Peony Management Company Limited v Oyatsi (Environment & Land Case 79 of 2020) [2024] KEELC 6460 (KLR) (3 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6460 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 79 OF 2020

JO MBOYA, J

OCTOBER 3, 2024

BETWEEN

PEONY MANAGEMENT COMPANY LIMITED ..... PLAINTIFF

AND

DESTERIO OYATSI ..... DEFENDANT

RULING

1. The Defendant/Applicant herein [who is an Advocate of the High Court of Kenya] has approached the court vide the Application dated the 27th of March 2024 and wherein same [Applicant] has sought the following reliefs:

    a. That the order made herein dated 4th March 2024 and issued on 22nd March 2024 be reviewed.

    b. That the orders made in clauses 4 and 5 of the said order dated 4th March 2024 and issued on 22nd March 2024 be set aside or reversed.

    c. That the costs of the present application be provided for.

2. The Application by the Defendant/Applicant is premised on various grounds, which have been enumerated in the body thereof. Furthermore, the Application is supported by the Affidavit of the Defendant/Applicant [Desterio Oyatsi] sworn on even date.

3. Upon being served with the Application beforehand, the Plaintiff/Respondent filed Grounds of Opposition dated 24th April 2024 and wherein same [Plaintiff/Respondent] has contended that the Application by the Applicant herein does not raise any reason/basis to warrant being granted. For good measure, the Plaintiff/Respondent has contended that the issues raised by the Applicant can only be addressed vide an appeal and not an application for review.

4. The Application beforehand was placed before the Deputy Registrar on 20th May 2024 whereupon the advocates for the parties agreed to canvass and dispose of the Application by way of written

submissions. In this regard, the Deputy Registrar [sic] proceeded to and gave directions pertaining to the filing and exchange of the written submissions.

5. On 17th September 2024, the file herein was placed before this court for further directions. Suffice it to point out that the advocates for the parties indicated that same had filed and exchanged their written submissions pertaining to the Application and thereafter invited the court to proceed and craft a ruling on the basis of the written submissions.

6. For coherence, the Defendant/Applicant filed two [2] sets of written submissions namely, the the written submissions dated 14th May 2024, and Rejoinder submissions dated 17th July 2024, whereas the Plaintiff/Respondent filed written submissions dated 15th July 2024.

7. The submissions alluded to in the preceding paragraph form part of the record of the court and same shall be taken into account in crafting the subject ruling.

Parties Submissions:

Defendant/applicant's Submissions:

8. The Defendant/Applicant filed two [2] sets of written submissions dated 14th May 2024 and 17th July 2024, respectively; and wherein the Applicant has raised, highlighted and canvassed two [2] salient issues for consideration by the court.

9. Firstly, learned counsel for the Defendant/Applicant has submitted that the Ruling of the court which was rendered on 4th March 2024 and the resultant Order arising therefrom, contain errors and/or mistakes apparent on the face thereof and hence there is need to review the Order with a view to correcting the errors and/or mistakes thereon.

10. In particular, learned counsel for the Defendant/Applicant has submitted that the Ruling and the resultant Order rendered on 4th March 2024, has altered the terms of the Judgment which was delivered on 30th November 2020. For coherence, learned counsel has contended that the Ruling and the Order complained of has constituted the Plaintiff/Respondent herein as a Decree Holder, yet the Plaintiff herein is a Judgement Debtor.

11. Secondly, learned counsel for the Defendant/Applicant has also submitted that the Ruling and Order complained of has also ordered and directed the Defendant/Applicant to create an easement over the suit property, contrary to and in violation of the provisions of Section 98 of the *Land Registration Act* 2012.

12. Arising from the foregoing, learned counsel for the Defendant/Applicant has therefore submitted that clauses 4 and 5 contained at the foot of the Ruling dated 4th March 2024 and by extension the resultant order, are therefore erroneous and thus ought to be reviewed.

13. In support of the Application for review, learned counsel for the Defendant/Applicant has cited and referenced various decisions including Multichoice Kenya Limited vs Wananchi Group Kenya Limited & 2 Others [2020] eKLR, Republic *vs Chief Land Registrar & Others, Judicial Review Misc. Appl. E011 of 2023*, Sardar Mohammed vs Charan Singh [1959] EA 795, Orero vs Seko [1984] KLR, 238 and Kimita vs Wakibiro [1985] KLR 317.

14. Flowing from the foregoing submissions, learned counsel for the Defendant/Applicant has therefore invited the court to find and hold that the Applicant has established and demonstrated the existence of an error and mistake apparent on the face of the Ruling and thus the Application ought to be granted.

15. Other than the foregoing, learned counsel for the Applicant has also submitted that the Application also ought to be allowed on the basis that there exists sufficient cause/basis to warrant the impugned Order being reviewed.

Plaintiff's/respondent's Submissions:

16. The Plaintiff/Respondent filed written submissions dated 15th July 2024; and wherein same [Plaintiff/Respondent] has adopted the Grounds of Opposition dated 24th April 2024 and thereafter highlighted two [2] salient issues for consideration by the court.

17. First and foremost, learned counsel for the Plaintiff/Respondent has submitted that the Applicant herein has neither established nor demonstrated the existence of an error or mistake apparent on the face of the record. In any event, learned counsel for the Plaintiff/Respondent has submitted that the issues raised by the Applicant are argumentative and thus incapable of falling within the purview of an application for review.

18. Additionally, learned counsel for the Plaintiff/Respondent has also submitted that the arguments by and on behalf of the Applicant border on an invitation to this court to re-engage with the facts and the law afresh, with a view to reaching/ arriving at a different decision. In this regard, it has been contended that the application constitutes an invitation to the court sit on appeal on its own decision, which is not only unacceptable but also constitutes a violation of the doctrine of functus officio.

19. Furthermore, learned counsel for the Plaintiff/Respondent has also submitted that the issues being raised by the Applicant herein constitute a demonstration of an erroneous decision by the court, which is separate and distinct from an error and mistake apparent on the face of record. Instructively, learned counsel has posited that the arguments underpinning the current Application ought to be canvassed before the Court of Appeal vide an appeal and not otherwise.

20. To this end, learned counsel for the Plaintiff/Respondent has cited and referenced the decision in Nyamogo and Nyamogo Advocates v Kogo [2001] 1 EA 173 wherein the Court of Appeal elaborated on the distinction between an error and mistake on one hand; and an erroneous interpretation of the law, on the other hand.

21. Secondly, learned counsel for the Plaintiff/Respondent has also submitted that the Applicant herein has also not demonstrated any sufficient cause or basis to warrant the review and/or variation of the Ruling rendered on 4th March 2024.

22. In view of the foregoing, learned counsel for the Plaintiff/Respondent has contended that the Application before the court is not only premature and misconceived, but same constitutes an abuse of the due process of the court.

23. In the circumstances, learned counsel has invited the court to find and hold that the Application beforehand is not only premature and misconceived, but that same is devoid of merits and thus same should be dismissed.

Issues For Determination:

24. Having reviewed the Application as well as the response thereto and upon taking into consideration the written submissions filed by the parties, the following issues crystallize [emerge] and are thus worthy of determination:

    a. Whether the Applicant herein has demonstrated and/or established the existence of an error or mistake apparent on the face of the record or otherwise.

b. Whether the court is seized the requisite jurisdiction to grant the orders sought or better still whether the current Application constitutes an invitation to the court to sit on an appeal in respect of its own decision.

Analysis And Determination :

Whether the Applicant herein has demonstrated and/or established the existence of an error or mistake apparent on the face of the record or otherwise.

25. The dispute beforehand arises from the Judgment of the court which was rendered/delivered on 30th November 2020, wherein the court [differently constituted] proceeded to and made the following orders:

    a. The Defendant's mesne profit fails.

    b. The Plaintiff's claim to right of easement or adverse possession over the Defendants land brought up under the limitation of actions fails.

    c. In light of the nature of the Plaintiffs development on the land and without any other access to Hatheru Road, it would not be fair to grant the relief sought by the Defendant.

    d. The order that commends itself to the court is for the parties to have an easement created in favour of the Plaintiff for the portion of the defendant land which the Plaintiff has been using to access Hatheru Road in accordance with Section 98 of the *Land Registration Act*. The Plaintiff will pay for the consideration of the easement.

    e. For the portion of the Defendant's land that the Plaintiff development has encroached on, the parties do undertake a valuation within sixty (60) days of the date of this judgement, with a view to determining its value for purposes of the Plaintiff compensating the Defendant. If the parties to not agree on the value of the portion affected within this time frame, they will file submission for the court to determine the reasonable payable to the Defendant.

    f. The Defendant is awarded cost of the suit.

    g. The Plaintiff will also meet the cost of the valuation and preparation and registration of the easement. [Emphasis supplied]

26. Following the delivery of the Judgment [details in terms of the preceding paragraph] the parties herein proceeded to and extracted a decree which was issued on 19th May 2021. For good measure, the decree under reference reproduced the terms of the Judgment which was delivered on 30th November 2020.

27. It is evident that the learned judge who rendered the Judgment directed the parties to undertake a valuation in respect of the portion of the Defendant's land which had been encroached upon by the Plaintiff's development and thereafter the valuation report was to be utilized to determine the quantum of compensation payable to the Defendant. For clarity, the limb of the Judgment in question directed that the valuation be carried out within sixty (60) days from the date of delivery of the Judgement.

28. Additionally, the limb of the Judgment pertaining to the valuation also directed the parties to agree on the value of compensation payable in respect of the portion of the Defendant's land encroached upon and that in the event of failure to agree, the parties were enjoined to file written submissions to enable the court to determine the reasonable compensation payable to Defendant.

29. Other than the foregoing, the Judgment under reference also ordered and directed the parties to commence the creation of an easement in favour of the Plaintiff pertaining to and concerning the portion of the Defendant's land which has been encroached by the Plaintiff's development. For coherence, it was ordered that easement was to be created in accordance with the provisions of Section 98 of the *Land Registration Act* 2012.

30. Despite the fact that the Judgment directed the parties to undertake valuation within a set timeline and also to register an easement over a portion of the Defendant's land, the parties herein failed to agree and/or comply with the terms of the Judgement.

31. Arising from the foregoing, the Plaintiff/Respondent approached the court vide Application dated 15th June 2023 and wherein same [Plaintiff] sought to have the court assess the compensation payable by the Plaintiff to the Defendant in terms of item (e) of the decree issued on 19th May 2021.

32. Following the filing of the said application, the court gave directions pertaining to the filing and exchange of written submissions. Thereafter, the court proceeded to and crafted a Ruling dated 4th March 2024 and wherein the court directed that an easement be created on the portion of the Defendant's land in accordance with Clause (e) of the Judgment rendered by the court on 30th November 2020.

33. Furthermore, the court also proceeded to and assessed the quantum of compensation payable to and in favour of the Defendant in respect of the portion of land, which had been encroached by the Plaintiff's development.

34. Suffice to point out that the orders that were given by this court in terms of the Ruling dated the 4th of March 2024, reiterated the crux of the Judgment that had been delivered by this court [differently constituted]. Suffice it to state that what this honourable court did was to highlight the terms of the Judgment, which had been rendered, but not complied with by the parties.

35. It is the said orders and directions which the Applicant herein now contend to constitute an error and/or mistake apparent on the face of the record and thus worthy of review.

36. To my mind, the orders and directions that are contained at the foot of the Ruling rendered on the 4th of March 2024, replicate the terms of the Judgment and the resultant decree issued on the 19th of May 2021. In any event, it is not lost on this court that the Applicant herein did not file any appeal as against the Judgment of the court.

37. Having juxtaposed the orders and directions contained at the foot of the Ruling delivered on the 4th of March 2024, as against the Judgment of the court delivered on the 30th of November 2020, I come to the conclusion that there is no error and/or mistake apparent on the face of the record.

38. On the contrary, the terms reproduced at the foot of the Ruling rendered on the 4th of March 2024, correspond with the Orders that were granted vide the Judgment and which Judgment has neither been challenged and/or impugned.

39. In my humble view, it was incumbent upon the Applicant to establish and demonstrate the existence of an error or mistake apparent on the face of the record. In any event, an error apparent is one that is discernable on the face of record and capable of being gleaned from the record without elaborate arguments, submissions and elucidation. However, in respect of the instant matter, the Applicant has neither demonstrated nor highlighted any error or mistake on the face of the Ruling.

40. On the contrary, what I hear the Applicant to be complaining of is that the Judge has ordered and directed the creation of an easement over his [Applicant's] Land contrary to the terms of the Judgment.

However, the Applicant herein seems to be keen to invite the court take afresh look at his arguments and most probably [just probably] arrive at a different conclusion.

41. To my mind, the Applicant herein either does not truly appreciate the gist and crux of the Judgment which was rendered in the matter, or same [Applicant] seems to imagine that through the current application, this court can vary the terms of the Judgment.

42. Quite clearly, what is purported [hyped] to be an error or mistake apparent on the face of record, is a red-herring and merely an endeavour to invite the court to take a second bite on the Judgment, which was not appealed against.

43. Furthermore, what I discern from the arguments by the Applicant herein seem to suggest that this court formed an erroneous view of the facts and the true import of the matter. In this regard, the court is being accused of forming/ taking an erroneous view of the law and the matter beforehand, does not fit within the purview of review.

44. To this end, it suffices to cite and reference the holding of the court of appeal in the case of National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, where the court dealt with the circumstances where review can be sought.

45. For coherence, the Court stated and held as hereunder;-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> 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". (My Emphasis).

46. In addition, the necessity to establish and demonstrate the existence of an error apparent on the face of record [which is distinct from erroneous decision] was also underscored in the case of Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR, where the court stated and held thus;-

> It bears emphasizing that the phrase "mistake or error apparent" by its 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 record.
>
> An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

> "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

47. Flowing from the decisions cited in the preceding paragraphs and taking into account the factual matrix, which has been highlighted herein before, there is no gainsaying that the Applicant herein has failed to establish the existence of an error or mistake apparent on the face of record.

48. At any rate, it is evident and apparent that the error or mistake, if any, exists in the mindset of the Defendant/Applicant and his learned counsel. For the avoidance of doubt, I repeat that there is no error on the face of record, in so far as the terms of the Ruling aligns itself with the Judgment and decree, which was delivered by the court and which judgment has never been set aside.

49. Arising from the foregoing, my answer to issue number one [1] is to the effect that the Applicant has failed to discharge the burden/obligation of demonstrating the existence of an error or mistake, in the matter known to law.

Whether the court is seized the requisite jurisdiction to grant the order sought or better still whether the current application constitutes an invitation to the court to sit on an appeal in respect of own decision.

50. Following the filing of the application dated the 15th of June 2023 and wherein the Plaintiff/Respondent sought liberty of the court to assess the compensation payable to and in favour of the Defendant, the court proceeded to and assessed the compensation payable to the Defendant, in line with the terms of the Judgment of the court.

51. Suffice it to point out that the assessment of the compensation due and payable to the Applicant herein accorded with the terms of the Judgment of the Court. For good measure, the court had ordered the parties to agree on reasonable compensation and in default, to file written submission to enable the court assess the compensation.

52. Be that as it may, the arguments which are contained in the body of the supporting affidavit as well as the written submissions by the Defendant/Applicant portray a scenario where the Applicant seems to be suggesting that the court arrived at an erroneous legal position in proceeding to and assessing the compensation. Furthermore, it is evident from the submissions by the Applicants that same seems to contend that the Ruling of the court has varied or altered the terms of the Judgment.

53. In my humble view, the position taken by the Applicant as pertains to the question of compensation also relates to the existence of an erroneous exposition of the law by this court. In this respect, if the court arrived at an erroneous conclusion, or better still misunderstood the gist of the Judgment under reference, same can only be corrected by the Court of Appeal and not by the same court, under the guise of review.

54. Put differently, it is my finding and holding that the issues raised by the Applicant connotes an erroneous view or position taken by this court, while interpreting the Judgment rendered on the 30th of November 2020. In this regard, one cannot be heard to advert to an error or mistake. For good measure, the analysis and the conclusion contained at the foot of the Ruling were deliberate and intentional and same reflects the true import and tenor of the Judgement.

55. In the premises, if there arises any improper analysis and consideration in the mind of the Applicant, then such improper analysis denotes an erroneous view of the court and thus same merits an appeal.

56. In this regard, it suffices to cite and reference the decision of the court of appeal in the case of Nyamogo and Nyamogo Advocates v Kogo [2001] 1 EA 173, where the court stated and held as hereunder:-

> "We have carefully considered the submissions made to us by the advocates of the parties to this appeal. 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 a 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 out. An error which as 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 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 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 an appeal."

57. Flowing from the foregoing, it is my finding and holding that the contention[s] by and on behalf of the Applicant cannot be corrected vide review. For good measure, whatever the Applicant opines to be an error or mistake, do not fall within the circumscription of an error or mistake on the face of record.

58. Furthermore, the arguments espoused by the Applicant herein, are merely intended to invite this court, not only to sit on appeal as pertains to the ruling on the 4th of March 2024, but also to venture forward and sit on appeal on the Judgment of Lady Justice K. Bor, rendered on the 30th of November 2020; and wherein the Judge was crystal clear about the creation of an easement.

59. In short, I find and hold that the application by the Applicant herein is not only misconceived but legally untenable. Besides, the application seeks to invite the court to sit on appeal on own ruling and to this extent, the application constitutes an abuse of the due process of the court [See the holding of the Supreme Court in *Rutongot Farm Ltd v Kenya Forest Service & 3 others (Petition 2 of 2016)* [2018] KESC 27 (KLR) (19 September 2018) (Ruling)]. [See also the decision in Satya Bharma Vs Director Public Prosecution [2018] eKLR].

Conclusion:

60. Arising from the analysis, [details enumerated in the body of the Ruling herein], there is no gainsaying that the Applicant herein has failed to establish and/or demonstrate the existence of an error or mistake apparent on the face of record.

61. On the contrary, the arguments by the Applicant herein are calculated, nay intended to invite the court not only to sit on appeal on the Ruling rendered on the 4th of March 2024, but also to sit on appeal

on the Judgment rendered on the 30th of November 2020, whose terms are explicit, unequivocal and devoid of ambiguity.

62. Quite clearly, the invitation by and on behalf of the Applicant, if acceded to will be tantamount to inviting [courting] anarchy into the corridors of justice. Furthermore, the invitation shall tantamount to doing violence to the rule of law and the general administration of justice.

Final Disposition:

63. In the premises, it is evident that the application beforehand it devoid of merits and thus same [application] be and is hereby dismissed with costs to the Plaintiff/Respondent.

64. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant

Mr. Desterio Oyatsi; and Eunice Akello for the Defendant/Applicant.

Mr. Muma Nyagaka for the Plaintiff/Respondent.