upon which this order is sought is that the magistrates' court does not have jurisdiction the effect of which Narok MCELC No. 158 of 2018 is nullity ab initio and cannot be transferred to a court of competent jurisdiction because there is nothing in effect to transfer in the first place. The 3rd and 4th respondents relied on the case of *Abraham Mwangi Wamigwi versus Simon Mbiriri Wanjiku & Another* [2012] eKLR and submitted that this court cannot transfer matters filed before courts without jurisdiction to itself for determination.

18. I have analysed and considered the application, replying affidavit, preliminary objection, grounds of opposition and the written submissions filed and the issue for determination is whether the application dated April 22, 2022has merit.

19. I will first proceed to deal with the preliminary objection sworn on May 17, 2022(sic). On the issue of what constitutes a preliminary objection, I make reference to the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969)* EA 696, where it was held that:

> " a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

20. The 1st respondent through her counsel objected to the form and manner of the application as drafted. I have looked at the said application and its heading reads Originating Notice of Motion. In the many years of my service to the judiciary, I have not come across any formal court document titled as such. This court is left to wonder whether the same is a typo or it is sheer arrogance of the drafter of the document. I will leave it at that.

21. Secondly, the 1st respondent is of the view that the application is completely devoid of merit because the applicant was never a party in the Appeals Tribunal and the substantive matter. I have perused the ruling in ELC Case No. 372 of 2017 delivered on October 6, 2017 by my brother Justice Kullow. The parties to the said ruling are Margaret Naisianoi Olososo as the plaintiff and Joshua Morana Olososo as the defendant. The applicant is not a party to ELC Case No. 372 of 2017.Again, before the Provincial Land Disputes Appeals Committee, the parties are Margaret Naisanoi Olososo as the Appellant and Joshua Moirana as the Respondent. The applicant is not a party to the said proceedings.

22. A cursory look at the preliminary objection sworn on May 17, 2022does not raise the points of law with precision which ought to be considered by this court. Counsel for the 1st respondent has deponed to issues which according to this court require more than just a cursory look of the pleadings but which may call for evidence to ascertain the same.

23. It then behoves this court to find out the intention of the applicant to bring forth the instant application. The way I understand the applicant is that since she was enjoined as a party in the Magistrate Court ELC Case No. 158 of 2018, then she ought to have the orders issued in ELC Case No. 372 of 2017 reviewed and set aside owing to her absence and lack of participation.

24. Section 80 of the *Civil Procedure Act* provides that:-

Any person who considers himself aggrieved-

a) By a decree or order in which an appeal allowed by this Act, but from which no appeal has

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.

25. The provisions of Order 45 Rule 1 of the Civil Procedure Rules provides for the review of a decree or order as follows:-

(1) Any person considering himself aggrieved: -

a) By a decree or order from which an appeal is allowed but from which no appeal has been preferred or

b) By a decree or order from which no appeal is hereby allowed, and from whom 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 the judgment to the court which passed the decree or made the order without unreasonable delay.

26. There are three aspects which are discernible from part (b) above

a) Discovery of new and important matter or evidence.

b) Mistake or error apparent on the face of the record.

c) Any other sufficient reason.

27. In Republic –vs- Public Procurement Administrative Review Board & 2 others the court held that: -

> " Section 80 gives the power of review and Order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.*Muyodi vs. Industrial and Commercial and Development Corporation &Another* [2006] 1 EA 243, where the Court of Appeal described an error apparent on the face of the record as follows:
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> "In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 the Court said that an error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted

by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

28. In the instant application, the applicant in my humble view, would be required to engage in a long process of reasoning or in elaborate argument to establish the error that she alleges exists in both rulings delivered by this court. I am convinced that the purported error cannot be said to be self-evident, thus it cannot rightfully be termed as an error apparent on the face of the record. I find that although the applicant has couched her application as one that seeks review orders, in actual sense, she seems not to be necessarily aggrieved by the decision in ELC Case No. 372 of 2017 but in real sense being aware that the window for filing an appeal has lapsed, intends to have the matter commence afresh unfortunately to the detriment of the other parties.

29. The Court of Appeal in *Afapack Enterprises Limited v Punita Jayant Acharya (Suing as the Administrator of the Estate of the late Suchila Anatrai Raval)* [2018] eKLR made the following observation:

> " It is also an important requirement that the application for review should be made without unreasonable delay. Although the appellant attributed his predicament to mistake of his counsel, what militated, against the exercise of discretion by the Judge in the appellant's favour was clearly the appellant's own conduct. The Judge found that the appellant "has not been diligent enough in pursuing its rights;" and that the appellant was guilty of inordinate delay in making the application for review. In the words of the Judge:
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> "An application for review ought to be made without unreasonable delay. Here the delay is spanning a period of nine months. Ordinarily nine months delay in an application for review, if no reasonable explanation is offered is inordinate." (emphasis mine)

30. That in the circumstances of this case, I find that the instant application for orders of review must fail since no sufficient reasons were furnished to the court to explain the more than 3 years delay in filing of the application, contrary to the requirement of Order 45 Rule 1(b) of the Civil Procedure Rules, that requires applications for orders of review to be filed without unreasonable delay.

31. But most important, this court if of the view that a person cannot lawfully and successfully so move the court for substantive prayers, such as setting aside a judgment or ruling, where he was not party to the said proceedings. In so far as the individual makes such a move, the prayers are being sought by an 'outsider' who is unknown to the proceedings. Strangers are not to be fed with the children's food. Put differently, once a suit has been filed, other persons other than the parties cannot effectively take part in the proceedings thereto unless they have been given leave of the Court to take part in them.

32. Having found that the applicant was not a party to the proceedings in ELC Case No. 372 of 2017, I will not proceed to consider the merits or otherwise of the second prayer as that would be engaging in an exercise in futility.

33. Arising from the above, I find that the application dated April 22, 2022 lacks merit. It is dismissed with costs to the 1st respondent. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 27TH DAY OF SEPTEMBER, 2022.

HON. C.G. MBOGO

JUDGE