



Ngugi v Platinum Stac Estates Limited & 4 others (Environment & Land Case E004 of 2023) [2023] KEELC 20559 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20559 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E004 OF 2023**

**JG KEMEI, J
OCTOBER 5, 2023**

BETWEEN

JANE WANGUI NGUGI PLAINTIFF

AND

PLATINUM STAC ESTATES LIMITED 1ST DEFENDANT

ANNE NYAMBURA KAMAU 2ND DEFENDANT

NICHOLAS NDUNGU KAMAU 3RD DEFENDANT

STACEY NJERI KAMAU 4TH DEFENDANT

ATTORNEY GENERAL (BEING SUED ON BEHALF OF THE LAND REGISTRAR RUIRU SUB-COUNTY) 5TH DEFENDANT

RULING

1. The subject of this Ruling is the Notice of Motion dated the 15/5/2023 filed by the Applicants seeking the following orders;
 - a. Spent
 - b. That Summons be issued to the Land Registrar Ruiru to appear and avail folders and binders in relation to Ruiru East Block1/T.792 and Ruiru East Block 1(Githunguri)792.
 - c. That this Honourable Court be pleased to set aside review and or vary its orders issued on the 4/5/2023 granting temporary injunction in terms of prayer No 4 of the Plaintiffs application.
 - d. Costs of this application be provided for.
2. The application is based on the grounds annexed to the application and the Supporting Affidavit of Anne Nyambura Kamau, the 2nd Applicant and a Director of the 1st Applicant. That the



Applicants are aggrieved by the Ruling of the Court issued on the 4/5/2023. That Ruiru East Block 1/T.792 is registered in the name of the 1st Defendant/Applicant while parcel Ruiru East Block1(githunguri) 792 belong to the Plaintiff/Respondent. That none of the parties claim parcel Ruiru East Block1(githunguri) T.792 which is nonexistent and yet the said parcel is the subject of prayer No. 4 in the said Ruling.

3. That the Land Registrar, Ruiru issued two Green Cards in the names of the Plaintiff and the 1st Defendant and confirmed the existence of two separate plots. It was averred that the Court was not informed that the 1st Defendant is in occupation of the suit land and at the time the orders were issued the construction was at the 2nd Floor with construction materials being in situ and at the risk of being wasted, stolen and or damaged and at the risk of losing a mortgage facility in the sum of Kshs 100 Million. For this reason, the Applicant contended that the balance of convenience tilts on its part and not the Plaintiff/Respondent. That the Land Registrar should be summoned to shed more light and clarity on the disputed land.
4. The Court was urged to exercise discretion in favour of the Applicants.
5. The application is opposed by the Plaintiff/Respondent vide the Replying Affidavit sworn on the 13/6/2023 where she deponed that the application was devoid of merit and an abuse of the process of the Court and the same should be dismissed with costs. That the two parcels with or without the word T refers to the same suit land and is located on map sheet No 2 marked JWN1. In the main the Plaintiff avers that the application falls short of the threshold for review and urged that it should be dismissed. That the Land Registrar and the District Surveyor should visit the land and show the parties their respective parcels of land.
6. The 5th Defendant/Respondent vide its Replying Affidavit sworn by Robert Mugendi Mbuba, the Land Registrar stated that from the registry records, parcels Ruiru East Blocak1/T.792 and Ruiru East Block 1 (Githunguri) 792 are two separate properties. He further went ahead and explained the entries in each of the two respective registers.
7. At the request of the parties, the parties visited the locus quo twice and filed reports in Court on the 10/7/2023 and 11/7/2023.
8. On the 18/7/2023 parties elected to file written submissions which submissions I have read and considered.
9. The Applicants submitted that the main issue before the Court is that the Court issued an erroneous order concerning parcel Ruiru East Block 1 (Githunguri)T.792 , a parcel that does not exist and none of the parties hold any interest therein. That by opening two registers the Land Registrar has confirmed that indeed there exist two separate plots namely T.792 and 792.
10. Relying on Order 45 rule 1 of the *Civil Procedure Rules*, the Applicants submitted that the green cards and the site visits reports by the Land Registrar confirm that the actual position and ownership of the suit plots on the ground constitute the discovery of new and important matters of evidence not presented before the Court at the time of issuing the Ruling on the 4/5/23. That the Court has now been presented with evidence showing that plot Githunguri No T.792 does not exist on the ground and therefore that constitutes an error on the face of the record and as such the order would not refer to the Applicants plot since there is no mention of Ruiru East Block1/T.792 in the order. In addition, that the Applicants' title was the first in time and therefore should prevail over the Plaintiff's title issued in 2019. That in light of the new revelation on the ground, the balance of convenience tilts on the part of the Applicants.



11. The Plaintiff/Respondent submitted that there is no evidence of any new and important evidence that would warrant review of the Ruling given that all factors were considered by the Court in its previous Ruling. The Court was urged that for a Court to review its orders there must be reason as set out in Order 45 rule 1 and a review cannot be founded merely on the basis that the Applicant is not happy with one of the remedies given in the order and that there can be an alternative remedy. See the case of *Anwar Ali & Another v Monica Muthoni & Another* [2021]eKLR.
12. It was further submitted that the report by the Land Registrar and the Land Surveyor all showed that the two titles converge on the same ground.
13. The 5th Respondent submitted that despite the existence of the two registers there is only one parcel of land on the ground. That the 5th Defendant's Replying Affidavit introduced the new evidence which had hitherto been unavailable to the Court. In addition, the Respondent submitted that the error on the face of the record arises from its view that the Court did not determine the other grounds for consideration in an application for injunction in line with the parameters set out in the case of *Giella v Cassman Brown & Co Limited* (1973) EA 358. That the Court ought to have determined the issue of whether the Plaintiff would suffer irreparable injury not compensable by an award of damages. In conclusion the Court was urged to set aside review or vary its orders issued on the 4/5/2023.
14. The key issue for determination is whether the application is merited.
15. Order 45 rule 1 of *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 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.
16. The operative tone of the above Order demands that the application for review must be based on
 - (a) The discovery of new and important matter of evidence which after the exercise of due diligence was not within the Applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made or
 - (b) account of some mistake or error apparent on the face of the record or
 - (c) any other sufficient reason.
17. The power to review is a creature of statute. It must be conferred by law either specifically or by necessary implication. Review is not an appeal in disguise. If the Court finds that the error pointed out in the review was under mistake and the earlier Judgment would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice, nothing would preclude the Court from rectifying the error. The power to review can be exercised for the correction of a mistake and not to substitute a view. Once a review is dismissed no further review can be entertained.



18. The rectification of an order stems from the fundamental principle that justice is above all since the power of review is exercised to remove an error and not for disturbing finality. If reasoning in the Judgment is at variance with the clear and simple language in a statute or it suffers from manifest error of the law or if there is an error apparent on the face of the record which is liable to be rectified the powers of review can be exercised. The review Court cannot sit as an appellate Court. It is beyond the purview of the executing Court to scan or review the reasoning provided by the Court in decreeing the suit. The execution Court is a creature of a decree. It cannot be allowed to be above it. A wrong decision can be subject to appeal to a higher forum, but the review is not permissible on the ground that the Court proceeded on wrong proposition of the law. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the later can only be corrected by exercise of the review jurisdiction.
19. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the Judgment. In the case of *Brown v Dean* (1910) AC 373 Lord Loreburn stated that the new evidence must at least be such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the Applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the Applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of Judgment. The provision relating to review contemplates grounds which would alter or cancel the decree.
20. A review can be done based on an error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 of the [Civil Procedure Rules](#) must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. 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. In the case of [West Bengal v Kamal Sengupta](#) AIR 2009 SC 476, the Court stated as follows;
- “The term mistake or error apparent by its very connotation signifies an error which is evident perse from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of review. ...To put it differently an order or decision of Judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court on a point of law or fact. In any case while exercising the power of review, the concerned Court cannot sit in appeal over its own Judgment/decisions.”
21. The third ground for review is for any other sufficient reason. The expression means a reason sufficiently analogous to those specified in the rule though cannot be held limited to the first two reasons.



22. The Applicants have sought review of the orders on the grounds that they are aggrieved by the decision of the Court; There are two titles held by each of the contesting parties and that the Applicants are in possession of the suit land where they are undertaking construction with financing having been provided through a borrowing; That Ruiru East Block 1 (Githunguri) T.792 does not exist; In addition that the site visit report shows that the plot occupied by the Applicants belongs to it and that the Plaintiff's plot should be across the highway.
23. The Applicants have argued that the site report constitutes discovery of new and important matters of evidence not presented before the Court at the time of delivering the Ruling. *Inter alia* that the origins of the two titles are now evident from the documents presented before the Court by the 5th Defendant.
24. The Court has perused the site reports and the documents of the 5th Respondent on record and finds that all reports agree that there are 2 titles over the same parcel of land. This report helped to reiterate the position presented to the Court before that there is an apparent case of double titling that is to say the presence of two titles going by different land reference numbers for the same parcel of land. It is also not in dispute that the Applicants are in dispute.
25. The Applicants have argued that the site report forms new and important evidence to warrant the Court to review the orders. The Court finds that the information contained in the site report is not new. It had been alluded to by the parties in their pleadings on record. Even if it was to be taken as new, the Applicants have not given reasons why the same could not be obtained before with reasonable diligence. The 5th Respondent presented documents that were always in its possession and with a little diligence the Applicants ought to have obtained them.
26. The Court finds that even if the documents / site report had been placed before the Court, it would not have affected the outcome of the Ruling. I say so because these issues are not new, having been raised before and the Court had pronounced itself on the same. The site report confirmed the pleadings before the Court. This issue requires to go for hearing so that the true owner of the land in question is determined.
27. That said the Court agrees with the Applicants that arising from the reports it is now clear that Ruiru East Block 1 (Githunguri) T.792 does not exist. To the extent that this is the case the error on record is now corrected to read: Land Reference No. Ruiru East Block 1/T.792 and Ruiru East Block 1 (Githunguri)792.
28. With respect to prayer No. (b) it would appear that the same was abandoned as the Court did not receive any submissions on the same. It is therefore struck out.
29. The 5th Respondent has argued that the Court did not determine the issue of prima facie case, the irreparable damage and the balance of convenience in the correct manner. The Court's view is that these are issues for appeal and not review as it goes to the merits of the decision of the Court.
30. In the end the application partially succeeds.
31. Final orders for disposal:-
 - a. The Ruling is hereby reviewed to read Land Reference No. Ruiru East Block 1/T.792 and Ruiru East Block 1 (Githunguri) 792.
 - b. That the Application is granted in terms of prayer 4 of the Application dated 10/1/2023.
 - c. An order of temporary injunction be and is hereby issued against the Respondents by themselves, agents, workers, servants or anybody claiming through them from further



construction, building or depositing further building materials or interfering with the Plaintiff's quiet possession on Ruiru East Block 1(githunguri)792 and/or known as Ruiru East Block 1/T.792 pending the hearing and determination of the suit herein.

d. Costs in the cause.

32. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 5TH DAY OF OCTOBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kanyi for Plaintiff

Mbichire for 1st, 2nd and 3rd Defendants

4th Defendant – Absent

Ms. Ndundi for 5th Defendant

Court Assistants – Phyllis & Lilian

