



**Darby (Suing for and on behalf of Ashbourne Properties Limited) v Thegeya & another  
(Environment & Land Case 365 of 2015) [2023] KEELC 656 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 656 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 365 OF 2015**

**JA MOGENI, J  
FEBRUARY 9, 2023**

**BETWEEN**

**ROBERT NICHOLAS DARBY (SUING FOR AND ON BEHALF OF  
ASHBOURNE PROPERTIES LIMITED) ..... PLAINTIFF**

**AND**

**HILLARY MAINA THEGEYA PREVIOUSLY KNOWN AS MAINA MWANGI  
THEGEYA ..... 1<sup>ST</sup> DEFENDANT**

**FINTEL LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this court for determination is the defendants/applicants' application dated June 28, 2022 duly filed under orders 45 rule 1(a), 51 of the [Civil Procedure Rules](#) and all other provisions of the law. The defendants/applicants are seeking the following orders: -
  - a) Spent.
  - b) That pending the hearing and determination of this application, there be a stay of the decree of this court made on May 11, 2022 and issued on the May 31, 2022.
  - c) That the decree of this court is so far as it relates to orders No (b), (c) and (d) be reviewed and set aside.
  - d) That costs of this application be awarded to the defendants.
2. The motion is premised on the supporting affidavit of Hillary Maina Thegeya, the 1<sup>st</sup> defendant herein and grounds (a) to (e) set out on its face.
3. The application is opposed. There is a replying affidavit sworn by Robert Darby on 9/09/2022.



4. The application was canvassed by way of written submissions. Parties submitted and a ruling date was reserved.
5. Having considered the motion, supporting affidavit, replying affidavit and the rival written submissions, this court is of the considered view that the only issue falling for determination is whether the grounds and facts presented make the applicants' motion merited. I will proceed to analyze the legal and jurisprudential framework on the issue.
6. The background of the matter is that the court delivered its judgment on May 11, 2022, for the plaintiff and gave orders as follows;
  - a) The transfer of the suit property LR No 209/9859 situate at Dam Estate Langata to the 1<sup>st</sup> defendant be and is hereby cancelled together with all subsequent entries on the title and an appropriate order do issue to the relevant Land Registrar.
  - b) The assets and liabilities of the company be shared out in proportion to the shareholding as at May 15, 2012 in relation to the dispute of the suit property.
  - c) In relation to prayer (c), parties to abide by laws on winding up of companies and seek the appropriate forum for this.
  - d) The costs of the suit are awarded to the plaintiff.
7. On the issue of whether the grounds and facts presented make the application merited thus calling for a review or setting aside of the impugned order, 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*. It is now well settled law that for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a court, the applicant 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.Further that the application has been brought without undue delay."
8. A clear reading of the above provisions shows that section 80 gives the power of review while order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review.
9. The starting point is that 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.



10. The impugned orders were made on May 11, 2022 and the instant application brought on June 29, 2022. That is 49 days. A period of that kind is not unreasonable delay even though Mr Kimani, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants was present when the judgment was being delivered. I note that the defendants contend that the application was made without delay as they only became aware of the full and exact contents of the decree upon being served with it by the plaintiff's advocates on June 23, 2022. In taking into account what constitutes undue delay, the court will apply its wisdom on a case by case basis. That said, I turn to the issue that is the crux of the instant application.
11. The next issue was that the defendants ascertained that the plaintiff vacated prayers 2 and 3 in his plaint and did not tender any evidence or submissions in respect of the same thus constituting sufficient reasons that it has become necessary for this court to review and set aside the order in issue as the same was made in error apparent on the face of the record. They submit that the impugned order erroneously canvassed prayers that were vacated by the plaintiff at the hearing of the case as the same fell outside the jurisdiction of this honorable court.
12. Regarding prayers (b) and (c), it is true that the plaintiff limited himself to 2 prayers out of the 5 prayers listed on the plaint dated 5/05/2015, one for cancellation of transfer of the suit property (prayer a) and for costs (prayer d). The court record indicates that the plaintiff abandoned the 2 prayers and no evidence was adduced in that respect. I am inclined to believe that the pronouncement of prayers (b) and (c) was an error.
13. In accordance with prayer (c), the court pronounced that it cannot render itself on the same due to lack of jurisdiction. This was stated at paragraph 50 of the impugned judgment. The prayer merely gives guidance for the parties to seek the appropriate forum for that.
14. Regarding the review for the order as to costs, the same was given because it was the plaintiff's undisputed evidence that 1<sup>st</sup> defendant represented the interest of the 2<sup>nd</sup> defendant. Additionally, any further argument will require an examination or argument to establish the alleged error, if any, and this would be beyond the scope of a review.
15. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 had this to say: -
 

“..... the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule.”
16. Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.
17. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of appellate jurisdiction, which is not permissible.
18. In *Attorney General & O'rs v Boniface Byanyima* HCMA No 1789 of 2000, the court citing *Levi Outa v Uganda Transport Company* [1995] HCB 340, held that the expression “mistake or error apparent



on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.”

19. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.
20. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the applicant in relation to prayers (b) and (c) do qualify to be grounds prescribed in order 45 rule 1 of the *Civil Procedure Rules*.
21. In view of my above conclusions, I find that the part of the grounds cited in relation to prayers (b) and (c) qualify to be grounds for review to bring the applicant’s application within the ambit of the grounds specified in order 45 rule 1. It is my finding that this is a proper case for the court to grant the review sought in relation to prayers (b) and (c) or even to exercise its discretion in favour of the applicant limited to prayers (b) and (c). Accordingly, the defendants/applicants’ application dated June 28, 2022 succeeds in part in the following terms:
  - a. The orders no (b) and (c) of this honorable court made on May 11, 2022 be and is hereby reviewed and set aside.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

.....

**MOGENI J.**

**JUDGE**

**In the Virtual Presence of :-**

**Mr Nyboma for Respondent/Plaintiff**

**Mr. Kimani Githongo for Defendant/Applicant**

**C. Sagina Court Assistant**

