Karani v Omoding (Environment & Land Case 68 of 2014)
[2024] KEELC 6575 (KLR) (8 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6575 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND CASE 68 OF 2014

BN OLAO, J

OCTOBER 8, 2024

BETWEEN

LAWRENCE ISOGOL KARANI ..... APPLICANT

AND

GEOFFREY OMODING ..... RESPONDENT

RULING

1. The dispute between Lawrence Isogol Karani(the Applicant) and Geofrey N. Omoding(the Respondent), over the ownership of the land parcel No South Teso/Amukura/2570 (the suit land) was heard and determined by this Court vide a judgment delivered on 12th March 2024. The Applicant who was the Plaintiff was claiming that the Respondent who was the Defendant had trespassed onto the suit land. The Applicant's claim was dismissed and the Court decreed that he was only entitled to 2 acres out of the suit land and should surrender the title thereto for rectification. There is no evidence that an appeal was preferred against that judgment.

2. The Applicant has now returned to this Court vide his Notice of Motion dated 15th April 2024 and filed under Certificate of Urgency. He seeks the following remedies:

    1. Spent

    2. Spent

3. This Honourable Court be pleased to review and/or vary it's judgment delivered on 12th March 2024 together with it's decree and consequential orders dismissing the Plaintiff's suit and ordering the Plaintiff to surrender his original title deed for L.R No. South Teso/Amukura/2570 for rectification and/or the order for cancellation of his title for L.R No South Teso/Amukura and issuance of a new title deed for 2 acres.

4. That after such review the said orders of the judgement be replaced with orders that the Plaintiff's claim is allowed as prayed with no order for cancellation of his title deed as aforesaid or such orders as the Honourable Court may deem fit to grant.

5. That the costs of this application be provided for.

The application is premised under Articles 50 (1) of *the Constitution*, Sections 80, 1A, 1B and 3A of the *Civil Procedure Act* and Orders 40, 45 and 51 of the Civil Procedure Rules. It is based on the grounds set out therein and supported by the Applicant's affidavit of even date.

3. The gist of the application is that there is an error apparent on the face of the record including congent issues which were not brought to the attention of this Court. They include the fact that the suit land was also the subject of a previous case being BusiaELC Case No46 of 2015 in which the Applicant's claim was dismissed. That it was not foreseeable that the previous judgment in Busia ELCCase No46 of 2015 could have had a bearing in these proceedings. Therefore, the issue of fraud having been litigated and decided upon in BusiaELC Case No46 of 2015, the case could not have been re-visited in this Court which had no jurisdiction to hear this dispute. That in the said suit, the Plaintiff therein one Rophina Imo Amaihad sued him alleging that he (the Applicant) had only purchased from her late father one Imo OsamongEMOI 2 acres of land comprised in the suit land but fraudulently transferred 3 acres to himself. That in hearing that case, the Court had framed the same issues which this Court has also framed. That if this Court had knowledge of the above case and judgment, it would not have arrived at the decision which it arrived at in this case. That if he had known that those issues would have arisen in this case, he could have brought that judgment to the notice of this Court.

4. Annexed to the Notice of Motion are the following documents:

    1. Copy of the register to the land parcel No South Teso/Amukura/2570.
    2. Copy of plaint in this case.
    3. Copy of defence filed in this case.
    4. Copy of sale agreement dated 26th May 2003 between Rophina Imo Amai and Geofrey N. Omoding.
    5. Copy of transfer of land.
    6. Copy of plaint in BusiaELC Case No46 of 2015.
    7. Copy of judgment delivered on 9th February 2021 in Busia ELC Case No 46 of 2015.

    When the application was placed before me on 17th May 2024, I directed that it be served upon the Respondent within 7 days and be canvassed by way of written submissions. The record shows that the Respondent was served on 31st May 2024. However, he did not file any reply to the application. Submissions were filed only by Mr Onsongo counsel for the Applicant and instructed by the firm of Obwoge Onsongo & Company Advocates. The application is therefore not opposed.

5. I have considered the application, un opposed as it as well as the submissions by counsel.

6. Notwithstanding the fact that the application is not opposed, I must consider it in light of the applicable law, the facts upon which it is premised and the submissions by counsel.

7. The law on review of judgments and orders is found in Section 80 of the *Civil Procedure Act*. It reads:

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 judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."

The procedure for review of a judgment or order is provided for in Order 45 Rule 1 (1) of the Civil Procedure Rules as follows:

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 a review of judgment to the Court which passed the decree or made the order without unreasonable delay."

A party seeking a remedy of review of an order or a decree must therefore satisfy the following requirements:

1. Prove that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced.

2. Demonstrate that there is some mistake or error apparent on the face of the record.

3. Provide any other sufficient reason.

4. File the application without unreasonable delay.

The above was reiterated by the Court of Appeal in the case of Francis Origo & Another v Jacob Kimali MungalaC.A. Civil Appeal No149 of 2001 [2005 eKLR] where, after citing the provisions of the then Order XLIV Rule 1 of the Civil Procedure Rules, the Judges said:

> "From the foregoing, it is clear that an Applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the Applicant must make the application for review without unreasonable delay."

It is crucial therefore that whatever ground an Applicant seeks to rely on in an application for review of judgment or order, the application must be filed without unreasonable delay. The Applicant moved to Court vide his Notice of Motion dated 15th April 2024 seeking a review of the judgment delivered on 12th march 2024. That is a delay of about one month (30 days) which I do not consider to be unreasonable.

8. The Applicant has based his application on the ground of some mistake or error apparent on the face of the record. In grounds No1 and 2, he has pleaded thus:

> " 1: "That there was an error apparent on the face of the record."
>
> 2: "That there are congent issues that were not within the Court's knowledge at the time of delivery of judgment."
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> The Applicant also suggests that this suit is res-judicata as the issue had been previously canvassed in BusiaELC Case No46 of 2015. In paragraph 9 of his supporting affidavit, he has deposed thus:
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> 9: "That the said orders that 0.96 acres be hived off my land for representative of the Estate of Imoo Osamong Emoitiis res judicata as the same issue was adjudicated upon in BUSIA ELC NO 46 of 2015 (Rophina Imo Amai v Lawrence Isogol Karani) and decided in my favour. "
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> He then goes on to add in paragraph 16 as follows:
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> 16: "That had I known that these issues could arise in the judgment, I could have brought this judgment to the Court's notice but since the issue of fraud was only alleged without being pleaded and specifically proved through a counter-claim and testimony, I could not reasonably foresee the said outcome."
>
> The Applicant has annexed to the application a copy of the judgment delivered by OmolloJ on 9th February 2021 in Busia ELC Case No 46 of 2015 involving one Rophina Imo Amai as Plaintiff and the Applicant as Defendant. That judgment was not availed to the Court during the proceedings in this case. Res judicata is a complete bar to any subsequent suit involving the same subject matter and parties or their privies. However, the onus is on the party pleading res judicata to prove it so that it can be canvassed at the earliest opportunity. It is not the duty of the Court to go through it's archives to find out which case is or is not res judicata unless the Court, on it's own, is already aware of a previous matter that it had handled involving the subject matter. In any event, if this suit is res judicata, it is rather late in the day to invoke that plea because this Court has already seized jurisdiction and determined the suit on it's merits. I cannot now sit on appeal against my own decision."

9. The main issue upon which this application is pegged is that there is an error apparent on the face of the record. An error or mistake apparent on the face of the record, as was held in Paul Mwaniki v NHIF Board Of Management2020 eKLR, must be one that is self-evident and does not require elaborate arguments to be established.

10. On the same issue, the Court of Appeal rendered itself as follows in the case of Muyodi v Industrial And Commercial Development Corporation & Another 2006 I E.A 243:

> " In Nyamogo And Nyamogo v Kogo[2001] E.A. 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 it's 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 the 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 up. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for and appeal." Emphasis added.

There is also a useful passage in the 13th Edition of Mulla On The Indian Code of Civil Procedure where on the issue of review, it is stated:

> " A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record. The line of demarcation between an error simplicitar and an error apparent to 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." Emphasis mine.

Finally, as was held by the Court of Appeal in the case of Multichoice(k) Ltd v Wananchi Group (k) Ltd & Others 2020 eKLR:

> " It bears emphasizing that the phrase 'mistake or apparent error' by it's very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at the record." Emphasis added.

Guided by the above principles, what then is the "mistake or error apparent on the face of the record" in this case? The Applicant has identified that issue as being that there was a previous judgment in a case involving him and one ROPHINA IMO AMAI over the suit land and which was not brought to the attention of the Court. I do not see how that can be a mistake or error apparent on the face of the record as already defined in the precedents mentioned above. That previous case was always within the knowledge of the Applicant who was the Defendant therein and it cannot now be a mistake or error on the face of the face of the record when it was not brought to the attention of the Court for it's consideration. The fact that the Applicant failed to place before the Court what he consider to be a matter which, perhaps, may have titled the case in his favour, cannot qualify to be a mistake or error apparent on the face of the record for the purposes of an application for review. It must also be remembered that a point which may be a good ground of appeal may not be a good ground for an application for review.

11. The up-shot of all the above is that having considered the Notice of Motion dated 15th April 2024, I find it devoid of any merit. It is accordingly dismissed with no orders as to costs.

BOAZ N. OLAO

JUDGE

8TH OCTOBER 2024

Ruling dated, signed and delivered on this 8th day of October 2024 by way of electronic mail and with notice to the parties.

BOAZ N. OLAO

JUDGE

8TH OCTOBER 2024