



Katula & another (Suing as Legal Representatives and Administrators of the Estate of Stephen Katula Muyendi) v Musambayi (Being Sued on his own Behalf and on Behalf of 41others) (Environment & Land Case 209 of 2017) [2024] KEELC 452 (KLR) (5 February 2024) (Ruling)

Neutral citation: [2024] KEELC 452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 209 OF 2017
CA OCHIENG, J
FEBRUARY 5, 2024**

BETWEEN

PIDDAN MUSAU KATULA 1ST PLAINTIFF

CHRISTINE MUTILE MWANGI 2ND PLAINTIFF

**SUING AS LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE
ESTATE OF STEPHEN KATULA MUYENDI**

AND

**SILAS KHAEMBA MUSAMBAYI (BEING SUED ON HIS OWN BEHALF AND
ON BEHALF OF 41OTHERS) DEFENDANT**

RULING

1. What is before Court for determination is the Defendants' Notice of Motion Application dated the 1st November, 2023 brought pursuant to Sections 1A, 1B and 3A of the *Civil Procedure Act* as well as Order 22 and 51 of the *Civil Procedure Rules*. The Defendants seek for the following Orders:-
 1. Spent
 2. Spent
 3. That the Honourable Court be pleased to set aside, vacate, vary or review Orders made on 30th October, 2023 on account of sufficient reason and apparent error on record.
 4. That costs do abide the Application.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Silas Musambayi Khaemba where he deposes that execution in favour of the Respondents was made prematurely as there was no Decree which the Respondents have extracted and served. He reiterates



that it is only the Decree which is executable and not a Judgment. He avers that it is fair that the aforementioned Orders be set aside for the Plaintiffs/Respondents to follow laid down procedures.

3. The Application was opposed by the Plaintiffs/Respondents who filed a Replying Affidavit sworn by Christine Mutile Mwangi where she deposes that the Defendants are essentially asking the Court to sit on Appeal from its own decision herein yet, Judgment and the Rulings which were delivered herein were very clear in their terms and do not require any further Application to this Court. She contends that Court Orders are not issued in vain. Further, that once a Court Order has been issued then the Decree Holder must be allowed to enjoy the fruits of his Judgment and cannot be again held in indefinite abeyance. She states that the Orders sought to be reviewed were not premature as being alleged by the Applicants as the duration which the Court granted them to vacate the suit premises had lapsed hence the application was rightly made. Further, that Judgment was delivered on 31st October, 2022 hence if the Applicants' wanted a stay then they should have moved the Court of Appeal appropriately. Further, no plausible reason has been given to vary the impugned Orders.
4. The Application was canvassed by way of oral submissions.

Analysis and Determination

5. Upon consideration of the Notice of Motion Application dated the 1st November, 2023 including the respective Affidavits, oral submissions and Defendants' List of Authorities, the only issue for determination is whether the Court should set aside, vacate, vary or review the Orders made on 30th October, 2023.
6. From the Court Record, I note the Orders issued on 30th October, 2023 emanated from the Plaintiffs' Notice of Motion Application dated the 13th July, 2023 where they sought the following Orders:-
 1. Spent.
 2. That the Defendants be ordered to give vacant possession of the suit premises being Title Number Mavoko Town Block 3/2111 within the next Twenty-One (21) days being that the time which had been granted them by this Court has lapsed.
 3. That in case of failure to vacate the suit premises then the County Commander of Kenya National Police Service in conjunction with the OCPD Athi River and OCS Athi River be ordered to assist in the eviction exercise of the Defendants herein from Title Number Mavoko Town Block 3/2111.
 4. That Costs of this Application be awarded to the Plaintiffs.
7. The Court after considering the said Application including the response from the Defendants, proceeded to allow it, since Judgment in this matter had been delivered on 31st October, 2022 where the Defendants were granted a period of one hundred and twenty (120) days before they would give the Plaintiffs vacant possession of the suit land. Further, I note the Defendants' being dissatisfied with the whole of the said Judgment, had lodged a Notice of Appeal on 8th November, 2022.
8. The legal provisions governing review of Court Orders are highlighted hereunder.

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.”

Further, Order 45 Rule 1(1) of the *Civil Procedure Rules* provides that:-

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.”

9. In the case of *Nyamogo & 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.”

10. 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.”

11. In this instance, the Defendants’ seek the Court to set aside the orders directing them to grant the Plaintiffs’ vacant possession insisting that there was an error apparent on the face of record since no Decree had been extracted by the Plaintiffs’ that is executable.

12. The Plaintiffs have opposed the instant Application insisting that the Defendants were asking the Court to sit on Appeal from its own decision yet Judgment and the Rulings which were delivered herein were very clear in their terms. Further, that they should be allowed to enjoy the fruits of their Judgment as the orders sought to be reviewed were not premature as being alleged by the Applicants’ as the duration which the Court granted them to vacate the suit premises had lapsed hence the Application was rightly made. From the averments in the instant Application including the oral 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 Court in its Judgment delivered on 31st October, 2022 had granted the Defendants a period of one hundred and twenty (120) days before they would give the Plaintiffs' vacant possession of the suit land but they have failed to do so and engaged in filing several Applications. From the Defendants arguments, it seems to me, they indeed are seeking an 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 Defendants have not met the threshold set for review as they have failed to demonstrate the alleged error apparent on the face of the record. I opine that if the Defendants' were indeed aggrieved by the order issued on 30th October, 2023, they should have proceeded to lodge an Appeal instead of the instant Application for review.
14. In the circumstances, I find the Notice of Motion Application dated the 1st November, 2023 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

