



**Mwithia v Gitonga (Environment and Land Appeal 62 of 1998)  
[2024] KEELC 609 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 609 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 62 OF 1998**

**CK NZILI, J**

**FEBRUARY 7, 2024**

**BETWEEN**

**GERALD MWITHIA ..... APPLICANT**

**AND**

**STANLEY GITONGA ..... RESPONDENT**

**RULING**

1. By an application dated 12.7.2023, the court is asked to grant leave to the firm of M.D Maranya & Co. Advocates to come on record for the applicant and proceed to review the ruling delivered on 30.4.2020 and the resultant orders regarding the description of land Parcel No. 447 Kianjai Adjudication Section to read land Parcel No. 457 Kianjai Adjudication Sections.
2. The grounds are set out on the fact of the application and a supporting affidavit sworn by Morris M. Gitonga on 12.7.2023. Briefly, the applicant avers there were material errors on the face of the ruling and the order extracted thereafter which the land officers cannot act upon unless corrected by this court; otherwise, both the judgment of this court and of the Court of Appeal will amount to futility.
3. The application is opposed by a replying affidavit of Henry Murithi Mwithia sworn on 27.9.2023. It is averred by an application dated 26.8.2013; the applicant sought an order that Parcel No. 447 be reinstated, which unfortunately belonged to John Kabuuri. The same was ordered, canceled, and returned to Parcel No. 498 which judgment by Hon. Lady Justice Kasango was never executed. Otherwise, the land would be more than 1.2 ha, as shown in the title deed annexed as HMM "3". The respondent avers the effect of the court of appeal judgment was to dismiss the suit at the lower court.
4. The respondent avers Parcel No. 457 belonged to the appellant as per a title deed issued on 13.7.2021, which the applicant was trying to grab from his father by seeking the orders sought. The respondent avers no error apparent on the face of the record has been established given since the commencement of the suit; there was no mention of Parcel No.457 anywhere in the pleadings starting with the plaint



dated 18.2.1993, judgment delivered on 15.7.1998 in Meru CMC No. 20 of 1993 in the memorandum of appeal dated 14.8.1998 and the judgment of the Court of Appeal dated 18.7.2013. The respondent avers that the orders sought would effectively make the applicant obtain ownership and title to land not subject to litigation before any court. Further, the respondent averred there has been an inordinate delay since the order was made on 30.4.2020; no sufficient reason has been advanced for review, and the application should be dismissed.

5. The applicant relied on written submissions dated 11.10.2023 stating that the court, under Sections 63 (e) and 80 *Civil Procedure Act* as read together with Order 45 of the *Civil Procedure Rules* and Article 159 of the *Constitution* can grant the orders sought.
6. It is submitted that the subject matter under litigation was land Parcel No. 457 Kianjai Adjudication Section erroneously indicated as Parcel No. 447 Kianjai Adjudication Section.
7. It was submitted due to an error; it was only fair to allow the application. Reliance was placed on *Zablon Mokina vs Solomon M. Choti & 3 others* (2016) eKLR, *Nyamogo vs Kogo* (2001) E.A 173 and *Republic vs Advocates Disciplinary Tribunal Exparte Appollo Mboya* (2019) eKLR.
8. The respondent relied on written submissions dated 26.10.2023. It was submitted review to correct an error should not involve extensive examination of facts but must be apparent. Reliance was placed on *Hosea Nyandika Mosagwe & 2 others vs the County Government of Nyamira* (2022) eKLR.
9. To this end, the respondent submitted that since Parcel No. 457 did not feature in any previous pleadings, judgments, and rulings and its source was not indicated, coupled with the fact that the precious judgment by Kasango L. J was not executed, and further that the Court of Appeal returned the parties to the status they were ante, this court cannot therefore know the status of Parcel No. 457 and its acreage, for review to apply.
10. Given the issues or questions raised, the respondent submitted that the alleged error was not apparent on the face of the record. On delay, the applicant appears after three years and four months without an explanation. Reliance was placed on the *Re-estate of Simoto Omwenje Isaka (deceased)* (2020) eKLR.
11. The respondent, relying on *Zablon Mokua vs Solomon M. Choti & others* (supra), submitted that the applicant was inviting the court to delve into several issues concerning Parcel No. 457, such as its ownership, historical background, acreage and its current registration regime which are issues not meant to be handled by way of review.
12. Under prayer 3 of the application, the applicant has sought to correct the numerical error of land Parcel No's. 447 to 457 Kianjai Adjudication Section. The applicant avers when he extracted the order and took it to the Land Registrar; it was when he was informed that the land parcel should have been Parcel No. 457 instead of Parcel No. 447.
13. The applicant says he recently became aware of the numerical error and moved the court to rectify the description of the suit land, which, if allowed, would not prejudice the respondent. The applicant terms the rectification necessary for execution to proceed, otherwise he stood to suffer irreparable loss should the apparent mistake not be corrected.
14. The respondent does not share the views of the applicant. He terms the application as lacking merits since Parcel No. 457 has never featured anywhere since the inception of the suit. Further, the error, if any, is not apparent on the face of the record, for it would require a drawn-out inquiry, which is unsuitable for a court exercising review jurisdiction.
15. An error apparent on the face of the record is self-evident and does not require an elaborate argument to be established. Order 45 Rule 1 of the *Civil Procedure Rules* provides that a person aggrieved by a



- decree or order on account of some mistake or error apparent on the face of the record may apply for review without unreasonable delay.
16. In *Nyamongo vs Kogo* (supra), the court said there is a distinction between a mere erroneous decision and an error apparent on the face of the record, the latter being one staring in the face with no two opinions about it.
  17. It must be manifest and evident that no court would permit such error to remain on the record. The court said it might be an error of law but must be definite and capable of ascertainment.
  18. In *Republic vs Advocates Disciplinary Tribunal exparte Apollo Mboya* (supra), the court said an erroneous order or decree cannot be corrected in the guise of exercise of the power of review. In *Muyodi vs Industrial & Commercial Development Corporation & another* (2006) 1 E. A. 243, the court said the mistake or error must be there for the whole world to see.
  19. The court has painstakingly gone through the entire file. What is clear is that the suit property was described as parcel No. 447, which was to be merged with Parcel No. 498. There was never any indication of Parcel No. 457 by the applicant. It is trite that parties are bound by their pleadings.
  20. In *Priscilla Wairimu Ndegwa vs Jane Wairimu Nganga Ndungu & another* (2019) eKLR, the court said under Section 99 of the *Civil Procedure Act*, it could correct clerical or arithmetical errors arising out of accidental slip or omission.
  21. In this suit, the applicant misrepresented the facts of the suit land throughout the proceedings and not the court if there is truth to his assertion that the land parcel should have been parcel No. 457 instead of Parcel No 447.
  22. The applicant has not owned up to the mistake and disclosed the evidence and basis of the new discovery. No official search and or report from the land registrar or surveyor has been availed that the subject land, though misdescribed, is the same on the ground, as is on the copy of records held by the land registry.
  23. It is not enough to allege there has been an error apparent on the face of the record without tracing how it arose and who caused it. In *National Bank of Kenya vs. Ndungu Njau* (1997) eKLR, the court said review may be granted whenever the court considers it necessary to correct an apparent error or omission on the part of the court.
  24. The applicant has not told the court how he was able to know Parcel No. 447 and plead on it up to the Court of Appeal, but unfortunately, he has discovered the decree should have referred to land Parcel No. 457. The owners of land Parcel No. 457 have not been disclosed. It is unclear if the owner was a party to the suit or is being introduced to it before being given an opportunity to be heard.
  25. The applicant has not shared with the court the documents he used in 1993 referring to land parcel No. 447 against those he has obtained from the Land Registrar, showing that the correct parcel of land is Parcel No. 457 instead of 447. Without such material, the court cannot decipher any error apparent on the face of the record or a mistake. See *Catherine Muthoni Ngari & another vs Gerald Kitbu Muchanje* (2019) eKLR.
  26. Additionally, if the order was for Parcel No. 447 to be canceled and merged with Parcel No. 498, it goes without saying that there would be no Parcel No. 447 but parcel No. 498, inclusive of the former Parcel No. 447.
  27. At the very least, one would have expected the applicant to address the issue raised by the respondent that the applicant has never executed the judgment of Kasango L. J and that the consequence is that



Parcel No. 457, as per the title deed, does not include the alleged seven acres since it is less than two and a half acres. So, for the applicant to say the Court of Appeal judgment cannot be implemented when the suit was dismissed and failed to establish the nexus between Parcel No's. 447, 498, and 457 and why all these were not captured in the pleadings and judgments since 1998, my finding is that the orders sought do not fit within Order 45 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act.

28. The delay in moving court has also not been explained at all. See Jacob Ilandi Mati vs Samuel Mati Gedion Mwinzi (2021) eKLR and Faith Karimi Muchangi & others vs Peter Njeru Mvungu (2017) eKLR.
29. The up short is I find the application lacking merits save for the prayer of the firm of M.D Maranya & Co. Advocates to come on record for the applicant Costs to the respondent. Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 7<sup>TH</sup> DAY OF FEBRUARY 2024**

**In presence of**

C.A Kananu/Mukami

Karanja for the respondent

**HON. CK NZILI**

**JUDGE**

