



**Wafulai v Lusindalo (Environment and Land Case Civil Suit
102 of 2013) [2024] KEELC 3413 (KLR) (8 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE CIVIL SUIT 102 OF 2013**

FO NYAGAKA, J

APRIL 8, 2024

BETWEEN

DAVID KAYAJA WAFULAI PLAINTIFF

AND

JOSEPH KHALEA LUSINDALO DEFENDANT

RULING

1. This is the third application post-delivery of judgment in this matter. Why the parties did not resort to appeal rather than coming to the Court over and over is a mystery to the Court but only plainly known and clear to each of the parties herein. I will, nevertheless, proceed to fulfil my duty as a Court, I shall not tire: when parties come to Court they deserve a hearing and for that matter an expeditious resolution of the dispute they have between them.
2. The notice of motion was brought under Section 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, Order 45 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law. It sought the following orders:-
 1. ...spent.
 2. ...spent.
 3. That at the inter partes hearing of this application, this Honorable could be pleased to review its orders of 30th November, 2023, to the extent that no drawing and filing of new mutation forms by the Surveyor in charge of Trans Nzoia County. But only to give effect to the mutation form complete contemplated in paragraph (b) of the judgment.
 4. That this Honorable Court we pleased to issue such further orders as it may deem fit in the interest of justice.
 5. That the costs of this application be provided for.



3. The application was based on three grounds. One was that there is a mistake apparent on the face of the record that requires the intervention of the court by way of review of its orders of 20/11/2023, committing the applicant to civil jail. Two, that it is clear that there was clear evidence to confirm that the applicant hearing never changed and or drew any other mutation forms altering the position of the respondents parcel as alleged by the Respondent on 07/06/2023 of the 5th paragraph of his affidavit sworn on that date. That this honorable court has power to hear the application and grant the ordinance sought in the interest of justice.
4. The application was supported by the affidavit of Joseph Khalea Lusindale which he swore on 19/12/2023. In the affidavit, he deposed that through the agreement dated 20/12/2011 and another one dated 29/10/2011 he sold the respondent a portion of land measuring 75ft x 100ft, which translate to 0.7 hectares of his original land Kiminini/Matunda Block 7 (Masaba)/159. He annexed and marked JKL-1A and 1B copies of the agreements. That thereafter the respondent and his own surveyor drew a sketch subdivision showing the exact position of the respondent's portion of land measuring 75 by 100 feet. That it showed the access road as filed in Court by the Respondent at the beginning of the suit. He annexed and marked as JKL-2 a sketch of the subdivision. That mutation forms were thereafter drawn which show the two parcels of land, one being "A" measuring 0.66 hectares which was to remain as the Applicant's portion and "B" measuring 0.07 hectares, to be the respondent's portion. He annexed and marked JKL-3 the copy of the Mutation Form.
5. But that however, the respondent declined to use the Access Road that the deponent had provided bordering parcel No. 164 towards the main road and demanded that the Applicant opens another Access Road which led to the instant suit since the deponent had refused to sign the Mutation Form.
6. He deposed that he obeyed the judgment of the Court and opened a new access road which borders parcel No. 158 towards the main road but the parcels shown as A and B remained as they still were in the original drawing as shown by the Development Plan at the back of the mutation form and as agreed. He annexed a copy of the registered mutation form, which he marked as JKL-4.
7. That upon registration of the Mutation Forms parcel A belonging to the deponent was allocated No. 1195 and parcel B belonging to the respondent, was allocated parcel No. 1196. That it is therefore not true, as alleged in paragraph 5 of the Affidavit sworn on 07/06/2023, that the deponent changed the position of his parcel of land, as he did not draw the new Mutation Forms besides the ones presented by the respondents in the List of Documents when he filed this suit. He annexed and marked JKL-5, the plaintiff's list of documents and he invited this Court to compare the original mutation forms presented by the respondent in its list of documents and the judgment in prayer (b) and the one that he registered at the Lands office to note that the Development Plan which was at the back of the Mutation Form was the same. Further, that he never changed the position of the respondent's parcel of land. That it would be a great injustice to the Applicant if the Honorable Court will use a mistake in the execution of the Mutation form to substantially change the correct position of the ground as that had already been agreed on even before the filing of this suit. That in the alternative, prayer (b) granted in the judgment directed the District Surveyor to give effect to the drawing of in the mutation forms presented by the respondent in his list of documents which the Applicant herein was agreeable to only to the extent of signing the same, but not drawing new forms that might be used by the respondent to cover up his illegality. That the application was brought in good faith and into interest of justice.
8. The application was opposed through a Replying Affidavit sworn by the defendant on 22/12/2023. In the affidavit, the respondent stated that their Ruling of 30/11/2023 could not be faulted because it was based on evidence availed to the Court. That after this matter was filed in the court, and by the consent of the parties, the Court directed the County Surveyor to proceed to the parcel of land



and present mutation forms to the Court, the County Surveyor wrote to both parties concerning the site visit. He annexed and marked DKW 1 a copy of the letter by the County Surveyor. The Surveyor visited the site in presence of the parties and presented the report together with the attached mutation forms, which he annexed and marked DKW 2 a copy of the report. That this was the Mutation Form that was supposed to be given effect to. That in contravention of the court order, the defendant prepared his own mutation forms dated 26/07/2018, which created parcel numbers 1195 and 1196 without involving the respondent or getting his consent as it was. That from the Google map that the respondent attached earlier to his application that parcel No. 1196 is vacant and the defendant wants now to take possession of the respondent's developed portion which he has numbered 1195. That the defendant's actions were tainted with the malice and the application herein lacked merit and should be dismissed.

9. After the respondent served the Replying Affidavit the Applicant filed a Supplementary affidavit in which he stated that the respondent's affidavit, paragraph 5 was misleading as the consent referred to was only limited to confirming the size and the position of the access road and not drawing new mutation forms. That prayer (b) of the judgment which he reproduced was to the effect of directing the Surveyor to give effect to the drawing on the mutation form. That however or from the respondents replying affidavit and annexure 3 thereto, it was clear that the respondents want to give effect to a new drawing to be done by the county surveyor who was only supposed to give effect to the drawing already presented by the court.
10. In it he referred to paragraph 3 of his supporting affidavit and deponed that when the respondent filed the present case he presented to the court as part of his documentary evidence or mutation form with a sketch of the proposed subdivision, with the agreeable measurements for implementation of the same. Further, that the respondent never sought cancellation of the original drawing presented to this court for the County Surveyor to prepare and give effect to the new drawing as proposed. That contrary to the Respondents allegations are paragraph 9 of the replying affidavit, the mutation form which the applicant presented for registration to create the parcel numbers 1195 and 1196 was prepared by the respondents own private surveyor before filing this case and it is the mutation form that the respondent used in his evidence.
11. The application was disposed of by way of written and oral submissions. The applicant filed his written submissions on 19/01/2024 but the respondent did not file any. However, both learned counsel made oral submissions on 14/02/2024.
12. In the written submissions, the applicant summed up the application first by stating that he was willing to comply with the judgment delivered on the 31/05/2018, but, however, the judgment was delivered based on the evidence presented by the plaintiff/respondent in support of this case and that among the documents the plaintiff presented the Mutation Forms in question. That there was no doubt that annexure 3 which was the mutation was the one in support of Prayer (b) of the plaintiff's plaint and therefore it was the subject document to be given effect. He then submitted that the consent and the County Surveyor's drawing thereof was to confirm the size and position of the road which was to be the road accessing the plaintiff's plot, but not new, mutation forms by the County Surveyor. That the allegations at paragraph 9 were therefore baseless and misleading.
13. He submitted further that he presented for registration the same mutation form as the plaintiff had submitted before this Court. That it was therefore the proper one to use, and neither did the Plaintiff seek its cancellation or for a new mutation and drawing. He submitted that the Plaintiff/respondent sought to implement now a new drawing which is meant to cover his illegalities and depart from the well-established legal principles that parties are bound by their pleadings.



14. He relied on the case of Daniel Otieno Migore versus South Nyanza Sugar Company Limited [2018] eKLR. He also relied on the Court of Appeal decision of the *Independent Electoral and Boundaries Commission versus Stephen Mutinda, Mule and 3 others* (2014) eKLR and *Raila Amollo Odinga and Another versus IEBC and 2 Others* 2017 eKLR.
15. In the oral of missions, learned counsel for the respondent submitted that there was no apparent error on the face of the record to warrant a review of the court's order of 30/11/2023. That the reason the court allowed that application was that the defendant had mischievously drawn a Mutation giving the Plaintiff/Respondent a vacant parcel of land, yet his parcel of land was fully developed, and so the application before the Court was designed to use the mutation forms which were filed with the suit in 2013. He submitted further that the plaintiff came to court to challenge the step by the defendant to give him an access road through a stranger's adjacent parcel of land and that with the consent of the parties recorded in 2014, the County Surveyor visited the ground. He rectified it the drawing on the 17/01/2014. He made the report and forwarded the mutation forms to court with the report and the this was the mutation form which was to be given effect. That the defendant's did not challenge it at the hearing and therefore the court did not make an error.
16. In response the Defendant's advocate submitted that the submissions he wrote were comprehensive. He stated that annexure 2 which was the mutation forms had a drawing at the back of it which contained labels A and B which were the portions allocated to the plaintiff and therefore a look at the Diagram shows a 6 metre road. That the purpose of the diagram was to show the size of the road.

Issues, Analysis and Determination

17. I have considered the application carefully. The law and the arrival submissions of the parties. I am of the view that there are two issues that arise for determination herein. The first one is whether the application is merited and the second one, who to bear the costs of the application.
18. Starting with the first issue, the law in regard to reviewing either a judgment or an order of the court is now settled. The substantive law is Section 80 of the *Civil Procedure Act* and the procedural one Order 45 Rule 1 of the *Civil Procedure Rules*.
19. On whether or not the application is merited, the beginning point is the understanding of the issue and the law. The applicant wishes this Court to review its ruling delivered on 30/11/2023. His contention is that there is a mistake on the face of the record in that, to him, the no new mutation should not be drawn, but that the one previously filed with the Plaintiff.
20. Section 80 of the *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.”



21. Order 45 Rule 1 of the [Rules](#) gives details regarding the circumstances or when an application for review may be made, pursuant to the previous provision. It 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.”

22. Therefore, in order to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, a party to must prove that:

i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants’ knowledge and which could not therefore produce at the time the order was made or,

ii. Some mistake or error apparent on the face of the record or,

iii. Any other sufficient reason.

23. And further, the application has to be brought without undue delay. The phrase “any other sufficient reason” has been elaborated in earlier decisions of courts of same level and higher. In [Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya](#) [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 Mativo J. (as he then was) culled out the following principles from a number of authorities: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.



- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is *prima-facie* visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the [Civil Procedure Code](#) provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the [Civil Procedure Code](#) does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 [CPC](#). The grounds on which review can be sought are enumerated in Order 45 Rule 1.
24. In the Ruling delivered on 30/11/2023 the Court considered extensively the issue of the mutation forms. I wish to take liberty and reproduce the findings of this Court in the said Ruling. This Court noted, among other aspects, and made findings to the effect, that
- “In my humble view the issue of the different mutation by the Defendant was a matter that was squarely before the court in the Application dated 29/01/2023 on which the Court ruled on 29/01/2021. It is not a new matter which would warrant a review of the ruling under the limb the applicant brought it...the Plaintiff had prayed in prayer (b) of the Plaint for an order directing the District Surveyor, Trans Nzoia County Surveyor to give effect to the drawing on the mutation form. The form was given in evidence... The question then that arises is, was the mutation forms which was used by the Defendant to give rise to the title deeds in issue given effect by the Surveyor of in charge of Trans Nzoia County? It is admitted by the parties that it was not: it was done by a private surveyor. That was contrary to the judgment of the court..., and given the fact that the issue that the mutation form which was used by the surveyor gave rise to a position of the titles issued which was different from the reality on the ground, and that as a result the Plaintiff is now being required to vacate from where he was originally shown by the Defendant himself to settle and he did settle and develop it, although the mutation form was in issue before the court in the Application of 29/01/2021, Moreover, even if the question of the mutation forms was not new, the implementation of the judgment of the court by the Defendant contrary to the judgment itself is sufficient reason in terms of Order 45 Rule 1 of the [Civil Procedure Rules, 2010](#), to grant the prayers sought.”
25. Indeed, this was a detailed analysis of the issues in this matter and the Court arrived at a reasoned decision. Did that constitute a mistake apparent on the face of record? I think not. That is a decision made on merit, after this Court considered all the material before it. If the Applicant herein was dissatisfied with the Ruling he should have appealed against it. It is not open for him to move the Court now for review on the merits of the decision. That is not the import of both Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#).
26. It should be as clear as noonday to the Applicant that his feted paragraph (b) of the Judgment delivered on 31/05/2018 cannot be read in isolation of the entire pleadings and the evidence before the Court.



First of all, I agree with his submissions that parties are bound by their pleadings. The cases of *Daniel Otiemo Migore versus South Nyanza Sugar Company Limited* (2018) eKLR, *Independent Electoral and Boundaries Commission versus Stephen Mutinda, Mule and 3 others* (2014) eKLR and *Raila Amollo Odinga and Another versus IEBC and 2 others* 2017 eKLR are all on point, and this Court has no reason to depart from their ratio decidendi or even distinguish them.

27. That being so, that is to say, since parties are bound by their pleadings, the Defendant must be bound by his own pleadings too. Thus, I now look at the pleadings of both the Plaintiff/Respondent and the Defendant/Applicant together with the evidence and the relief granted in the judgment, and consider whether there is a mistake in the ruling of 30/11/2023 as alleged. At paragraph 5, following his averment in paragraph 4 that he made two agreement over parcel No. Kiminini/Matunda Block 7(Masaba) 159, the Plaintiff pleaded that

“The Plaintiff states that he immediately took possession of the plots and commenced developments”.

To the Plaintiff the Defendant filed a Defence dated 23/08/2023 in which at paragraph 5 he averred that

“The Defendant admits the contents of paragraph 5 of the Plaintiff only to the extents that the Plaintiff is in occupation and use of the suit plot but nonetheless the plaintiff is put to strict proof of the alleged developments thereon.”

At no point in his pleadings did the Defendant plead that the Plaintiff switched the plots (as found by the Surveyor) and drawn on the Mutation Forms that were submitted to the Court. He cannot now purport to go against his pleadings. Thus, it is not in dispute that the plot on which the Plaintiff alleged he bought and was shown was the one which he was “in occupation and use” as admitted by the Plaintiff. The issue of developments on the land admitted to be in occupation and use was confirmed vide the Report by the County Surveyor, dated 28/01/2014, produced as P.Exhibit 5.

28. Furthermore, the Defendant applicant relied Mutation Forms dated annexed as JKL-3 and JKL-4 to argue that they were the same. It would take a person who does not think to agree to and make a finding that the two documents are the same. First, the handwritings on them are quite different whether on the top page or the inner ones. Again, annexure JKL-4 while it purports to reproduce the contents of JKL-3 has more than the content on the latter. JKL-4 even has a serial number, 04384394, on the top page while annexure JKL-3 does not. Again, JKL-4 is dated 23/07/2018 while the former has no date. When it is compared with the document filed in Court on 23/07/2013 only annexure JKL-3 agrees with it both in handwriting and content. Annexure JKL-4 is a new or changed document.
29. This Court can only withhold its breath and patience regarding how far the Applicant has tested its intellect, especially by arguing three times over the issue of the Mutation Forms. He has underestimated the Court’s intelligence, but it is okay: the truth has still come out.
30. Lastly, regarding the content of the reliefs granted on 31/05/2018, the learned trial judge held that

“I hereby enter judgment in favour of the Plaintiff against the defendant as prayed in prayers (a), (b) and (c) of the Plaintiff dated 23/07/2013.”

This leads the Court to examine the reliefs sought in the Plaintiff dated 23/07/2013.



31. Prayer (a) was that

“An order directing the defendant to sign mutation forms for parcel No. Kiminini/Matunda Block 7 (Masaba) 159, in default the Deputy Registrar for the Honourable Court to execute the same”

Prayer (b) was the

“An order directing the District Surveyor, Trans Nzoia County to give effect to the drawing on the Mutation form.”

Prayer (c) was on injunction.

32. Thus, when the Court entered judgment as stated above, did it enter judgment in (a) directing the Defendant to sign the mutation forms filed with the Plaintiff or the ones he refused to sign? No. The relief was that the Plaintiff was to sign a “mutation form” and not “the mutation form” in relation to the parcel of land in question. Prayer (b) followed that of the once the Defendant signed a “mutation form” or if he did not sign it and the Deputy Registrar signed it, it was now a specific or known mutation form and that is why it was now referred to as “the mutation form”. It did not mean that the form the Court referred to in (b) was that which the Defendant refused to sign. Otherwise why would the County Surveyor have gone to the site after the consent of 02/12/2013 if he was not to draw an independent Mutation Form than the one disputed? On which form was he to draw and create a road of access? The same one which was disputed? Was he given the same form to go and re-draw the road on? No. If not, as I find, then who drew the road which the Defendant relied on to produce the titles in relation to parcel Nos. 1195 and 1196?
33. In any event, were the annexures marked as JKL1A & 1B, JKL-2, JKL-3, JKL-4 and JKL-5 documents which are new to the parties and which, with due diligence were not available to the applicant at the time of giving evidence and delivery of judgment and besides at the time of making and prosecuting the application dated 07/06/2023? No. If anything, these are documents which the Court has looked at over and over when making various decisions herein. The decisions have been on merit yet the applicant wants the Court to indirectly sit on appeal over them. In my humble view, the Applicant has resorted to vexing the Court by presenting to it evidence which has been carefully evaluated time and again. This is unacceptable and shows nothing but an intent to vex the Court while abusing its process. He should implement the judgment of the Court as ordered on 30/11/2023. There comes a time when litigation must come to an end. Under the sun there are times and seasons: a time to plant and a time to reap, a time to go to war and a time to accept peace, a time to sue and a time to accept the decision of the Court. This is the time: if the Applicant did not appeal the decision of the Court as given on 30/11/2023 he should now accept it.
34. The upshot is that there is no mistake in the Ruling delivered on 30/11/2023. The Application herein is without basis and is an abuse of the process of the court. It fails. It is dismissed with costs to the Respondents.
35. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA EMAIL THIS 8TH APRIL, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE

ELC, KITALE

