



**Nderi (Suing as the Attorney for and on Behalf of John Mburu Karanja) v Wahome & 3 others
(Environment and Land Case 138 of 2010) [2023] KEELC 20532 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 138 OF 2010
OA ANGOTE, J
OCTOBER 5, 2023**

BETWEEN

**ALOIS IRIGA NDERI (SUING AS THE ATTORNEY FOR AND ON BEHALF OF
JOHN MBURU KARANJA) PLAINTIFF**

AND

**SAMUEL WANJOHI WAHOME 1ST DEFENDANT
MICHEAL WAWERU MBUGUA 2ND DEFENDANT
ANASTACIA KIMEU MUTHIKE 3RD DEFENDANT
CONTINENTAL DEVELOPERS LIMITED 4TH DEFENDANT**

RULING

1. By a Notice of Motion dated 2nd November, 2022 and Amended on 30th November, 2022 the Plaintiff seeks the following orders:
 - a. That this Honourable Court be pleased to review and/or vary the ruling delivered herein on the 6th October, 2022 by Honourable Judge O.A. Angote granting the 3rd Defendant/Respondent an unconditional order of stay of execution pending the final determination of her appeal.
 - b. That this Honourable Court be pleased to grant an order directing that all the monthly rental proceeds derived from Land Reference Number Nairobi/Block 82/1910 Tena Estate (hereinafter referred to as “the suit property”) be deposited in a joint interest earning bank account held between the Plaintiff’s Advocate and the 3rd Defendant’s Advocate for purposes of preservation of such income during the pendency of the 3rd Defendants intended appeal and to ensure due performance of the decree in the likely event that the same becomes ultimately binding on the 3rd Defendant on the determination of her intended appeal.



- c. That M/S Paragon Property Consultants Limited be appointed as the property agents for the suit property for purposes of smooth collection of rent and overall management of the suit property, pending hearing and determination of the 3rd Defendant's intended appeal.
 - d. That this Honourable Court be further pleased to set strict timelines within which the 3rd Defendant should file her appeal in default of which the orders of stay of execution shall lapse and stand discharged.
 - e. That the costs of this Application be provided for.
2. The application is premised on the grounds on the face of it and further supported by the affidavit sworn by John Mburu Karanja, the Plaintiff, on 30th November, 2022. The Plaintiff's case is that on 6th October, 2022 the 3rd Defendant obtained an unconditional order of stay of execution pending appeal and that there is an error apparent on the face of the record following the glaring omission by the court to note that the suit property is not occupied by the 3rd Defendant.
 3. It was deponed that at paragraph 26 of the Ruling, the court stated that the 3rd Defendant would be rendered homeless in the event that she would be evicted from the suit property in execution of the Decree and that while on his annual visit to Kenya, the Plaintiff paid a second visit to the suit property and confirmed that there still exists on the suit property a single dwelling unit rented out to a monthly tenant.
 4. According to the Plaintiff, the 3rd Defendant has never lived on the suit property, hence there was no risk of her being rendered homeless and that he has no intention of evicting the tenant residing on the suit property nor did he seek security for the due performance of the Decree.
 5. It was deposed that the tenant should continue occupying the suit property with all the rental proceeds being deposited into a joint interest earning account held between the Plaintiff's Advocate and the 3rd Defendant's Advocate for purposes of preservation of such income during the pendency of the intended appeal in the likely event that the same becomes binding on the 3rd Defendant.
 6. The Plaintiff deposed that the fact of non-occupation of the suit premises by the 3rd Defendant and lease of the same to a third party tenant is self-evident and does not require elaborate argument to prove; that the Honourable Court inadvertently omitted to address this salient fact in its ruling although the same had been brought to the court's attention through the Affidavit of Alois Iriga Nderi sworn on 18th February, 2022 and that this was therefore a plain error which is so obvious and substantial and failure to correct it would infringe on his due process rights and damage the integrity of the judicial process.
 7. The Plaintiff further stated that the 3rd Defendant has since the date of delivery of judgment on 23rd September, 2021 been enjoying the rental income from the suit property to the Plaintiff's prejudice; that it is imperative that the Honourable court remedy this apparent error on the face of the record and have all rental proceeds from the suit property be preserved; and that further, there is need to appoint a reputable property agent, preferably M/S Paragon Property Consultants Limited, to manage the suit property.
 8. The Plaintiff averred that the 3rd Defendant had not, as at the date of the application, bothered to file her Memorandum of Appeal to demonstrate any seriousness in pursuing the intended appeal; that the court also ought to set strict timelines within which the 3rd Defendant should file her appeal, and in default any orders for stay of execution granted herein to automatically lapse and stand discharged.
 9. The Plaintiff deponed that the purpose of stay of execution was to preserve the subject matter in a dispute so as to ensure that the rights of the parties are protected; that in this case, the subject matter



of the dispute is the suit property and the rental income ensuing therefrom, and no party had a better right to the rental income from the suit property than the other and that the 3rd Defendant has a right to appeal but that the Plaintiff also had a corresponding right to enjoy his just entitlement and the court must balance the competing rights.

10. Despite being afforded sufficient time to file a response to the application, the 3rd Defendant failed and/or neglected to do so.

Analysis and Determination

11. Having considered the application and the grounds adduced in support thereof, the issues that arise for determination are:

- i. Whether the Plaintiff has made out a good case to justify the grant of orders for review?
- ii. What orders the court should grant in the circumstances?

12. A brief background of this matter is that on 23rd September, 2021, the court entered judgment in favour of the Plaintiff against the 1st, 2nd and 3rd Defendants jointly and severally. In exercise of her right to appeal, the 3rd Defendant filed a Notice of Appeal dated 5th October, 2021. The 3rd Defendant then applied for a stay of execution of the judgment pending the hearing of her intended appeal vide a Notice of Motion dated 3rd November, 2021. The Court allowed the application and granted her an unconditional order of stay of execution pending appeal on 6th October, 2022.

13. The Plaintiff has now approached the court in the instant application seeking a review or variation of the order of the court emanating from the Ruling delivered on 6th October, 2022. The application is premised on the ground that there is an error apparent on the face of the record and that the Court failed to note that the property was occupied by a rent paying tenant, and not the 3rd Defendant.

14. The Plaintiff is seeking for a conditional order of stay of execution to issue by having the rental income from the suit property deposited into a joint interest earning account held in the names of the parties advocates herein. The Plaintiff has further sought for orders that the suit property be put under the management of a reputable property agent, and has proposed the firm of M/S Paragon Property Consultants Limited to do so.

15. The Plaintiff's application is in no uncertain terms asking the court to sit in review of its orders issued on 6th October, 2022. The power of the court to review its orders emanates from Section 80 of the *Civil Procedure Act* which 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 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. The conditions to be met in an application for review on the other hand are set out under Order 45 of the *Civil Procedure Rules*. Order 45 Rule 1 provides as follows:

“ 1. Application for review of decree or order [Order 45, rule 1.]

- (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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

17. The Plaintiff’s application is premised on the ground that there is an error apparent on the face of the record and that there are sufficient reasons to warrant an order for review. In *Njoroge & 104 Others* (suing in representative capacity for *Kariobangi South Civil Servants Estate Tenant Purchasers v Savings & Loan Kenya Ltd & another* [1988] eKLR, the court explained the principle of “error apparent on the face of the record” as follows:-

“There is also a helpful passage in the 13th Edition of Mulla on the Indian Code of Civil Procedure where order 47 rule 1 on review is discussed and at page 1672 it states:-

“A mere error of law is not a ground for review under this rule. It must further be an error on the face of the record...It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does not require an elaborate argument to be established...To warrant a review of an error alleged to be on the face of a record, such an error ought to be so clear as to be without any disputes. Where the very existence of an error on a record is contestable by parties, I think, such a matter is a ground which should be canvass on an appeal.”

18. The Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, also set out the principles to guide courts in determining whether or not to review a decision on the ground that there is an error apparent on the face of the record and it rendered itself thus:

“In *Nyamogo and 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 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. 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

19. The Plaintiff has deponed that in the affidavit of Alois Iriga Nderi of 18th February, 2022 sworn in reply to the 3rd Defendant’s application for stay of execution, the court was informed that there was rental income being earned from the suit property.
20. However, it was deponed, the court inadvertently omitted to note that the 3rd Defendant did not reside on the suit property and that she would not have been rendered homeless had the order for stay not been granted.
21. From the record, there were allegations in the affidavit in response to the application for stay of execution that rental income was being collected from the suit premises. This allegation was not rebutted by the Respondent. Indeed, the allegation has not been rebutted in the current application. As it were, the current application has not been opposed at all by the Respondent.
22. Considering that the Ruling of the court staying execution of the Judgment was primarily based on the assumption that the Defendant was living in the premises, and her eviction will render her homeless, and that being not the case, I am in agreement with the Plaintiff’s counsel that there is not only an error on the face of the record, but also sufficient reason to review the order of the court and grant a conditional stay of execution.
23. The Plaintiff has also sought that this Honourable Court set strict timelines for the filing of the 3rd Defendant’s Appeal in default of which any order for stay of execution shall lapse and stand discharged. Rule 82 (1) of the *Court of Appeal Rules, 2022*, provides that:-
 - (1) Subject to rule 115, an appeal shall be instituted by lodging in the appropriate registry, within Q of the date when the notice of appeal was lodged:-
 - (a) a memorandum of appeal, in quadruplicate;
 - (b) the record of appeal, in quadruplicate;
 - (c) the prescribed fee; and
 - (d) security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days of the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.
 - (2) An appellant shall not be entitled to rely on the proviso to sub-rule (1) unless his application for such copy was in writing and a copy of it was served upon the respondent.
 - (3) The period limited by sub-rule (1) for the institution of appeals shall apply to appeals from superior courts in the exercise of their bankruptcy jurisdiction.”
24. From the record, in support of her application for stay of execution pending appeal, the 3rd Defendant annexed the Notice of Appeal duly filed and a Draft Memorandum of Appeal. The order of stay of execution was therefore issued on the premise that the 3rd Defendant intended to institute an appeal.



25. The 3rd Defendant, despite filing the Notice of Appeal on time, failed to institute the intended appeal within the set timeline of sixty days from the date of filing the Notice of Appeal. Rule 83 of the aforementioned *Court of Appeal Rules, 2022* set out the effect of failure to institute an appeal within the given timeline thus:-

“83 If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.”

26. In *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR, the Court of Appeal explained the deeming provision under Rule 83, as follows;

“In the case of failure to lodge an appeal within 60 days after filing of the notice of appeal, Rule 83, which is invoked by the applicant herein, provides thus;

‘83. If a party who has lodged a notice of appeal fails to institute an appeal within the appointed time he shall be deemed to have withdrawn his notice of appeal and the court may on its own motion or on application by any party make such order. The party in default shall be liable to pay the costs arising therefrom of any persons on whom the notice of appeal was served.’

We think that the true meaning and import of the rule is more often than not scarcely appreciated. The rule as framed prescribes the legal consequence for non-institution of an appeal within the 60 days appointed by the Rules of Court. Moreover, the said consequence is couched in mandatory, peremptory terms: the offending party shall be deemed to have withdrawn the appeal. It seems to us that the deeming sets in the moment the appointed time lapses.”

27. It would appear that since the delivery of the Ruling granting the order of stay of execution pending appeal, there has been no action on the part of the 3rd Defendant with regards to pursuing the appeal, until the filing of this application. From the record, the court notes that the 3rd Defendant’s Advocate only wrote to court vide a letter dated 27th January, 2023 requesting for certified copies of the decree and proceedings in this matter.

28. It must be acknowledged that execution in and of itself, even in the absence of an intended appeal will prejudice the 3rd Defendant. However, the Plaintiff cannot be locked out indefinitely from enjoying the fruits of his judgment.

29. The withdrawal of a Notice of Appeal, whether on application by the parties or automatically by effluxion of time, is sufficient enough reason to review/vary the order of the court. This court has noted earlier that the purpose of stay of execution was to preserve the subject matter in a dispute to ensure that the rights of the parties are protected.

30. Where there is no pending appeal, then the need to preserve the subject matter equally ceases to exist. The circumstances have changed so much so that the continued operation of the order for stay of execution can no longer be justified, unless the Respondent shows that indeed there is a valid appeal before the Court of Appeal.



31. The only logical step therefore, is for this court to review and/or vary the order of stay of execution as prayed for in the application. The Plaintiff's application dated 2nd November, 2022 and amended on 30th November, 2022 is allowed as follows:
- a. An order be and is hereby granted directing that all the monthly rental proceeds derived from Land Reference Number Nairobi/Block 82/1910 Tena Estate be deposited in a joint interest earning bank account held between the Plaintiff's Advocate and the 3rd Defendant's Advocate for purposes of preservation of such income during the pendency of the 3rd Defendants intended appeal.
 - b. M/S Paragon Property Consultants Limited be and is hereby appointed as the property agents for Land Reference Number Nairobi/Block 82/1910 Tena Estate for purposes of collection of rent and overall management of the suit property, pending hearing and determination of the 3rd Defendant's intended appeal.
 - c. The Record of Appeal to be filed within 90 days from the date of this Ruling, and in default the stay of execution shall lapse and the mandate of M/S Paragon Property Consultants Limited shall stand discharged.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Macharia for Respondent

No appearance for Applicant

Court Assistant - Tracy

