



**Mitey v Baseland Property Consultants Ltd & 2 others (Environment & Land
Case 56 of 2015) [2023] KEELC 20586 (KLR) (11 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20586 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 56 OF 2015
JM ONYANGO, J
OCTOBER 11, 2023**

BETWEEN

EMILY CHEBET MITEY PLAINTIFF

AND

BASELAND PROPERTY CONSULTANTS LTD 1ST DEFENDANT

HIGHLAND VALUERS LTD 2ND DEFENDANT

ROSE CHECHIRCHIR RONO 3RD DEFENDANT

RULING

1. The 2nd Defendant filed a Notice of Motion dated 14th March 2023 seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this application inter partes, this court be pleased to stay all the execution proceedings herein against the 2nd defendant.
 - d. That this honourable court be pleased to review and/or vary the judgment of 29th May 2015 (sic) to the extent that paragraph (a) of the decree against the defendants jointly and severally against the defendants be vacated, and in lieu thereof judgment be entered against the 1st and 2nd defendants in the ratio of 1:2 respectively.
 - e. The costs of this application be borne by the plaintiff in any event.
2. The reasons upon which the application is based are stated on the face of the Notice of Motion and the Supporting Affidavit of Samuel Kiptala Chemelil sworn on the 14th March 2014. In the said affidavit Mr. Chemelil deposes that he is a director of the 2nd Defendant. He states that judgment was entered



against the 1st and 2nd defendants jointly and severally to refund the sum of Kshs 710,000 together with interest thereon to the plaintiff. That the decision did not take into account the fact that the 1st defendant had expressly admitted holding the sum of Kshs.210,000. He further avers that whereas the 2nd defendant denies receiving the sum of Kshs 500,000/= he has nevertheless committed to pay the said amount in good faith and has since made a payment of Kshs 300,000 in favour of the plaintiff but the plaintiff has refused to accept partial payment and intends to proceed with execution.

3. He deposes that the decision to enter judgment against the 1st and 2nd defendants jointly and severally when the cause of action was not joint and several (sic) shall lead to an unjust outcome whereby the parties do not bear their burden of the judgment. Further that no reasons have been advanced to support the decision and that the court has a broad discretion to review its decisions.
4. The application is resisted by the plaintiff and 1st defendant. In her Replying Affidavit, the Plaintiff deposes that the application is misconceived, vexatious and lacks merit. She adds that the application is premised on falsehoods and that it is intended to mislead the court to grant the orders sought without disclosing material facts. She deposes that the Applicant has failed to disclose that in the Amended Plaintiff dated 8th October, 2018, the plaintiff prayed that the defendants be held jointly and severally liable for breach of contract and therefore the learned magistrate (sic) did not err in holding the 1st and 2nd defendants jointly and severally liable. She states that the reasons for review advanced by the 2nd defendant can only be raised on appeal.
5. Regarding the 2nd defendant's attempt to pay the decretal sum by instalments, she deposes that under Order 21 rule 12(2) of the Civil Procedure Rules, payment by instalments ought to be done with the consent of the decree-holder. She further states that she needs the money to buy drugs due to her failing health and that the application is merely intended to frustrate her and delay the realization of the decree.
6. In his Replying affidavit sworn on 5th April, 2023, James Kibos, the director of the 1st Defendant deposed that by a letter dated 14th August, 2010, the Applicant appointed the 1st Defendant as a commission agent to market and sell parcel no. Eldoret Municipality/bloc 10/1639. That pursuant to the said agency agreement he sold the said property to numerous purchasers including the plaintiff. The 1st defendant then remitted over Kshs 14,000,000 to the applicant and retained its agency fees. The 1st defendant however reneged on the agreement in issue and sold the property to a third party hence the instant suit.
7. He further deposed that the 1st defendant was sued in its capacity as an agent of the 2nd defendant and therefore the allegation by the 2nd defendant that the cause of action was not joint is without legal basis. He contended that the question revolving around the breach of agency agreement is a new issue which they ought to litigate separately between the 2nd and 1st defendant.
8. He deposed that the Applicant has not demonstrated any new issue or fact to warrant the judgment being reviewed and that the applicant merely seeks to settle scores with the 1st defendant.
9. The application was disposed of through written submissions and the Applicant, plaintiff and 1st defendant filed their submissions which I have carefully considered.

Analysis and Determination

10. The main issue for determination is whether the judgement delivered on 25th January, 2023 should be reviewed.
11. The provisions that govern orders of review are found in 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.

12. In the instant case learned counsel for the Applicant contends that there is an error apparent on the face of the record as the court failed to consider the sum of Kshs 210,000 which is being held by the 1st defendant and decreed that the full amount of Kshs 710,000 be paid by the 1st and 2nd defendants jointly and severally. He contends that the error is likely to result in a miscarriage of justice and is unfair to the 2nd defendant. He is of the view that based on the 1st defendant's admission that he is holding part of the purchase price, each party ought to pay their fair share of the judgment sum and that the 2nd defendant should only be liable for what it received.
13. On the other hand, learned counsel for the 1st defendant submits that what the Applicant seeks to correct is not an error apparent on the face of the record as it is not self-evident. He contends that the Applicant seeks to amend the judgment which holds the 1st and 2nd defendants jointly and severally liable. He maintains that since the Applicant was acting as an agent of the 1st defendant, it is trying to renege on paying the 1st defendant's commission through this application. He is of the view that the question of agency between the 1st and 2nd defendant ought to be litigated separately. He relies on the case of [Nyamogo & Nyamogo v Kogo](#) (2001) EA 170 where the court observed as follows;

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must 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 would be made out. 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”



14. Similarly in *National Bank of Kenya Limited v. Ndungu Njau* (Civil Appeal No. 211 of 1996 (unreported)) the Court, held 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. I 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 ground for review.”

“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”

15. I am constrained to agree with counsel for the 1st defendant that the issue of whether the refund to the plaintiff should be pro-rated between the 1st and 2nd defendant is not an error apparent on the face of the record. The court arrived at the considered decision that the 1st and 2nd defendants ought to refund the sum of Kshs 710,000/= to the plaintiff jointly and severally. The court did not delve into the issue of the agency relationship between the 1st and 2nd defendant as this is an issue purely between the said parties which does not concern the plaintiff. The fact that the Applicant has to explain why it should not pay the full amount means that the same is not within the meaning of “error apparent on the face of the record” and is therefore not a ground for review.
16. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Plaintiff and 1st defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF OCTOBER 2023

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J.M ONYANGO

JUDGE

In the presence of;

1. Miss Lelei for Mr. Tororei for the 2nd Defendant/Applicant
 2. Mr. Osewe Atieno for the Plaintiff/Respondent
- Court Assistant: A. Oniala

