



Kenya Railways Corporation v Loki Developers Limited & 2 others (Environment & Land Case 2191 of 2007) [2023] KEELC 18069 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2191 OF 2007**

JA MOGENI, J

MAY 10, 2023

BETWEEN

KENYA RAILWAYS CORPORATION PLAINTIFF

AND

LOKI DEVELOPERS LIMITED 1ST DEFENDANT

THE HON ATTORNEY GENERAL 2ND DEFENDANT

SAMUEL KANYEKI 3RD DEFENDANT

RULING

1. The Applicant filed a Notice of Motion dated 3/02/2023 brought under Section 1A, 1B and Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, seeking to come on record post judgment for the intended 3rd defendant and also to have the applicant herein joined to the suit as the 3rd defendant that the pending the hearing of this application inter partes the court be pleased to issue a stay of execution, implementation and/or enforcement of the judgment delivered on 24/01/2023 and all consequential orders. That the court be pleased to set aside, review and/or vary the judgment of Lady Justice Mogeni delivered on 24/01/2023; and that the Respondent provides costs of this application.
2. The application is based on the grounds that the Applicant's interests was not considered yet he has an interest in the suit parcel, having bought it as bonafide purchaser for value without notice whose rights are protected under the Torrens System of Land Registration. Further that the plaintiff instituted the suit against the wrong party and therefore the court had no jurisdiction to hear a matter where the right parties were not in court. That the applicant who is a 3rd party was not given an opportunity to be heard and will suffer irreparable harm and is at the risk of the buildings erected on the suit property being demolished. That he is condemned unheard.
3. The application is also based on the supporting affidavit of the Applicant dated 03/02/2023. The Applicant deponed he had a bona fide claim on the suit property known as LR No. 17870, and that



when the suit was instituted they had already acquired an interest in the suit property. He referred to the court to the 1st defendant's bundle of documents stating that they knew the suit property had been divided and sold to a third party who is the applicant. That the applicant became a bonafide purchaser for value whose rights are protected under the Torrens System of Land Registration.

4. The Applicant avers that the Plaintiff chose to institute the suit against a wrong party and did not join the Applicant yet he was aware that the Applicant stood to be affected by the decision thus the court had no jurisdiction over the matter and that the effect of the orders of the court issued on 24/01/2023 is that they condemn the applicant unheard.
5. That the suit was heard to conclusion and judgment entered in the Plaintiff's favour which adversely affects the Applicant. That the Applicant states that he only became aware of this judgment in this suit only after it was delivered.
6. That the applicant stands to suffer irreparable harm since he has put in substantial developments on the suit property. The applicant wants the judgment set aside. Plaintiff/respondent's Response
7. The Plaintiff/Respondent Defendant responded through the replying affidavit of the Acting General Manager, Legal Services & Corporation Secretary of the Plaintiff dated 17/03/2023. The Acting General Manager Mr Stanley Gitari, opposed the application and stated the court was functus officio and so the matters raised in the application should be raised at the appeal. It was his contention that the application was made belatedly and in bad faith. He averred that the law is very clear on the grounds upon which a party can seek review of judgment and the applicant has not fulfilled the same.
8. He further stated that the 1st defendant never made good its threat to apply to strike out the suit as he had stated in its affidavit and he never enjoined M/s Turbo International Limited instead it participated in the suit meaning that it was properly sued.
9. He averred that the transactions referred to by the 3rd defendants in their supporting affidavit were unlawful, illegal and made after the plaintiff had declared a dispute with the 1st defendant. That this suit was filed in October 2007 after issuance of demand letters. He prayed that the application be dismissed because it was unmerited. Parties proceeded by way of written submissions.

3rd Defendant/applicant's Submissions

10. Counsel for the proposed 3rd Defendant/Applicant filed a summary of facts giving a break-down of the issues in the suit. He submitted that the suit property had already changes ownership to various 3rd parties but these parties were not enjoined to the suit. He identified four issues requiring to be addressed, among them was whether the applicant as the registered owner of the suit property had the right to be heard and whether judgment delivered should be set aside, whether the applicant/ proposed 3rd defendant had met the threshold of joinder. That the Applicant has a bona fide claim by virtue of being the owner of the suit property and that the LR No 17870 did not exist and the court pronounced itself on land that was not there.
11. Counsel referred to Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the [Civil Procedure Act](#) which provide for a review of judgment by any person aggrieved by a decree or order. Counsel also cited among others the following cases, *Chandler v Alberta Association of Architects* [1989] 2SCR, *Sangram Singh v Election Tribunal, Kotach*, AIR 1955 664, [Mbuki & Others v Macharia & Another, Francis Kariuki Muruatetu & Another Republic & 5 Others](#) [2016] eKLR, and [Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others](#) [2013] eKLR. The quoted cases enumerated the circumstances where such a review could be granted – an error or omission on the part



of the court; or the discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the Applicant.

12. Counsel submitted that a review in this case would serve a useful purpose as the Applicant had an identifiable stake in the suit parcel, information which the Plaintiff was aware of since the suit property had changed ownership and was now owned by 3rd parties.

Plaintiff/respondent's Submissions

13. The plaintiff adopted the contents of the Replying Affidavit where Mr Stanley Gitari deponed that no application was ever made by the 1st defendant to enjoin M/s Turbo or 3rd defendant despite the 1st defendant being aware of their interest neither did they produce any photographs to show the alleged developments on the suit property. That the application of the 3rd defendant for joinder is being made post judgment and that there are clear conditions laid out in Order 45 of *Civil Procedure Rules* that such an application should meet and the current application falls below the conditions provided.
14. He submitted that no discovery of new and important matter or evidence to call for review had been provided. Further that the issue of the 3rd proposed defendant claiming ownership to the suit property was raised by the 1st defendant during the hearing of the suit but was never pursued. He contended that no sufficient reason has been provided to warrant the grant of the prayers made. He made reference to among others the following cases, *Menginya Salim Murgari v KR* [2014] eKLR, *John Gilbert Ouma v Kenya Ferry Services Ltd* [2021] eKLR, *Nasibua Wa Kenya Moses v University of Nairobi & Another* [2019] eKLR, *Pancrast. Swai v Kenya Breweries Limitd* [2014] eKLR.
15. Counsel for the Plaintiff/Respondent that a party seeking to be enjoined in a suit must do so at any time during the pendency of the suit and not after the suit has been concluded. He agreed with the proposition that the court has the discretion to enjoin any party to a suit at any stage but this must be done before delivering of a judgment. Counsel submitted that there was indolence on the Applicant's part as he did not file any application until after the judgment had been delivered. That the Applicant had not offered any reasonable explanation, given that the suit was filed by a plaint in 2005. Counsel enumerated the circumstances which would warrant grant of leave to enjoin a party to a suit – complete settlement of all the questions in the proceedings, protection of the rights of a party who would otherwise be adversely be affected in law, and to prevent a likely course of proliferated litigation.
16. Counsel submitted that the court had become functus officio at the time the Applicant made this application, having already pronounced its judgment.

Analysis and Determination

17. I find that there are two issues that commend itself for resolution:
 - I. Whether the application for review is merited
 - II. Whether the Applicant can be joined in the suit after the conclusion of proceedings.
18. On whether the application for review is merited, review of decrees or orders is grounded in the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.
19. Order 45 Rule 1 of the *Civil Procedure Rules* provides:
 - “(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.”

20. In *Timber Manufacturers and Dealers –v- Nairobi Golf Hotels (K) Ltd* HCCC No.5250/92 (reported in Odunga’s Digest on Civil Case Law and Procedure Vol. IV at page 3553) Emukule J. held:

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

21. In *Nyamogo & Nyamogo Advocates v Kogo* [2001] 1 EA 173 the court held that:-

“An error on the face of the record cannot be defined precisely or exhaustively... 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 could be made out. 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 apparent on the face of the record.”

22. Mativo J. in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR also held:

“Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & Others* had this to say:-

“... A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is 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 stabling it. It may be pointed out that the expression “any other sufficient reason” used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule.”

23. In my view I find that the Applicant does not raise the grounds of new or important evidence, an error or mistake apparent on the face of the record, or sufficient reason as required under Order 45 Rule 1. The mix up in the typing referring to the suit property as Kikuyu Township/229 does not invalidate the finding of the court since this information does not form a substantial part of the judgment. The Applicant is faulting the court’s decisions based on the pleadings and evidence by the parties to the suit which is an exercise that would be more suited to an appeal against the court’s decision rather than an application for review. I therefore find that the applicant has failed to satisfy the court on this point.



24. On whether the Applicant can be joined in the suit after the conclusion of proceedings. Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

25. The Court of Appeal in [J M K v M W M & Another](#) [2015] eKLR, concurring with the decision of the Trial Judge to decline adding party after conclusion of proceedings, further elaborated on the provision of Order 1 Rule 10 (2) thus:

“We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.”

26. This position was also affirmed by the Court of Appeal in the case of [Rubina Ahmed & 3 others v Guardian Bank Ltd \(Sued in its capacity as a successor in Title to First National Finance Bank Ltd\)](#) [2019] eKLR.

27. Nyamweya J in [Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another](#) [2014] eKLR also held that:

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made “at any stage of the proceedings”. “Proceedings” are defined in Black’s Law Dictionary Ninth Edition at page 1324 as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”.

28. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

29. Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the [Civil Procedure Rules](#) is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.

30. The upshot is therefore that the Applicant herein cannot be joined to this suit, the proceedings having been long concluded and judgment delivered.

31. The Applicant also fails to meet the second requirement of Order 1 Rule 10 (2) that is being a party whose presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. The Applicant’s lays claim to the suit property as a bonafide purchaser of value. He claims to have bought a portion of the suit property subdivided from LR 17870. The Applicant’s claim and the facts of ELC Suit No. 2191 of 2007 as disclosed by the Applicant involve



a distinctly separate cause of action from the cause of action that forms the basis of the Plaintiff's claim in this case.

32. Furthermore, the Applicant having failed to demonstrate that he is a necessary party to this suit, there are no sufficient reasons warranting the review or setting aside of the court's judgment as provided under Order 45 Rule 1 of the Civil Procedure Rules. The application ought to be, and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY 2023.

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MOGENI J

JUDGE

In the virtual presence of :-

Ms Sandra Kavaji for Plaintiff/Respondent

Mr Munyua Ezekiel for 1st Defendant

Mr. Oketch for Mr.Gichamba for Proposed 3rd Defendant

No appearance for the 2nd Defendant

