



**Lomoro v Spring Hillpark Limited (Environment & Land Case E151 of 2021) [2024] KEELC 5231 (KLR) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5231 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E151 OF 2021**

**JA MOGENI, J**

**JULY 8, 2024**

**BETWEEN**

**OLIVIA ADONG' GEORGE LOMORO ..... PLAINTIFF**

**AND**

**SPRING HILLPARK LIMITED ..... DEFENDANT**

**RULING**

1. Before me for consideration is a Notice of Motion Application dated 5/04/2023 filed by the Defendant/Applicant, brought under Section 3A of the Civil Procedure Act, Order 42 Rule 6, Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and any other enabling provision of the law. The Defendant/Applicant is seeking the following orders;
  1. Spent
  2. This Court be pleased to Review its Ruling and Order of 28/02/2024, set aside the order dismissing the Application dated 15/08/2023 and in its place, grant a conditional stay of execution of the Judgment delivered on 27/07/2023 pending the hearing and determination of the appeal on condition that the defendant causes a transfer of the three-bedroom apartment number A12 of Block A in Bellcrest Gardens Apartment erected on Land Reference Number 209/16978 situated along Kileleshwa Githunguri Road into joint names between the plaintiff and defendant herein within 30 days of the court's order.
  3. This honorable court be pleased to order a temporary stay of execution of the judgment delivered on 27/07/2023 pending hearing and determination of this application inter parties.
  4. Costs of this application be in the cause.



2. The Application is premised on the grounds as stated in paragraph (1) – (13) on the face of the Application together with the annexed further affidavit of David Ojjo Agili, the managing director of the Defendant/Applicant herein sworn on 5/04/2024. I do not need to reproduce the same.
3. The Application is opposed. The Plaintiff/Respondent filed a Replying Affidavit by Olivia Adong' George Lomoro sworn on 26/04/2024.
4. The application was canvassed by way of written submissions. By the time of writing this Ruling, none of the parties had duly submitted.
5. I have considered the motion and the rival affidavits. I have also considered the relevant law. I in turn have had time to analyze the emerging issues therein and this court is of the considered view that the germane issue falling for consideration is whether the Court can review the ruling delivered on 29/02/2024.

### **Analysis and Determination**

6. The main desire of the Applicant is to review, vary and/or set aside the Ruling and order issued on 29/02/2024 where the Court found that the Defendant/Applicant had satisfied the limb of filing the application without inordinate delay but he has failed on the other two limbs which are very critical to the application for stay. The Court therefore did not grant the Defendant a stay of execution of the Judgment delivered on 27/07/2023.
7. It is common ground that the High Court has a power of review, but such power must be exercised within the framework of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.
8. 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.”
9. Further, Order 45 Rule 1 of the Civil Procedure Rules provides the conditions under which the Court can allow an application for review. They are as follows: -

“ 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.”
10. The Honourable court is vested with the power and discretion to issue review orders on its judgments or rulings. In addition, the Court of Appeal held that “...the court has unfettered discretion to review its own decrees or orders for any sufficient reason.” Sufficient reasons have been explained not to be analogous to the grounds in the Rule since that would fetter the discretion of the Court [see *Wangechi*



*Kimita & Another vs Mutabi Wakabiru CA No. 80 of 1985* (unreported)]. However, while the Court has such wide discretion, that discretion must be exercised judiciously.

11. The conditions to be satisfied are derived from the said Order 45 Rule 1 (1). They are basically three limbs which are discernible from part (b) above and which must be looked at jointly with the fourth one, as summarized below;
  - a) Discovery of new and important matter or evidence. b) Mistake or error apparent on the face of the record. c) Any other sufficient reason. d) Application must be made without unreasonable delay.
12. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* gives the Court the power to make orders for review, Order 45 sets out the conditions to be met in a review. The pertinent issue for determination herein therefore, is whether the applicant has brought itself within any of the above conditions and their relationship as explained.
13. In the present application, according to the Defendant/Applicant, he understands that one of the reasons the court declined to stay execution of the judgment on account of our security is that it was doubtful how the plaintiff herein would have the property in their name in the event of a successful appeal. He wishes to offer an alternative security worth much more than the decretal amount and which security the registered leaseholder is prepared to have it transferred jointly into the names of both the plaintiff and defendant herein to hold as security pending hearing and determination of the appeal herein. A three-bedroom apartment. They have gotten the property valued and have attached the same. That he is prepared to transfer the property into the joint names of the Plaintiff and Defendant within 30 days of the court order and surrender its sub lease to court as security for the stay of execution pending appeal sought in the application. He reiterates the fact that the Defendant is not in funds to be able to put down a cash security in light of the fact that all the monies were spent in the suit project and we shall have to wait for the plaintiff's unit to be sold before they can access money.
14. The Plaintiff/Respondent on the other hand contended that this Honourable court has already delivered its Decision on the issue stay of execution via its Ruling dated 29/02/2024. The instant application by the Defendant purporting to seek a review of the Ruling above does not meet the criteria as set for the grant of review orders which grounds are limited to the discovery of new evidence or correction of an apparent mistake. The subject application points at no error on the part of this Honourable court and neither does it point to any new discovery capable of altering the previous decision and thus the court is functus officio and incapable of entertaining the same. Further, the previous application by the Defendants was opposed by the Plaintiff on the grounds that the Defendant was attempting to dictate the terms of settlement of the decree which is the same tactic repeated in the instant application. The Defendant has not furnished any proof of ownership of the alleged property or any nexus between the owners and the Defendant or tendered any explanation why the Defendant cannot liquidate its share, if any, and settle the decree. It is clear that the application is a further abuse of precious judicial time and only aimed to denying the Plaintiff the fruits of her judgement.
15. The power to review is a creature of statute. It must be conferred by law either specifically or by necessary implication. Review is not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules of procedures or technicalities of the law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review was under mistake and the earlier judgment or decision would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice, nothing would preclude the Court from rectifying the error. The power to



review can be exercised for the correction of a mistake and not to substitute a view. Once a review is dismissed no further review can be entertained.

16. The rectification of an order stems from the fundamental principle that justice is above all since the power of review is exercised to remove an error and not for disturbing finality. If reasoning in the decision is at variance with the clear and simple language in a statute or it suffers from manifest error of the law or if there is an error apparent on the face of the record which is liable to be rectified the powers of review can be exercised. The review Court cannot sit as an appellate Court. It is beyond the purview of the executing Court to scan or review the reasoning provided by the Court in decreeing the suit. The execution Court is a creature of a decree. It cannot be allowed to be above it. A wrong decision can be subject to appeal to a higher forum, but the review is not permissible on the ground that the Court proceeded on wrong proposition of the law. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the later can only be corrected by exercise of the review jurisdiction.
17. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. In the case of *Brown Vs Dean (1910) AC 373*, Lord Loreburn stated that the new evidence must at least be such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgment. The provision relating to review contemplates grounds which would alter or cancel the decree.
18. A review can be done based on an error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident, and does not require an elaborate argument to be established. See the case of *West Bengal Vs Kamal Sengupta AIR 2009 SC 476*.
19. In the case of *Muyodi v Industrial and Commercial Development Corporation and Another EALR (2006) EA 243*, the Court of Appeal while dealing with an issue of review and describing an error apparent on the face of record, held 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.”

20. Thus, an error apparent on the face of record must be one that is obvious to the eye, and it must be one which when looked at does not yield two results. It shows itself to the read ordinary reader of the record and not the one looking for something hidden or obscure: yeah, “...an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.” (See Chandrakhant Joshibhai Patel v R [2004] TLR, 218).
21. The third ground for review is for any other sufficient reason. The expression means a reason sufficiently analogous to those specified in the rule though cannot be held limited to the first two reasons.
22. Turning back to the application at hand, it is clearly manifest that the Defendant/Applicant has neither shown to the satisfaction of the Court that there is a new and important matter of evidence that has been discovered, an error apparent on the face of the record of the Court’s directions, and/or there is ground for review for any other sufficient reasons. Having analyzed the application in depth, it would appear to the Court that it is a disguised appeal. The Defendant/Applicant deponed that these new facts were not available to the them at the time the application dated 15/08/2023 was heard and determined. However, I note that the sub-lease attached shows that the lessee is Homes Kenya Limited who is not a party to this suit. The registered proprietor of this new security being offered is Homes Kenya Limited. The issue in the impugned Ruling was not the value of the security being offered. The issue was the Defendant was offering property that is not registered in its name. The law is clear that if the applicant is aggrieved by the decision of the Honourable Court it is open for him to proffer an appeal. Otherwise this Court is now functus officio. Lastly, this Application was filed on 5/04/2024 which is 36 days since this Court delivered its Ruling on 29/02/2024. It cannot be said that the Application was brought without inordinate delay.
23. To this end, the upshot is that the Defendant/Applicant has not demonstrated any errors apparent on the face of record, discovery of new evidence or sufficient reasons to warrant the review and or setting aside of the orders given on 29/02/2024.
24. By reasons of the foregoing, it is my finding that the Defendant/Applicant has failed to satisfy the conditions upon which an order for review can issue. In the circumstances, the Defendant’s Application dated 5/04/2024 is hereby found to be without merit and is dismissed with costs.
25. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF JULY 2024.**

.....

**MOGENI J  
JUDGE**

In the Presence of:

Ms. Koki for Plaintiff/Respondent

Mr. Simiyu for Defendnat/Applicant

Ms. Caroline Sagina: Court Assistant



.....  
**MOGENI J**  
**JUDGE**

