



REPUBLIC OF KENYA



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

**Karimi v Kilifi Plantation Limited (Civil Suit 236 of 2017)
[2023] KEELC 18775 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18775 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 236 OF 2017
MAO ODENY, J
JULY 11, 2023**

BETWEEN

JAMES KARIMI PLAINTIFF

AND

KILIFI PLANTATION LIMITED DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 22nd November 2022 by the Plaintiff/applicant seeking the following orders:
 - a. That the judgment of this court delivered on 8th November, 2022 be reviewed to include the express orders as prayed for in the 2nd prayer in the Plaint.
 - b. That the costs of this application be in the cause.

Plaintiff's Submissions

2. Counsel for the Plaintiff/Applicant submitted that the plaintiff filed this suit seeking judgment against the Defendant for;
 - a. Kshs. 5,631,621 on account of special damages;
 - b. Specific performance of the contract between the Plaintiff and the Defendant and in the alternative, the allocation by the Defendant to the Plaintiff of an alternative property valued at Kshs. 4,500,000;
 - c. Costs and incidentals to this suit and interest thereof at court rates.



3. It was counsel's submission that the court in its Judgment delivered on 8th November, 2022 at paragraph 34 stated that;

“I find that the Plaintiff has proved his case on a balance of probabilities that there was a valid agreement with the Defendant and has further proved the special damages incurred in the construction of the structures on the suit plot.”
4. Further that at paragraph 35 of the judgment the court stated;

“I have considered the pleadings, the evidence on record, the submissions by the counsel and issue the following specific orders that the Defendant do pay the Plaintiff Kshs. 5,631, 621 on account of special damages. The Plaintiff is also entitled to costs of the suit”
5. Counsel submitted that the Honourable court mistakenly failed to grant the order of specific performance of the agreement by providing an alternative property valued at Kshs. 4,500,000/-, which the court found was proved.
6. Counsel cited Section 80 of the *Civil Procedure Act* and order 45 rule 1 and rule 1 (b) of the *Civil Procedure Rules* on reviews and submitted that there is a mistake or error apparent of the face of record.
7. Counsel relied on the case of *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* [2019] eKLR where Mativo J (as he then was) gave an explanation of the term mistake or error apparent on the face of the record signifies that the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position.
8. Ms Mwangi submitted that the error in this case clearly does not need or require detailed examination, scrutiny and a clear explanation either of the facts or the legal position. That the judgment delivered was clear that the Plaintiff has proved his case on a balance of probabilities that there was a valid agreement.....
9. Counsel further submitted that from the above extract the Plaintiff proved his case on the issue of having a valid agreement and the Defendant being in breach needed to perform his part of the contract by offering and alternative parcel of land as a remedy. That the omission of the express order for specific performance is an error apparent on the face of the record since all the analysis could only lead to that determination and urged the court to allow the application.

Respondent's Submissions

10. Counsel for the Respondent submitted that the issue for determination is whether the Honourable court should review the Judgment delivered in respect of this case.
11. Counsel similarly cited Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* on reviews and submitted 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. That error or omission must be self-evident and should not require an elaborate argument to be established.
12. Counsel relied on the cases of *Nyamogo & Nyamogo v Kogo* {2001} EA 170 , Indian Supreme Court in the case of *Aribam Tuleswar Sharma v. Aribam Pishak Sharmal*, *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR and *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR on error apparent on the face of record in reviews.
13. It was counsel's submission that the Application is irregularly in Court since an Applicant in an Application for review ought to have annexed a formal extracted Decree or order in respect of which



the review is sought. That the Applicant has only attached judgment and no formal extracted decree and/or Order.

14. Counsel relied on the case of *Suleiman Murunga V Nilestar Holdings Limited & Another* (2015) eKLR on the issue extraction of a decree or an order and urged the court to dismiss the application with costs.

Analysis and Determination

15. This is an application for review and the law governing review of a court's judgment is set out in Section 80 of the *Civil Procedure Act* and order 45 rule 1(1) of the *Civil Procedure Rules*. Section 80 provides as follows:

“ Any person who considers 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 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.

16. Similarly order 45 rule 1(1) of the *Civil Procedure Rules* provides as follows:

1) any person considering himself aggrieved-

- a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or
- c) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a 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.

17. In the present case, the relevant provisions under Order 45 Rule 1 (1) that the court is concerned with is “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.

18. This court is vested with the power and discretion to issue review orders on its judgments or rulings as was held in the case *Wangechi Kimita & Another vs Mutahi Wakabiru* CA No 80 of 1985 (unreported) that:

“ any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by Section 80 for the *Civil Procedure Act*. The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.



The current position would, then, appear to be that the court has unfettered discretion to review its own decrees or orders for any sufficient reason.”

19. However, this discretion must be exercised judiciously to avoid miscarriage of justice. The court held that the Plaintiff had proved his case on a balance of probabilities and that he was entitled to the orders sought however the court by mistake or error did not specifically indicate so in the final orders.
20. In the case of *Muyodi -v- Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal described an error apparent on the face of the record in the following terms:

“...in *Nyamogo & Nyamogo -v- Kogo* (2001) EA 174 this Court said that 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 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 has to be established by 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 or wrong view is certainly no ground for a review although it may be for an appeal...”
21. The Plaintiff has given sufficient reason why the error apparent on the face of the record should not be reviewed. This is a case where the court on its own motion could have rectified the error because it occurred by mistake. Anyone reading the judgment would notice the error apparent without going into any arguments and looking for more explanation.
22. The Application is hereby allowed as prayed and include prayer No 2 in the Plaint. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF JULY 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

