



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kipsongok (Suing on behalf of the Estate of Philip Kibor - Deceased)
v Kihara alias Waithaka Kaguru (Environment & Land Case
359 of 2015) [2023] KEELC 18946 (KLR) (12 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18946 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 359 OF 2015**

JM ONYANGO, J

JULY 12, 2023

BETWEEN

**SOSTEN KIPSONGOK (SUING ON BEHALF OF THE ESTATE OF PHILIP
KIBOR - DECEASED) PLAINTIFF**

AND

DAVID WAITHAKA KIHARA ALIAS WAITHAKA KAGURU DEFENDANT

RULING

1. What is before me is the Plaintiff/Decree-Holder's application dated October 31, 2022 seeking the following orders:
 - a. Spent
 - b. That this Honourable court be pleased to review the decree or judgment of the court delivered on June 22, 2022.
 - c. That in the alternative, the court do review the judgment/decree only to the extent of the terms of prayers (a) and (b) in the Amended Complaint to read inter alia:-
 - a. A permanent injunction restraining the defendant, his agents, servants and/or assigns from entering into, occupying, fencing, selling, trespassing, encroaching or otherwise interfering with the plaintiff's quiet possession and enjoyment of part of the portion of land measuring 1.5 acres curved out of land namely Eld/Mun/Langas Phase 11 Sheet 1V/64-73 and 73-77(L.R.8500).
 - b. An order directing the Land Registrar, Uasin Gishu County through her authorized county surveyors to establish and ascertain the correct boundary or beacon in respect of



that portion of land measuring 4.5 acres in Eld/Mun/Langas Phase 11 Sheet 1V/64-73 and 73-77

- c. The costs of the application be in the cause.
2. The application is based on the fact that there is an omission of the description of the acreage in contention between the plaintiff's and the defendant's land namely Eld/Mun/Langas Phase 11 Sheet 1V/64-73 and 73-77 (L.R 8500) in the prayers in the Amended Plaintiff. This is further elaborated in the Plaintiff's supporting affidavit.
3. In opposing the application, the Defendant filed Grounds of Opposition dated November 30, 2022 in which he raised the following grounds:
 - i. That the Applicant's application is fatally and incurably defective.
 - ii. The application seeks to amend the Plaintiff to conform to the judgment which is untenable.
 - iii. There is already an appeal lodged in this matter and as such review is no longer available.
 - iv. The ambiguity in the plaintiff cannot be cured by review.
 - v. The applicant's application is devoid of merit and should be struck out with costs.
4. The parties agreed to dispose of the application by way of written submissions and both parties filed their submissions.

Plaintiff's Submissions

5. In his submissions Mr Omboto learned counsel for the plaintiff contended that there was an inadvertent error in the prayers in the Amended Plaintiff as the acreage of the parcel in contention is not stated though it is stated in paragraph 9 of the Amended Plaintiff. As a result of the said error the trial judge made the following finding:

' The court finds that as the plaintiff has proved his claim on a balance of probabilities, there is need to establish and ascertain the boundary of the 4.5 acre portion of the suit land that belongs to the defendant and to restrain the defendant from further interference with the remaining parcel.'

6. He submitted that the error was not deliberate and that the defendant would not be prejudiced if it was corrected as the court has the power to review its judgment if there is an error apparent on the face of the record. He relied on the cases of *Republic v Public Procurement Administrative review board & 2 Others (2018) eKLR*, *Pancras T Swai v Kenya Breweries Limited (2014) eKLR*; *Sardar Mohamed v Charan Singh Nand Singh & Another (1959) EA 793*, *Ajit Kumar Rath v State of Orisa & Others 9 Supreme Court Cases*, *Edison Knayabwera v Patori Tumwebaze (2005) UGSC 1* and *National Bank of Kenya Limited v Ndungu Njau (1997) eKLR* for the proposition that the court may review its judgment or order to correct an error of fact or law which is self-evident and which does not require any elaborate argument.

Respondent's Submissions

7. On his part, Mr Kimani learned counsel for the Defendant submitted that the application is fatally defective as it refers to a judgement delivered on June 22, 2022 yet the judgment herein was delivered on June 8, 2022. He contends that even if the application was proper, the same is bound to fail as ambiguity in the Plaintiff cannot be cured at this stage as it would be tantamount to amending the plaintiff



to introduce a claim of 1.5 acres that was never pleaded. He relied on the case of *Kiarie v Waiganjo (2004) eKLR* where the court held that the lower court was wrong in granting an application for review as the said application sought amendment of the plaint after judgment.

8. He submitted that the judgment was entered in terms of specific paragraphs in the plaint and nowhere in the Amended plaint did the plaintiff claim a specific acreage as the only acreage mentioned is what the defendant owns. It was his submission that an application for review cannot cure a shortfall of poor draftsmanship as the plaintiff ought to have specified what acreage he was claiming. He relied on the case of *Hosea Nyandika Mosagwe & 2 Others v County Government of Nyamira (2022) eKLR* where the court declined to grant an application for review on the grounds that it amounted to an application for variation.

Analysis and Determination

9. The only issue for determination is whether the application for review should be granted.
10. Orders of review are governed by Section 80 of the *Civil Procedure Act* and Order 45 (1) of the *Civil Procedure Rules* which provide as follows:

Section 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.

Order 45 rule 1 of the Civil Procure Rules provides that :-

(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.

11. In this instant case, the applicant contends that there is an error in the judgment and decree as the acreage of the land in dispute has been omitted. This arises from the fact that the prayers in the Amended Plaint do not mention the acreage of the land which the defendant has been restrained from encroaching on. As a result of the said omission, the decree as extracted does not indicate the portion of land parcel no. Eld/Mun/Langas Phase 11 Sheet 1v/64-73 and 73-77 (L.R8500) that the defendant is restrained from encroaching on. Similarly, the order directed at the Land Registrar is not clear on the size of the land whose beacons should be established.
12. In so far as the judgment and decree are based on the pleadings, I am constrained to agree with counsel for the Defendant that the error is as a result of the poorly drafted plaint. The proposed review would



therefore be tantamount to amending the plaint after judgment which is not what is contemplated under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. It is also clear that the said provisions do not contemplate a review where an appeal has been preferred like in the case at hand.

13. In view of the foregoing, the application for review lacks merit and it is hereby dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JULY 2023

.....

J.M ONYANGO

JUDGE

In the presence of;

Miss Kosgei for Mr. Omboto for the Plaintiff/Applicant

Miss Kesei for Mr. Kinyanjui for the Defendant/Respondent

Court Assistant: A. Oniala

