



REPUBLIC OF KENYA



KENYA LAW
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**District Physical Planning Officer & 4 others v Langat (Constitutional
Petition 1 of 2013) [2023] KEELC 18629 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
CONSTITUTIONAL PETITION 1 OF 2013**

MC OUNDO, J

JULY 6, 2023

BETWEEN

**DISTRICT PHYSICAL PLANNING OFFICER 1ST APPLICANT
DISTRICT SURVEYOR, KERICHO COUNTY 2ND APPLICANT
DISTRICT LANDS OFFICER, KERICHO COUNTY 3RD APPLICANT
DIRECTOR OF PHYSICAL PLANNING 4TH APPLICANT
DIRECTOR OF SURVEY 5TH APPLICANT**

AND

DAVE KIPKORIR LANGAT RESPONDENT

RULING

1. Before me for determination is the notice of motion dated October 7, 2022 brought pursuant to the provisions of section 3A and 80 of the *Civil Procedure Act*, order 45 rule 1 and order 51 of the *Civil Procedure Rules* and all enabling provisions of the law where the Applicants herein seek that the court reviews the judgment orders and decree made on the May 5, 2015, and thereafter there be stay of execution of the Decree as well as stay of sentencing of the contemnors herein, together with all consequential orders and thereafter grant any appropriate relief it deems fit that will serve the ends of justice.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of one Mugendi Geoffrey Moses, an Assistant Director of Physical Planning and who was based at the headquarters, Ardhi house, Nairobi, sworn on the October 7, 2022. The Application was disposed off by way of written submissions to which I have considered.
3. In summary the main basis for seeking of the review of the judgment together with all consequential orders therein was that there had been discovered new and compelling evidence that was not available



to court during the trial to wit that the PDP No R22/84/4 (Approved Plan No 113) which had formed the basis for the purported creation of land parcel known as Kericho Municipality Block 5/159 which was registered to the Respondent/Petitioner herein had actually been approved to facilitate the creation of land parcel known as LR No 631/1194 which had been allocated to a women group known as Melgut Investment. That further PDP No R22/84/4 (Approved Plan No 114) was also not intended to be allocated to the Petitioner but was planned for and allocated to an entity called Scriptural Holiness Mission as LR 631/1191.

4. That the PDP Ref No 22/2011/01 (Approved Plan 224) upon which the Petitioner had acquired land through a letter of allotment and which the court had proceeded to make its determination had been prepared for a separate parcel of land to settle the Talai Community and did not affect PDP No R22/84/4 (Approved Plan No 113)
5. That there had been no Part Development Plan the ever prepared by the Director to inform the purported allocation of parcel of land known as Kericho Municipality Block 5/159 which then rendered the title held by the Petitioner null and void and incapable of being accorded protection in the context of Article 40(6) of *the Constitution*.
6. That the judgment needed to be reviewed as it had failed to accurately describe the suit parcel of land with precision and an attempt to implement it had occasioned injustice. That there was therefore a glaring error on the face of the judgment as it was not in consonance with the pleadings. Reliance was placed on the decision in *Dina Management Limited v.s Count Government of Mombasa & 5 Others* [2021] eKLR.
7. The Applicants further sought that the court reviews its judgment because there had been sufficient reason that the same could not be implemented because PDP Ref No 22/2011/01 (Approved Plan 224) which had been approved to settle the Talai Community was distinct from PDP No R22/84/4 (Approved Plan No 113) and the two parcels of land did not overlap. Reliance was placed on the decision in *Independent Medico Legal Unit vs The Attorney General of the Republic of Kenya*. (sic)
8. In response and in opposition of the application the Petitioner filed his Replying Affidavit sworn on December 20, 2022 and written submissions dated the February 23, 2023 to the effect that, the Respondents had already filed an Appeal to the Court of Appeal vide Nakuru in Civil Application No E001 of 2022 seeking leave to file and serve Notice of Appeal out of time whereas vide the Court of Appeal at Nakuru in Civil Application No E069 of 2022 they had sought stay of execution, stay of further proceedings and/or orders of injunction directed at the Environment and Land Court at Kericho in ELC Petition No 1 of 2013 *Dave Kipkorir Langat vs. Physical Planning Office, Kericho County & 4 Others*. That in lieu of the said application, this Honourable Court had no jurisdiction to entertain the instant application because the matter was already before the Court of Appeal. That the Applicants could therefore not invoke an Appeal and Review jurisdiction at the same time. Reliance was placed on the decision in the case of *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited* (sic). Their submission was that the instant application was fatally defective and ought to be struck out in limine.
9. Further submissions were that the Applicants' application for review was in effect a re-hearing of the original Petition as they had advanced a narrative which in effect was evidence that they were aggrieved by the judgment, order and/or decree made on the May 5, 2015. Reliance was placed on the decision in the case of *Hosea Nyandika Mosagwe & 2 Others vs. County Governmet of Nyamira* [2022] eKLR.
10. There was further submission that the failure to annex an extract of the impugned decree to their application rendered the Applicants' application fatally defective as was held in the case of *Wilson Saina vs Joshua Cherutich T/a Chirutich Company Limited* [2003] eKLR amongst other citations.



11. That a review was only available where there was an error on the face of the record or a discovery of new and important matter of evidence which the Applicants could not, even with the exercise of due diligence, have placed it in their pleadings or before the judge at the earliest opportunity. That the Applicants had been heard before the court on the Petition wherein they had been represented by the Hon. Attorney General- Kisumu office at which time they had submitted all their documentary findings and arguments and which findings and arguments they had again preferred in the year 2022 in the current occupation purporting that it was new evidence, yet it had all along been within their knowledge.
12. That the application for review was made after seven years since judgment had been delivered and could not earn sympathy from any court. Reliance was placed on the decision in *Stephen Gathua Kimani vs Nancy Wanjira Waruingi T/a Providence Auctioneers* [2016] eKLR.
13. The Respondent's final submissions was that if the Applicants were dissatisfied with the judgment delivered on May 5, 2015, an appeal process was applicable to them by filing a Notice of Appeal to the Court of Appeal. The jurisdiction for review was not open to them.

Determination.

14. Order 45 Rule 1 of the *Civil Procedure Rules* provides 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 review of judgment to the court which passed the decree or made the order without unreasonable delay.”
15. Section 80 of the *Civil Procedure Act* provides as follows:-

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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
16. From the above provisions, it is clear that whereas Section 80 of the *Civil Procedure Act* gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;
 - i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - ii. on account of some mistake or error apparent on the face of the record, or



- iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.
17. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.
18. The issue to be determined therefore is whether the Applicants herein had met the three grounds necessary for review as herein above captioned.
19. I have considered the application herein and the lengthy submissions whereby the Applicants seeks to have the court review a judgment that had been delivered on the 5th May 2013 together with all consequential orders therein for reason that they had discovered new and compelling evidence that was not available to them/court during the trial to wit that the PDP No R22/84/4 (Approved Plan No 113) which had formed the basis for the purported creation of land parcel known as Kericho Municipality Block 5/159 which was registered to the Respondent/Petitioner herein had actually been approved to facilitate the creation of land parcel known as LR No 631/1194 which had been allocated to a women group known as Melgut Investment.
20. That further, PDP No R22/84/4 (Approved Plan No 114) was also not intended to be allocated to the Petitioner but had been planned for and allocated to an entity called Scriptural Holiness Mission as LR 631/1191.
21. That the PDP Ref No 22/2011/01 (Approved Plan 224) upon which the Petitioner had acquired land through a letter of allotment and which the court had proceeded to make its determination had been prepared for a separate parcel of land to settle the Talai Community and did not affect PDP No R22/84/4 (Approved Plan No 113) as the two were distinct parcels of land which did not overlap.
22. That further, there had been no Part Development Plan ever prepared by the Director to inform the purported allocation of parcel of land known as Kericho Municipality Block 5/159 which then rendered the title held by the Petitioner null and void and incapable of being accorded protection in the context of Article 40(6) of the Constitution.
23. I find that the Applicants' line of argument did not constitute "new and compelling evidence that was not available to them during the trial". I say this because this same argument had been raised and litigated upon during the trial wherein the impugned judgment had contained snippets of the said submissions thereto while making reference to the documents presented before it which snippets included the issue of PDP Ref No 22/2011/01(see para 5), PDP No R22/84/4 and allocation to an entity called Scriptural Holiness Mission as LR 631/1191(see para 12-14 and para 38).
24. The said argument in my view consisted of arguments on a view that had been considered and hereby the court which had led to the impugned judgment.
25. Indeed what the applicant is heard to be saying is that: (And I shall reproduce the same in *verbatim*)

"The gist of our application is also premised on the fact that the Petitioner was allocated land by virtue of the letter of allotment dated 3rd June, 1988. Alongside the said letter of allotment was an approved part development plan (PDP) which previously was approved by the Commissioner of Lands. The importance of a PDP cannot be gainsaid. It actually shows location of the land allocated. In this case it was PDP No R22/84/4, approved Development Plan No 113. This fact was recognized by the trial court at paragraph 38 of the judgment. However, the court relied on an excerpt of a letter that showed that PDP



0. R22/84/4 un-surveyed LR No/631/1191, this is contrary to the actual land which was allocated vide the letter of allotment which shows that the Petitioner was allocated vide letter of allotment dated 2nd June 1988 Ref. No 21350 XXII 75 RE: UNS. Residential Plot B — Kericho Municipality attached Plan No R/22/84/4 area 2.4 Ha for a term of 99 years from 1/6/1988. Attached to the supplementary affidavit of the Petitioner sworn on an undated date but filed on 24th March, 2014.

The Petitioner did not produce any evidence to show how he processed the letter of allotment culminating into the LR. No Kericho Municipality Blocks5/159. The process that should have been followed is well explained in the affidavit of Hellen Mutai the County Land Registrar at paragraphs 4, 5, 6, 7, 8, 9, 10, 11 of the said affidavit.

The title held by an individual is the culmination of a process and the validity of a title depends on the legality of the said process. In the circumstances, a litigant cannot just wave title in our faces and proclaim his rights he must demonstrate that the process used to obtain the title filled the law. “

26. The grounds relied upon in this application in my humble view are not grounds of Review as is stipulated by the provision of Order 45 Rule 1 of the *Civil Procedure Rules* but qualify to be grounds of Appeal. In the case of *National Bank of Kenya Ltd vs Ndungu Njau* [1996] KLR 469 the court held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose.”(Emphasis added).

27. Further Bennett J in *Abasi Belinda vs. Frederick Kangwamu & Another* [1963] E.A. 557 held that:

“a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”

28. In stating that the two sites fall on indifferent zones and are separated by an existing 20 meter road reserve is to introduce new argument surrounding the settlement of the Talai community which in a way was procuring new evidence to try and vary the judgment. From the above decisions, it is clear that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier but should only be exercised for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it as was in the present case.

29. On the second ground as to whether the Applicants had established sufficient cause to warrant a review of the judgment orders and decree made on the May 5, 2015. Their submission that judgment could not be implemented because PDP Ref No 22/2011/01 (Approved Plan 224) which had been approved to settle the Talai Community was distinct from PDP No R22/84/4 (Approved Plan No 113) and the



two parcels of land did not overlap, I find was not sufficient cause as is stipulated under the law but rather was an augmentative ground of appeal.

30. On the last limb as to whether the Application was made without un- reasonable delay, I find that the Applicant has failed to discharge the same. The impugned Judgment was delivered on the May 5, 2013, the current application was filed on the October 25, 2022 which was over 9 years which I find was unreasonable delay in the circumstance.

31. The Applicants have further sought that the court stays execution of the Decree as well as the sentencing of the contemnors herein together with all consequential orders. They have however not annexed the formal extracted impugned decree or Order in respect of which the review in sought which then rendered their application fatal as was held in the case of *Julius Mukami Kanyoko & 2 Others vs Samuel Mubua Kamere & Another* [2014] eKLR to wit that;

“The plain reading of the above provision (referring to order 45 Rule 1) is that an applicant for review ought have annexed a formal extracted decree or Order in respect of which the review in sought. In essence judgment and/or ruling. Thus where an applicant fails to annex what is sought to be reviewed such an an Application is defective.”

32. Further, it is not in dispute that the Applicants have filed an Appeal to the Court of Appeal in Civil Application No E001 of 2022 seeking for stay of execution of the court’s order where they had been found in contempt and were awaiting sentencing. The fact that the Court of Appeal had deemed their Notice as duly filed essentially was indicative enough that this Court has no jurisdiction to entertain the instant application seeking to stay the execution on the sentencing of the contemnors because the matter is already before that Court. The Applicants cannot invoke an appeal and review jurisdiction at the same time. The application in that effect is fatally defective as was held by the Court of Appeal in the case of *Martha Wambui vs. Irene Wanjiru Mwangi & Another* (2015) eKLR, where it had been held that;

“From the above provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...”

33. In the end, I find that the Applicants have come to a dead end as their application does not meet the threshold set out under Order 45 Rule 1 of the *Civil Procedure Rules*. This is not a proper case for the court to exercise its discretion in favour of the Applicants and I accordingly proceed to dismiss the application dated October 7, 2022 with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 6TH DAY OF JULY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

