



Nthiwa & 3 others v County Director of Land Adjudication and Settlement (Makueni County) & another; Kimango (Interested Party) (Environment and Land Judicial Review Case 6 of 2019) [2023] KEELC 20717 (KLR) (4 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 6 OF 2019
TW MURIGI, J
OCTOBER 4, 2023**

BETWEEN

**PETER MAWEU NTHIWA 1ST APPLICANT
CHARLES MATHEKA LOVE 2ND APPLICANT
PHILIP NYAMAI KAMUYA 3RD APPLICANT
SAMMY MAUNDU MWANIA 4TH APPLICANT**

AND

**COUNTY DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT
(MAKUENI COUNTY) 1ST RESPONDENT
MINISTER OF HOUSING AND LANDS THROUGH THE DEPUTY COUNTY
COMMISSIONER MUKAA SUB COUNTY 2ND RESPONDENT**

AND

GIDEON MWONGELA KIMANGO INTERESTED PARTY

RULING

1. Before me for determination is the notice of motion dated October 5, 2022, brought under article 159(2)(a), (b), (d), 50 and 10(2) of the *Constitution of Kenya, 2010*, order 50 rule 1, order 9 rule 9 and order 45 rule 1 of the *Civil Procedure Rules 2010* and all other enabling provisions of the law in which the Applicants seek the following orders:-
 1. Spent.
 2. Spent.



3. THAT upon the grant of prayer No. 2 above, this Honourable Court be pleased to review and set aside the ruling delivered on May 22, 2020.
 4. That this Honourable Court be pleased to allow the Applicants herein to amend their substantive Motion dated August 22, 2019.
 5. That the costs of the application be provided for.
2. The application is based on the grounds appearing on its face together with the supporting affidavit of Charles Matheka Love sworn on his own behalf and on behalf of the other Applicants.

The Applicants' Case

3. A summary of the grounds and averments in support of the application is that the Court erred in dismissing the substantive Motion dated August 22, 2019. The basis of this argument is that the Judge failed to consider the fact that the Applicants made a technical mistake in seeking for an order of *certiorari*, Prohibition and *mandamus* instead of an order of *certiorari* as directed by the court.
4. The Applicants contended that the court erred in failing to consider that the mistake could be cured by amending the substantive Motion. The Applicants argued that the court made an error apparent on the face of the record by striking out the Notice of Motion dated August 22, 2019. That by striking out the Notice of Motion dated August 22, 2019, they were condemned without being heard contrary to the principles of natural justice and Article 159 (2) (d) of the Constitution.
5. They asserted that the application has been brought in good faith and hence they should not be punished for the mistakes of their previous Advocate. For those reasons, the Applicants contended that they have established sufficient grounds to warrant a review of the ruling of the court and urged the court to grant the orders sought.

The Interested Party's Case

6. The Interested Party opposed application through the replying affidavit sworn by Alphonse Muema Mbindyo Advocate on 1 November 6, 2022.
7. He averred that the Applicants have not shown any discovery of new and important evidence to warrant this court to review its ruling dated May 22, 2020. In addition, he argued that there has been an inordinate delay of 2 years 5 months in filing the present application. He averred that the Applicants ought to have appealed against the ruling instead of filing the present application. He urged the court to dismiss the application with costs to the Interested Party.
8. The application was canvassed by way of written submissions.

The Applicant's Submissions

9. The Applicant's submissions were filed on February 14, 2023. In the Applicants submissions, Counsel reiterated the contents in the affidavit in support of the application. Counsel further submitted that the mistakes of the previous Advocate should not be visited upon the Applicants. To buttress this argument, Counsel relied on Article 50 of the Constitution and on the following authorities:-
 1. Omwoyo Vs African Highlands & Produce Co. Ltd (2002) 1 KLR.
 2. Belinda Muras & 6 Others Vs Amos Wainana (1978) KLR.
 3. Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KLR.



10. Counsel went on to submit that neither the Applicants nor their Advocate were indolent in presenting the instant application.

The Interested Party's Submissions

11. The Interested Party filed his submissions on March 16, 2023.
12. On his behalf, Counsel submitted that failure to comply with the terms of the court order cannot be termed as a technical mistake on the part of the Applicants.
13. Counsel went on to submit that the substantive Motion seeking for an order of *certiorari*, Prohibition and *mandamus* cannot be termed as a technical mistake since the Applicants were only granted leave to apply for an order of *certiorari*.
14. Counsel argued that the substantive Motion offends the provisions of Order 53 Rule 3 (1) of the [Civil Procedure Rules](#). Counsel submitted that the Applicants had failed to meet the conditions for the grant of review as set out in Order 45 Rule 1 of the [Civil Procedure Rules](#).
15. Counsel contended that if the Applicants were aggrieved by the ruling of the court, they ought to have appealed against the same instead of filing the present application. Counsel maintains that the Applicants were granted an opportunity to be heard because they participated in the Preliminary Objection which lead to the ruling that they are now seeking a review.

Analysis and Determination

16. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions the main issue for determination is whether this court should review the ruling dated May 22, 2020.
17. The Applicants are seeking a review of the ruling dated May 22, 2020. The basis of the application is that the court erred in striking out the substantive Notice of Motion dated August 22, 2019.
18. The law that governs applications for review is set out in Section 80 of the [Civil Procedure Act](#) and in Order 45 Rule 1 of the [Civil Procedure Rules](#).
19. Section 80 of the [Civil Procedure Act](#) 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.
20. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides that: -
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 the judgment to the court which passed the decree or made the order without unreasonable delay.

21. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjob Amalgamated Limited & Another Vs Kenya Commercial Bank Limited* (2014) eKLR where the Court held that: -

“In the High Court both the *Civil Procedure Act* in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”

22. The record shows that on July 20, 2019, the Applicants were granted leave to apply for an order of *certiorari* to remove into the High Court and quash the proceedings, judgment and orders made by the Deputy County Commissioner Mukaa Sub County on 20th February, 2019 in Appeal to the Minister Case No. 23 of 2007 between the Applicants and Gedion Mwangela Kimango.

23. The leave granted was to operate as stay against the judgment and orders of the County Commissioner Mukaa Sub County until the determination of the application for the orders of *certiorari*.

24. While granting the leave, the Applicants were directed to file and serve the substantive motion within 21 days from the date of the leave.

25. Upon the grant of the leave, the Applicants filed a Notice of Motion dated 22nd August, 2019 seeking the following orders:-

1. That the Applicants be granted leave to apply for an order of *certiorari* to remove into the High Court and quash the proceedings, judgment and orders made by the Deputy County Commissioner Mukaa Sub County on 29th February, 2019 in appeal to the Minister Case No. 23 of 2007 between the applicants and Gedion Mwangela Kimango.
2. That an order of Prohibition against the Deputy County Commissioner and/or his agents be issued to prohibit surveyors from entering and/or interfering with Plot No. 1590 Wathini Adjudication Section.
3. That an order of *mandamus* be issued compelling the Commissioner of Lands through the Minister of Lands and Settlement to issue the title deed in respect of Plot No. 1590 Wathini Adjudication Section to the applicants.
4. That the costs of the application be in the cause.

26. The application was opposed by the Interested Party vide the Notice of Preliminary Objection dated 23rd September, 2019 on the following grounds:-

1. The said Notice of Motion dated 22nd August, 2019 offends the mandatory provisions of Order 53 Rule 3(1) of the Civil Procedure Rules 2010.
2. The said Notice of Motion is in breach of the express order of the Honourable Court made on 30th July, 2019.



3. That the Notice of Motion as filed is defective and incompetent in that the leave granted by the Honourable Court on 30th July, 2019 was for an order of *certiorari* and not leave to seek an order of Prohibition or *mandamus* and thus offends the provisions of order 53 Rule 1 of the Civil Procedure Rules 2010.
27. The Preliminary objection was canvassed by way of written submissions. The Court upheld the Interested Party's Objection vide its ruling delivered on 22nd May 2020, and struck out the Ex-parte Applicants Notice of Motion dated 22nd August, 2019 with costs to the Interested Party.
28. It is this ruling of the court that the Applicants now seek to have reviewed.
29. In order to obtain a review, an applicant must demonstrate that there is discovery of new and important evidence. In the present case, the Applicants have not shown that there is discovery of new or important matter of evidence that the Applicants could not have placed before the Court during the hearing of the Preliminary Objection.
30. As regards the second requirement, the Applicants must establish that there is an error apparent on the face of the record.
31. In the case of *Nyamogo & Nyamogo Vs Kogo* (2001) EA 170 the court held as follows;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness 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 where there may be 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 is certainly no ground for review though it may be one for appeal.”
32. Similarly, in the case of *Timber Manufacturers and Dealers Vs Nairobi Golf Hotels (K)* HCCC No. 5220 of 1992, Emukule J held that;

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”
33. The Applicant contended that there is an error apparent on the face of the record to warrant a review of the court's ruling. The basis of this argument is that the Court failed to consider that the fact that the Applicants made a technical mistake in seeking for an order of *certiorari*, prohibition and *mandamus* instead of an order of *certiorari*.
34. The Applicants asserted that the mistake could be cured by allowing them to amend the substantive Motion. They argued that they were not granted an opportunity to be heard due to the mistake of their previous Advocate.
35. For an error to be apparent on the face of the record, it must be obvious and self-evident.



36. In the present application, the Applicants have not pin pointed the error that is apparent on the face of the record. The grounds laid by the Applicants do not disclose an error apparent on the face of the record but in my view, these are grounds for an Appeal.
37. The Court is also mandated to consider if there are sufficient reasons to review the Court’s ruling.
38. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of *The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR* stated that;
- “These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”
39. The Applicants have not demonstrated any sufficient reason to warrant a review of the Court’s ruling.
40. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.
41. The ruling sought to be reviewed was delivered on 22nd May, 2020. The instant application was filed on 6th October, 2022. That duration is far from reasonable and the same has not been explained.
42. In so finding, I am persuaded by the holding in the case of *John Agina Vs Abdulswamad Sharif Alwi C.A Civil Appeal No. 83 of 1992*, where the court stated as follows;
- “An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy of the court.”
43. In the end, I find that the application dated October 5, 2022 is devoid of merit and the same is dismissed with costs to the Interested Party.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 4TH DAY OF OCTOBER, 2023.

In the presence of:-

Court assistant - Mr. Kwemboi.

In the absence of the parties.

