



Kogo (Suing as an agent of Geoffrey Michael Trimby and Margaret Lesley Trimby being the registered trustees of Neema School (Kenya Trust) v Mkindo (Environment & Land Case 151 of 2018) [2022] KEELC 15393 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15393 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 151 OF 2018
MAO ODENY, J
DECEMBER 20, 2022

BETWEEN

VICTOR GIRI KOGO (SUING AS AN AGENT OF GEOFFREY MICHAEL TRIMBY AND MARGARET LESLEY TRIMBY BEING THE REGISTERED TRUSTEES OF NEEMA SCHOOL (KENYA TRUST) PLAINTIFF

AND

WALTER CHIPA MKINDO DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated February 17, 2022 by the plaintiff/applicant seeking the following order:
 - a. That this honourable court be pleased to review by varying, vacating and/or setting aside its orders made pursuant to its ruling delivered on October 14, 2021.
 - b. That costs of this application be provided for.
2. The applicant relied on the grounds on the face of the application together with the sworn affidavit of Victor Giri Kogo who deponed that he instituted this suit in his capacity as a donee of a power of attorney donated by the registered trustees of Neema School Kenya Trust hence the court should allow the applicant to regularize the suit as opposed to instituting a fresh suit.
3. The defendant opposed the application *vide* a replying affidavit sworn on March 10, 2022 by his counsel Nyachiro Robert Arati who deponed that the application was an afterthought filed after the plaintiff was served with a bill of costs on February 3, 2022.
4. Counsel deponed that the application does not meet the criteria for grant of orders of review and that the arguments raised by the plaintiff could only be properly raised on appeal.



5. Counsel agreed to canvas the application *vide* written submissions which were duly filed.

Plaintiff's Submissions

6. Counsel relied on the provisions of order 2 rule 15 of the *Civil Procedure Rules* and the case of *DT Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR, and submitted that the power of attorney was not challenged and that striking out the suit at this stage was unfair. That failure to obtain leave prior to filing the suit was a procedural issue that could be regularized by article 159 (2) of the *Constitution of Kenya*.
7. It was counsel's submission that order 9 rule 1 of the *Civil Procedure Rules* was not mandatory in the presence of a registered power of attorney and that the court has discretion to order the plaintiff to comply with the said order 9 and grant the prerequisite leave to proceed with the hearing of the suit.
8. Counsel relied on the case of *Joseph Ochieng & 2 others, Trading Aquiline Agencies v First National Bank of Chicago* [1995] eKLR.

Defendant's Submissions

9. Counsel for the defendant submitted that the plaintiff had failed to meet the threshold required for review as set out under order 45 (1) of the *Civil Procedure Rules* and that the grounds raised were similar to those raised at the hearing of the preliminary objection on locus standi.
10. It was counsel's submission that the application does not raise any discovery of new and important matter or evidence to warrant the court to review its orders. Additionally, that the applicant does not demonstrate and or point out a mistake or error apparent on the face of the record.
11. Counsel relied on the cases of *Executive Committee Chelimo Plot Owners Welfare Group & 288 others v Langat Joel & 4 others sued as the Management Committee of Chelimo Squatters Group* [2018] eKLR; and *Anthony Chelimo v Kenya Commercial Bank Limited* [2020] eKLR and urged the court to dismiss the application with costs.

Analysis and Determination

12. The issue for determination in an application for review is whether the applicant has met the threshold for review as provided for under order 45 rule 1 of the *Civil Procedure Rules* and section 80 of the *Civil Procedure Act*
13. Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* provide 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 from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

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

14. Order 45 rule 1 restricts the grounds for review as (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground the application has to be made without unreasonable delay.

15. In the Court of Appeal case Civil Appeal No 2111 of 1996, *National Bank of Kenya vs Ndungu Njau*, the court 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 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 proceeds on an incorrect expansion of the law".

16. Similarly, in the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR where the court held that:

"The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of order 45 rule 1 of the Civil Procedure Rules and section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision...

21 The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of appellate jurisdiction, which is not permissible."

17. The above cases whose reasoning is founded on the provisions of section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* aptly captures what a review is and when it can be done and how it can be done. The court cannot go out of the four corners of the law to sympathize with the applicant to bend the law. The court can only empathize as a human being and leave it at that and not move further.



18. This suit was struck out on October 14, 2021 following a preliminary objection on locus standi dated November 4, 2020. The current application is a replica of what was argued during the preliminary objection and the applicant has not demonstrated that there is any 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 ruling or order was made.
19. The applicant has also not demonstrated that there was any mistake or error apparent on the face of the record. I therefore find that the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF DECEMBER, 2022.

M.A. ODENY

JUDGE

