



**County Government of Bungoma & another v Attorney General & 2 others;
Commissioner for Lands (Interested Party); Wafula (Applicant) (Environment &
Land Case 563 of 2016) [2022] KEELC 15103 (KLR) (22 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 563 OF 2016
AA OMOLLO, J
NOVEMBER 22, 2022**

BETWEEN

**THE COUNTY GOVERNMENT OF BUNGOMA 1ST PETITIONER
CHIULI MURUMBA 2ND PETITIONER**

AND

**THE HON. ATTORNEY GENERAL OF KENYA 1ST RESPONDENT
THE MINISTRY FOR LANDS, HOUSING AND URBAN
DEVELOPMENT 2ND RESPONDENT
AYUB MURUMBA KAKAI (SUED AS THE ADMINISTRATOR
INTESTATE ESTATE OF THE LATE WILLINGTON WELEKHASIA
KAKAI) 3RD RESPONDENT**

AND

THE COMMISSIONER FOR LANDS INTERESTED PARTY

AND

BENJAMIN BARASA WAFULA APPLICANT

RULING

1. The applicant filed an amended notice of motion dated July 26, 2021 seeking to be joined as the 4th Respondent in this petition and the same was dismissed vide the comprehensive ruling dated June 28, 2022. The applicant has filed another motion dated July 4, 2022 supported by an affidavit sworn by Benjamin Barasa Wafula on July 21, 2022 seeking for the following orders;



1. This Hon Court be pleased to dispense with this application on priorities before the November 28, 2022; so that the Applicant's/Interested Party's interests about same matters, same parties and similar Causes of Actions through Misc Criminal Applications No E008 of 2021 and E018 of 2021 as well as the Environment and Land Case No 59 of 2018 are not damaged irreparably.
 2. That, after considering such urgency, this Hon Court be pleased to review and reinstate the Application dated the July 26, 2021; because all the Subject Matters about this Environment and Land Case No 563 of 2016; Nairobi Criminal Court of Appeal COACRAPPL No E008 of 2021 and E018 of 2021 as well as the Busia Environment and Land Case No 59 of 2018; are averred against the County Government of Bungoma encroaching itself and its Leases, agents and clients on private land, without surveying what was bought by the National Government through the Legal Kenya Gazette Notice No 1710 June 12, 1970.
 3. That, it pleases this Hon Court to determine the Applicant's/Interested Party's both Applications dated July 26, 2022 and July 21, 2022; so that he disputes the capacity and locus standi of the 2nd Petitioner/Respondent, who is neither an employee nor the Attorney of the County Government of Bungoma; to avoid future petitions about wrong representation.
 4. That, it pleases this Hon Court to determine the application dated June 9, 2021 for compelling the 1st and 2nd Respondents to avail the Land Registrar's and Surveyor's Report investigated on the May 7, 1997 and confirmed by the District Land Registrar on September 17, 1998; before hearing of the main Petition scheduled for November 28, 2022.
 5. Costs of the entire process payable to the Applicant/Nominee herein, since the commencement of the Application dated July 26, 2021.
2. The Applicant's motion was based on the grounds that there was an apparent mistake on the Ruling delivered on June 28, 2022 on how the Trial Judge interpreted the Petitioners' / Respondents' Constitutional Rights by stating the land ownership, acquisition and compensation of 1.9 Ha (4.75 acres) instead of 0.76 Ha (1.9 acres), averments by the Respondent of what the entire LR No Ndivisi/Muchi 1265 to be measured.
 3. The applicant also stated that the trial Judge erred to interpret that the Petitioners' /Respondents' constitutional averments are not appealing for public participation to determine how LR No Ndivisi/Muchi 1265 exists within its neighborhood and that the Petitioners' constitutional averments can only be equally determined, after the National Government Surveyors Investigating the Subdivision Cases as directed on the November 22, 1973 and that the judge erred in failing to consider Article 22(1-2) of the Constitution.
 4. The applicant also stated that there is new information on the face of the application dated July 26, 2021.
 5. The applicant's motion was vehemently opposed by the petitioners/respondents vide grounds of opposition dated October 31, 2022 and replying affidavit sworn by Joseph Wakoli Wambati on the same date.
 6. The petitioners/respondents objected the jurisdiction of this court to sit on their own appeal and stated that the issues raised are res judicata, that the application on the face of it does not meet the threshold for review and that the applicant lacks locus standi to bring the motion seeking to review the ruling of the court.



7. The petitioners/respondents also stated that the issue of the size of land compulsorily acquired by the 1st Petitioner in 1971, whether the 3rd Respondent is entitled to the title to Land Parcel No Ndivisi/Muchi/1265 and whether such parcel of land exist are matters raised in the petition and cannot be legitimately determined through the current Notice of motion.
8. The Applicant filed his submissions dated November 11, 2022 and stated that when the 3rd Respondent made an application in succession cause no E021 of 2022 to have the Applicant appointed as his nominee, the Magistrate's court found that the Applicant is already permitted to prosecute matters of public interest concerning compulsory acquisition of land. That he is seeking to be joined because there are related matters over the same cause of action with Busia ELC case no 59 of 2018, COA civ application no E08 of 2021 and E018 of 2021.
9. The applicant refers to consolidation of suits which has nothing to do with the application for review. The Applicant went further to argue why he should be enjoined into these proceedings stating that the Petitioners should have filed for review of the judgement of HCC 1145 of 1987 instead of filing a fresh suit in the year 2014. That the Petitioners are objecting to the Applicant's joinder because they have raised similar issues between similar parties. The remainder part of the submissions was arguing why the Applicant should be joined to these proceedings.
10. I have read and considered the applicant's motion together with its supporting affidavit and Petitioners'/Respondents' grounds of opposition and replying affidavit. I have equally considered the submissions rendered by the Applicant. I find the core issue for determination is whether the applicant has met the threshold for grant of review orders sought. 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.'

11. Order 45, rule 1 provides for application for review of decree or order as follows;

' 1.

- (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 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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.'

12. The germane issue for determination herein, therefore, is whether the Applicant has established any of the grounds to warrant an order of review. Before probing into the merits of the grounds relied on by the Applicant for review, it's noteworthy to establish that the court dismissed the applicant's prayer to join the suit because he failed to establish any legal interest in the subject matter before the Court.

13. In *Muyodi vs Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

' In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said 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.'

14. The applicant stated that the trial judge made an apparent mistake on interpretation of Petitioners' constitutional rights, averments and failing to consider article 22 of the Constitution. This alleged mistake tilts on the decision itself rather than being an error on the face of the record. The applicant raised issues in his submissions as if he was arguing the application for joinder (already determined). It therefore depicts a scenario of an appeal being sought camouflaged as a review.

15. In *Abasi Belinda v Frederick Kangwamu and another* [1963] EA 557 Bennett J held that:

' A point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.'

16. Further, the applicant stated that he had obtained new information on the face of the application date July 26, 2021. However, the Applicant referred this Court to an order and a letter alleging that the 3rd Respondent and his family has had nominated him to represent them. The Judge in the impugned ruling stated clearly that the Applicant had the liberty to bring to this case whatever he wished through the 3rd Respondent. It appears the Applicant misconstrue authority to represent a party to mean the same thing as being joined to the proceedings, Secondly, if the Applicant feels that the subject matter in



this case relates to the cause of action in Busia ELC 59 of 2018, the procedure is to make an application for consolidation. All these were dealt with in detail in the determination sought to be reviewed. The Applicant does not bring any new information that showing his interest in this matter which was not argued in the previous application.

17. In *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira [2022] eKLR*, the court relied on the decision in the case of *Evan Bwire V Andrew Aginda Civil Appeal No 147 of 2006* as cited in *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR* the Court of Appeal held as follows:

' An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.'

18. In respect to prayer no 4 of the application, the applicant asked the court to grant orders sought in his application dated June 9, 2021. If that application has not been determined, the applicant ought to have fixed it for hearing and not seek fresh orders in the current application. In any event, he has not been joined in the current suit so there is no way the court can grant a relief to a person who is not a party to the proceedings. Prayer 4 is thus made without locus and is pre-mature the application dated June 9, 2021.
19. In conclusion, I find that the arguments relied on in support of this application do not meet the threshold of review. Therefore, the applicants motion dated July 4, 2022 be and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2022

A. OMOLLO

JUDGE

