Republic v Cabinet Secretary for Lands and Physical Planning & 2 others; Gachoki (Interested Party); Gathara (Exparte Applicant) (Environment and Land Miscellaneous Application 5 of 2020) [2022] KEELC 14594 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 14594 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 5 OF 2020

A KANIARU, J

SEPTEMBER 21, 2022

BETWEEN

REPUBLIC ..... APPLICANT

AND

CABINET SECRETARY FOR LANDS AND PHYSICAL PLANNING ..... 1ST RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 2ND RESPONDENT

CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

AND

MARY WANDAMA GACHOKI ..... INTERESTED PARTY

AND

DANSON KIRUNYU REPRESENTED BY DEDAN MAINA GATHARA ..... EXPARTE APPLICANT

RULING

1. This ruling is on a notice of motion dated March 8, 2021 and filed on March 9, 2021. The motion is expressed to be brought under Order I rules 9 and 10, Order 9 rule 9 of the *Civil Procedure Rules*, and Sections 1A (1,2 & 3) and 1B (a,b,c,d) and 3A of the *Civil Procedure Act* (Cap 21 Laws of Kenya) and all other enabling provisions of the Law.

Application

2. The suit is in the nature of Judicial Review application and the present application is brought by Mary Wanjiku Kirunyu who seeks to be joined as the exparte applicant in the suit to represent Danson Kirunyu in place of Dedan Maina Kirunyu. The parties in the suit are the Republic as the applicant, while the respondents are The Cabinet Secretary For Lands And Physical Planning, The Director Of Land Adjudication and Settlement and The Land Chief Registrar. Mary Wandama Gachoki Is the interested party while the ex parte applicant is Danson Kirunyu represented by Dedan Maina Kirunyu.

3. The motion came with three (3) prayers which are as follows:-

> Prayer 1: That Mary Wanjiku Kirunyu be enjoined in this suit as the Exparte Applicant in place of Dedan Maina Gathara.
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> Prayer 2: That the court reviews, discharges and or vacates the orders issued on July 27, 2020 dismissing the Exparte applicant's suit for want of service and consequently reinstate the Ex-parte applicant's suit and the interlocutory order of injunction herein.
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> Prayer 3: That costs be provided for.

4. The application is premised on grounds, *interalia*, that a Chamber Summons application was filed by Dedan Maina on behalf of the exparte applicant seeking leave to apply for certiorari and prohibition orders. It was deposed that leave was granted and the ex-parte applicant directed to serve the substantive application upon the relevant parties within 21 days and file proof of service in court. That on September 9, 2020, the exparte applicant enquired from his advocate the status of the matter and the advocate forwarded a copy of the application. It was further deposed that the ex-parte applicant learnt through the internet that the matter had been dismissed on July 27, 2020 for non-service yet the advocate had not informed him.

5. It was deposed that the application had been served upon the Secretary at the legal department of the Ministry of land and Physical Planning at Ardhi House as evidenced from the stamp on the application together with the affidavit of service of Francis Nyakeoga, a process server. According to the ex-parte applicant, there had been an error apparent on the record as the court was said to have inadvertedly failed to take note of the service effected on the legal department of the respondents. It was contended that the application had been proper and valid.

6. It was also deposed that the wife to the ex-parte applicant became aware of the proceedings in January 2021 and instructed the firm on record - Wamwayi & Co Advocates - to withdraw the application, seek to vacate the order dismissing the application; and subsequently seek to reinstate the suit. That she petitioned the court in Pet E002 of 2021, to be made guardian for the exparte applicant who suffers from schizophrenia and the petition was granted. It was deposed that the matter having been filed by someone who had no capacity to sue on behalf of the exparte applicant, then there was need to join her in the suit. It was further deposed that the respondents and the interested party would suffer no prejudice if the application is allowed. With the application is filed a supporting affidavit sworn by the Mary Kirunyu, the intended representative of the ex-parte applicant. The said affidavit basically reiterates the averments in the application.

7. The application is opposed by the interested party, who filed a replying affidavit on April 26, 2021. She termed the application as flivorous, vexatious and an abuse of the court process. According to her, the application should be struck out. It was said that counsel for the ex-parte applicant is not properly on record, having filed the pleadings post judgment and failed to seek leave of court to obtain consent from the previous advocates on record. It was also deposed that the suit had been filed by someone

who had no capacity and that the intended representative of the ex-parte applicant could not be joined in a suit that has already been determined on merit.

8. Further, it was stated that there is no error on record to warrant the setting aside of the judgment. It was argued that the court had considered the affidavit of service sworn by the process server and noted that the service had not been proper. The interested party contended that she was also not served with the application and averred that the error as alleged was one for an appeal and not an application for review. It was also stated that the ex parte applicant could not blame his former advocate for dismissal of the matter as the case belonged to him and further that he had failed to demonstrate any efforts made to follow up on prosecution of the case. In the circumstances the court was urged to dismiss the application.

9. By leave of court granted on June 14, 2021, the attorney general for the 1st, 2nd and 3rd respondents filed a replying affidavit on June 16, 2021. It was sworn by one Elijah K Kiania, the Land Adjudication and Settlement Officer, Mbeere/Kirinyaga. He gave a history of the suit parcel in which he stated that the suit parcel was subject of adjudication and was initially parcel No 1180 recorded as owned by Danson Kirunyu, the exparte applicant. That an objection had been filed by Kirunyu Njagi and at the time of hearing, the objector was deceased and he was represented by his wife Mary Wandama (the interested party). That the objection was dismissed and an appeal preferred before the Minister in Appeal case no 398 of 2011, which appeal was determined in favour of the objector/appellant.

10. He further deposed that the ex-parte applicant was represented by Dedan Maina and that both the representatives of the appellant and the respondent had sworn affidavits to represent the families of the two deceased. It was further stated that the order of the court in accordance with the appeal had already been implemented in favour of Nyamu Njagi (husband to the interested party).

11. The application was canvassed by way of written submissions. The intended representative of the ex-parte applicant filed her submissions on October 22, 2021. She reiterated the averments in the application. She submitted that Dedan Maina Gathara had no capacity to institute the suit on behalf of the ex parte party but averred that she had rectified it by filing the instant application in which she had sought to be joined as guardian ad litem of the ex parte applicant. On whether the advocates for the ex-parte applicant were properly on record, it was submitted that the previous advocates representing the ex parte applicant were aware of the notice of change filed and had raised no objection. For that reason, the current advocate were properly on record.

12. On the issue of service of the pleadings, it was said that the process server had effected service of the pleadings on the secretary at the legal department of the Ministry of Lands and Physical Planning at Ardhi House and that this was the proper place of service for the respondents. It was also claimed that the state counsel had not opposed the manner of service effected and that the said service was therefore proper. On the part of service on the interested party, it was contended that, it was a mistake by the former advocate and that service of the application would now be effected on the interested party. Also such non- service was said not to have been deliberate or aimed at obstructing justice. On this, reliance was placed on the case of *Patriotic Guards Limited Versus James Kipchirchir Sambu* Civil Appeal No 20 of 2016. The court was also urged to allow the application on grounds that it had been filed without unreasonable delay; that the interested party had failed to demonstrate any prejudice they would suffer; and lastly that the contention was on a land matter which is emotive in nature.

13. The interested party filed her submissions on March 8, 2021. She gave a background of the dispute and outlined two issues for determination by the court. The first was whether the firm of Wamwayi & Co Advocates was properly on record, considering they had come on record post judgment. It was submitted that the said law firm ought to have made an application to seek leave to come on record or

alternatively record a consent with the former advocate. To buttress this point, they relied on the case of *John Langat V Kipkemoi Terer & 2 Others* [2013] eKLR where it was stated that a consent could not effect the change of advocates without an order of the court. It was held that the said advocates were not properly on record and the appeal and application filed by the advocates therein were deemed incompetent. It was further submitted that the law firm of Wamwayi and Co Advocates had been appointed by Dedan Maina Kirunyu whom it was argued had no instruction to file the suit or appoint an advocate.

14. The second issue was whether there was an error apparent on the record. On this, it was submitted that was no such error. According to the interested party, in the judgment the court was not satisfied that the respondents shared a common secretary; that the application ought to have been served upon the attorney general and not the ministry of lands and physical planning; and lastly that the interested party had not been served with the application. They contended that such an error as alleged was one that could not be addressed by way of a review but by way of an appeal. To support this the interested party relied on the case of *Paul Mwaniki Vs National Hospital Insurance Fund Board of Management* [2020] eKLR where it was held that "no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it".

15. Additionally, with regard to non- service of the judicial review application on the interested party, it was stated that in accordance with the provisions of Order 53 Rule 4 of the *Civil Procedure Rules* non service of documents was a fatal mistake. Reliance was placed on the case of *Republic Vs The Gichugu Land Dispute Tribunal & 2 Others* which cited with approval the case of *Singalala Polytechnic Vs Nelson Ongwero* CA 13 A of 2013 where the court stated that failure to comply with Order 53 rule 4 of the *Civil Procedure Rules* renders the application incompetent and liable for striking out.

16. Lastly, it was reiterated that Dedan Maina Gathara had no capacity to file the substantive motion for judicial review proceedings and this ground was not a ground for review. The interested party deposed that he would suffer prejudice if the application is allowed as she would not enjoy the fruits of her judgment.

Analysis and Determination

17. I have considered the application filed before the court, the responses by the parties, the submissions and the court record in general. The genesis of the suit is a contention on ownership of land parcel Mbeere/Wachoro/988 currently registered in the name of Namu Njagi. The land was the subject of adjudication within the Wachoro section and the ex-parte applicant was allocated parcel No 1180. However, Nyamu Njagi filed an objection - Objection No 159 of 1981 - contesting the said allocation. The objection was set down for hearing on April 18, 2011. At that time, the objector was deceased and according to the court record he was represented by his wife, the interested party. That objection was determined in favour of the ex parte applicant. As a result, an appeal was preferred by the interested party on behalf of her deceased husband (the objector). The same was Minister's Appeal No 398 of 2011. The appeal was determined in her husband's favour.

18. The outcome of the appeal is what prompted the judicial review application filed here by the exparte applicant. Initially, an exparte chamber summons application was filed in which leave of court was sought to apply for judicial review orders. The court granted leave and allowed the parties to file the substantive application within 21 days and effect service on all parties. The exparte applicant later filed the substantive application seeking Certiorari orders to quash the decision of the Minister that awarded the suit parcel of land to Nyamu Njagi (Deceased) who was represented by the interested party. He also sought an order of prohibition to prohibit the interested party from implementing the decision issued by the Minister in the appeal. The court in its determination of the application held that proper

service had not been effected upon the affected parties (the respondents and the interested party) and accordingly struck out the application.

19. The application before me seeks to have Mary Wanjiku Kirunyu joined in the suit as the representative for the exparte applicant in place of Dedan Maina Gathara; review and discharge of the orders dismissing the substantive application; and thereafter reinstate the suit and also grant costs of the suit. In my view only the interested party has effectively opposed the present application. I say this for reason that, the response filed by the respondents did not in any way touch on the issues raised in the application. It only gave the court the history of the suit parcel according to the records from the adjudication stage to the appeal preferred to the Minister.

20. Turning now to the interested party's response, she contested the application on what I would condense as three grounds to wit; that the Counsel on record for the ex-parte applicant was not properly on record; that the suit had been instituted by Dedan Maina Gathara who had no capacity to file the suit; and lastly that there was no error apparent on the record to warrant the grant of the orders for review.

21. I think it is necessary first to deal with the issue of capacity of the then exparte Applicant – Dedan Maina Gathara– to file and prosecute the application for judicial review. Related to this is the issue of whether the applicant in the application now under consideration – Wanjiku Kirunyu– can be allowed to replace Dedan Maina Gatharain the same application for judicial review.

22. My understanding of the law is this: where a party is first required to acquire the necessary capacity to institute a suit or proceeding in a court of law, such party must acquire the requisite legal capacity first. If he files a suit or proceeding without acquiring such capacity, such suit or proceeding is null and void ab-intio. A suit that is null and void ab-initio is treated by the courts as one that never existed and any orders given or arising from such suit are treated as also null and void and therefore of no consequence.

23. It is necessary to give an example and draw a parallel using decided cases. I wish to explain that the examples do not relate to cases where, as here, the party was required to obtain an order making him a guardian ad litem. It actually concerns a parties who were supposed to obtain letters of administration but had failed to do so before filing suit. The first case is that of *Troustik Union International And Ingrid Ursula Heinz Vs Mrs Jane Mbeyu & Mrs Alice Mbeyu*: Ca No 145 of 1990 where court of appeal held thus:

> " The administrator is not entitled to bring an action as administrator before he has taken letters of administration. If he does, the action is incompetent as at the date of its inception."

The second example is *Nathaniel O Khisa Vs Mary Khisa Nyanyi & 3 Others* [2013] eKLR where the suit was struck out because the plaintiff had not obtained letters of administration.

Although these cited suits are not about lack of an order to become guardian ad litem, they nonetheless illustrate what happens to a suit filed by a person who is supposed to acquire the required legal capacity but fails to acquire such capacity before instituting a suit.

24. The applicant in the application at hand has argued that Dedan Maina Gathara had no legal capacity to file the Judicial Review suit that she now seeks to join. If that is the case, the suit filed by Dedan Maina Gathara was null and void *ab-initio* and there is therefore no suit that she can seek to join. Her argument therefore that Dedan Maina Gathara had no legal capacity is self-defeating and of no benefit to her because as pointed out, there is no suit existing for her to join. The applicant is therefore laboring under a serious misapprehension of Law by thinking that she can join a suit filed by a person without the requisite legal capacity.

25. That said, I would wish to point out when the application for judicial review was filed, the supporting affidavit that came with it had an annexure which was letter of authority dated 10/3/2020 in which Danson Kirunyu, who now the applicant is alleging to suffer some mental impairment, is shown authorizing Dedan Maina Gathara to file the application for judicial review. The court that handled the judicial Review matter therefore proceeded on the basis that Dedan Maina Gathara was a proper party before it. It is only now that the applicant is belatedly coming up with the story that Dedan Maina had no legal capacity. As I have already pointed out, her story is not helpful to her. It actually helps to defeat her application for joinder. And given the letter of authority that I have mentioned, I would need more and better persuasion to believe her story.

26. The next issue to consider is whether the applicants advocate is properly on record. The law requires that where a counsel is coming on record in a suit post-judgement, or where a party wants to act in person where judgement has already been delivered, such counsel or party requires consent of the counsel on record in the pre-judgement stage or, in the alternative, seek leave of the court to come on record. The court is infact required to give an order allowing such counsel to come on record or such party to act in person. In this regard, Order 9 rule 9 is relevant. It is as follows:

Order 9 rule 9

> "When there is change of advocate, or when a person decides to act in person having previously engaged an advocate, after judgement 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 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.

27. From a jurisprudential standpoint, the cases of *SK Tarwadi Vs Veronicah Muehlemann*: Misc Civil Appl No 6 of 2018 [2019] eKLR, *John Langat Vs Kipkemoi Terer & 2 others:* [2013] eKLR and *Florence Hare Mkaha Vs Pani Tawakal Mini Coach & Another* [2014] eKLR all embrace the position that such coming on record by counsel or acting in person by a party can not be allowed if the applicable law cited herein is not complied with. I am aware of the decision by Mutungi J in *Ngitimbe Hudso Nyanumba Vs Thomas Ong'ondo* [2018] eKLR which seemed to treat the omission to comply with the law as a mere technicality. But there seems to be a preponderance of judicial pronouncements emphasizing that the law should be complied with first.

28. On my part, I am more persuaded by the observation of W Korir J (as he then was) in *Tarwadi*'s case (supra) where he observed thus:

> "In my view the essence of order 9 rule 9 of Civil Procedure Rules is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another or act in person. The provision is therefore an important one and cannot be wished away."

29. It is plain to me that in this matter, the applicant's counsel did not bother to comply with the law. He seems to suggest that the former counsel on record is aware of the situation but does not explain why consent from that counsel is lacking. In any case, what is required is written consent from such counsel, not awareness. It is such consent that the court is required to act upon and make an order. Where such consent is not granted by the former counsel, an application is supposed to be made to the court seeking leave to come on record. Since the counsel for applicant has not done either of these things, I

am constrained to take the position, which I hereby do, that his application here is incompetent for want of compliance with the applicable law.

30. But I would still like to consider whether review as sought by the applicant would be merited. The law for review is to be confined strictly to the scope or ambit of Section 80 of the *Civil Procedure Act* (Cap 21) and Order 45 rule 1 of *Civil Procedure Rules, 2010*. Section 80 of *Civil Procedure Act* (Cap 21) provides as follows:

> 80 "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 form which no appeal is allowed by this Act, May apply for a review of judgement to the court which which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

31. Order 45 Rule 1 of *Civil Procedure Rules, 2010*, provides as follows:

> 45(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 form 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

32. From these provisions one can distil the following necessary requirements:

a. There should be discovery of new and/or important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant tor could not be produced by him at the time when the decree was passed or order made, or

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

c. Any other sufficient reason, and

d. The application has to be made without unreasonable delay.

33. The applicant herein has argued that her application for review is merited. The interested party on the other hand is of the view that the only recourse open to the applicant is appeal. In this respect, it is necessary to distinguish between an appeal and a review. In *National Bank Of Kenya Ltd Vs Ndungu Njau*[1996] KLR 469 [CAK] at page 9, the court stated:

> "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 sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be 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 can not be a ground for review."

See also: *Ajit Kumar Rath Vs State of Orisa & Others*, 9 supreme court cases 596 at page 608 and also *Tokesi Mambili & Others Vs Simion Litsanga* [2004] eKLR for the proposition that a review can not be asked for merely for fresh hearing or arguments or correction of erroneous view taken earlier, that is to say, the power for review can be exercised only for correction of patent error of law or fact which stares one in the face without any elaborate argument being needed to establish it.

34. It is also crucial to appreciate that the grounds for review should not be shallow or wish washy. They have to be strong and weighty (See *Evan Bwire Vs Andrew Nginda*: Civil Appeal No 103 of 2000, Kisumu: [2000] LLR 8340).

35. As is clear in this matter, judgement was delivered on 27/7/2020. In the judgement, service is one of the two issues (infact they are issues (a) and (b)) delineated for determination. Then after elaborate reasoning and analysis -during which the court found that one kind of service done was improper while another kind of service required to be done was not done - the court decided to strike out the application for judicial review. Its decision and finding regarding service was not an error, mistake, or accidental slip of the pen. It was arrived at through a thoughtful and logical process. It is this finding that I am now being invited to revisit and review. It is plain to me that the finding is not fit for review. The proper option or way is to appeal. I say so because when I consider the manner in which the finding was made, the unsuitability of the application before the court for review strikes me immediately. It is very clear to me that the issue of service was central and fundamental to the judgement that the applicant now seeking to challenge by way of review. The only proper way to mount a challenge is through an appeal. The court did not make an error; it did not make a mistake; it made a reasoned finding. It is for this reason that I find a review unsuitable.

36. The upshot, in light of the foregoing, is that the application before me is for dismissal and I hereby dismiss it with costs to the interested party.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 21ST DAY OF SEPTEMBER, 2022.

In the presence of Wambugu Ndegwa for Wamwai for Exparte Applicant; Momanyi for Mwangi Maina for interested party and Kiongo (AG's office) for respondent.

Court assistant: Leadys

A.K. KANIARU

JUDGE