



Mukolya (Suing as the Legal Representative of the Estate of Mukolya Kithu – Deceased) & 4 others v Mulwa & 3 others (Environment & Land Case 30 of 2019) [2022] KEELC 13479 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13479 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 30 OF 2019
CA OCHIENG, J
OCTOBER 13, 2022**

BETWEEN

MICHAEL MBITHI MUKOLYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUKOLYA KITHU – DECEASED) 1ST PLAINTIFF

RAPHAEL KALOKI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DISHON ITUTE KITHU – DECEASED) 2ND PLAINTIFF

MAURICE MUTHAMA KITHU 3RD PLAINTIFF

PAUL MWANGANGI MUTHYA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MUTHYA KITHU MICHAEL ALIAS MUTHYA KITHU – DECEASED) 4TH PLAINTIFF

SIMON MULEI NZWILI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NZWILI NTHENGE KITHU – DECEASED) 5TH PLAINTIFF

AND

BONFACE MULWA 1ST DEFENDANT

HENRY MULWA 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

1. What is before court for determination is the 1st and 2nd defendants’ notice of motion application dated the 30th march, 2022, brought pursuant to sections 1A, 3B and 80 of the *Civil Procedure Act* including Order 45 and 51 of the *Civil Procedure Rules 2010*. The Applicants seek the following orders:



- a. That the honourable court be pleased to review the decision made on March 10, 2022 and consequential orders.
 - b. That costs do abide the Application.
2. The application is premised on the grounds that the court needs to relook at its decision as there was an error and sufficient reason to review it. Further, that the ruling of justice githinji extensively dealt with issues the respondents are raising and all three attempts to appeal the said decision at the High Court did not succeed. They contend that the plaintiffs herein are seeking the same orders which is to set aside orders of the tribunal, that had directed for the subdivision of the land. Further, that the plaintiffs are purely shopping from one forum to another, litigating and seeking the same remedy while giving their disputes a cosmetic uplift. They insist the court does review the decisions made on March 10, 2022 so that the order of 1997, be implemented and justice prevail. The application was further supported by the affidavit of the 1st defendant Boniface Mulwa where he refers to the order made on July 30, 2019 and contends that the said order should not have been issued before the main suit is heard and determined as similar orders were sought in the Plaint. He explains that the plaintiffs' essentially sought to stop implementation of the order of tribunal passed on October 2, 1997. Further, that the plaintiffs want the court to either examine this decision or sit as an appeal court on the decision through a plaint but this court lacks jurisdiction to do so. He avers that together with the 2nd defendant they filed a Land Dispute Tribunal Case No. 150 of 1996 which was decided in their favour to the effect that land parcel numbers Muthetheni/Kyethivo 207 and 209 should be shared equally between the two families. Further, that together with the 2nd defendant, they caused a decree to be issued and the plaintiff immediately sought to have the adoption of the award set aside but vide a ruling delivered on November 25, 1997, the court dismissed the application and upheld the orders adopting the said award. He reiterates that this suit is *res judicata*.
 3. The plaintiffs opposed the application by filing a replying affidavit sworn by Raphael Kaloki where he averred that the application is scandalous and an abuse of the court process. He contends that the defendants/applicants have not introduced any evidence in their application that would necessitate this court to review its orders granted on March 10, 2022. He states that the defendants/applicants have not demonstrated to this court that there is an error apparent on the face of the record and whatever issues they are raising now, require a full hearing. He reiterates that the plaintiffs' suit is not *res judicata* and this was an attempt by the defendants/applicants to re-litigate on issues already determined. He reaffirms that the defendants/applicants intentions were clearly to delay the full hearing of the main suit. Further, that access to justice and right to be heard is not an opportunity for vexatious litigants to file incompetent applications.
 4. The Application was canvassed by way of written submissions.

Analysis and determination

5. Upon consideration of the notice of motion application dated the March 30, 2022 including the respective affidavits and rivaling submissions, the only issue for determination is whether this court should review its orders issued on March 10, 2022 and hold that this suit is *res judicata*.
6. The 1st and 2nd defendants in their very expansive written submissions reiterated their averments as per the affidavit, provided the history of the dispute herein and insists they have filed the instant application for review as there was an error apparent on the face of record. Further, they proceeded to demonstrate afresh on how the instant suit is *res judicata*. To buttress their averments, they relied on a myriad of decisions including *Njue Ngai v Ephantus Njiru Nganga & Another* (2016) eKLR; *Ukay Estate Ltd & Another v Shah Hirji Manak Ltd & 2 Others* (2006) eKLR; *Florence Maritime Services Limited*



Ɖ Another v Cabinet Secretary for Transport Ɖ Infrastructure Ɖ 3 Others (2015) eKLR; US Supreme Court case of *Allen v Mc Curry*, 449 us 90,94, 101 S Ct 411 (1980); *Accredo AG Ɖ 3 others v Steffano Ucceli Ɖ Another* (2019) eKLR; *Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki Ɖ 2 Others* (2018) eKLR; *Uburu Highway Development Limited v Central Bank of Kenya Ltd Ɖ 2 Others* (1996) eKLR; *Michael Bett Siror v Jackson Koech* (2019) eKLR; *Mwangi Kimote v Murata Sacco Society* (2018) eKLR; *Kenya Commercial Bank v Benjob Amalgamated Limited; Republic v Registrar of Societies - Kenya Ɖ 2 others Ex parte Moses Kirima Ɖ 2 Others* (2017) eKLR and *Apondi v Canuald Metal Packaging* (2005) I EA 12.

7. The plaintiffs in their submissions rely on the averments as per their replying affidavit and insists the applicants have not met the threshold set for review. To support their arguments, they also relied on very many decisions including: *Republic v Public Procurement Administrative Review Board Ɖ 2 Others* (2018) eKLR; *Ajit Kumar Rath v State of Orisa Ɖ Others 9* Supreme Court Cases 596; *Moses Kipkolum Kogo v Nyamogo Ɖ Nyamogo Advocates* (2000) eKLR; *Evan Bwire v Andrew Nginda* Civil Appeal No. 103 of 2000 LLR 8340; *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* (2019) eKLR; *Kenya Commercial Bank v Benjob Amalgamated Limited; Suleiman Murunga v Nilestar Holdings Limited Ɖ Another* (2015) eKLR; *Evans Mudoga Matebwa v Peter Asingira Ondiri* (2021) eKLR and *Hosea Nyandika Mosagwe Ɖ 2 Others v County Government of Nyamira* (2022) eKLR.

8. I will proceed to highlight various legal provisions governing review.

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

“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.”

9. Further, 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 judgment to the court which passed the decree or made the order without unreasonable delay.”

10. In the case of *Nyamogo Ɖ Nyamogo -v- Kogo* (2001) EA 174 the Court held that:

“An error apparent on the face of the record cannot be defined precisely or 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 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

11. While in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal held that:

“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.”

12. The 1st and 2nd Defendants seeks a review of this court’s Ruling dated the March 10, 2022 claiming there was an error apparent on the face of record. The Plaintiffs have opposed the instant Application and insist it is an abuse of the process of court. I note the impugned Ruling emanated from an application by the 1st and 2nd Defendants seeking to have this suit dismissed for being res judicata and for the court to set aside certain orders issued on the July 30, 2019. From a perusal of the instant Application including the annexures therein, I note this court analyzed all the previous proceedings including decisions before directing that this matter should be heard and determined on merit. From the averments in the instant Application including the lengthy submissions, it is my considered view that there is no discovery of new and important facts or error apparent on the face of record as claimed since the Applicants already relied on all the previous proceedings including decisions they are still referring to. From the Applicants arguments, it seems to me, they seek to appeal against the impugned Ruling but have opted to file an application for review instead.
13. Based on the facts as presented while relying on the legal provisions cited above and associating myself with the quoted decisions, I find that the Applicants have not met the threshold set for review as they have failed to demonstrate the alleged error apparent on the face of the record. It is my considered that if indeed the Applicants were aggrieved by the Court’s Ruling dated the March 10, 2022, they should have proceeded to lodge an Appeal instead of the instant Application for review. To my mind there are very many contested issues herein which cannot be determined at an interlocutory stage.
14. In the circumstances, I find the notice of motion application dated the March 30, 2022 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 13TH DAY OF OCTOBER, 2022

CHRISTINE OCHIENG

JUDGE

