Mogaka v National Land Commission & 5 others (Environment & Land Petition 7 of 2021) [2022] KEELC 2618 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2618 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND PETITION 7 OF 2021

JM ONYANGO, J

JULY 7, 2022

BETWEEN

BENARD NYAMANYA MOGAKA ..... PETITIONER

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KISII ..... 2ND RESPONDENT

LAND REGISTRAR ..... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

BELINDA ONGUSO MOKAYA ..... 5TH RESPONDENT

MARGRET BOSIBORI MOKAYA ..... 6TH RESPONDENT

RULING

Introduction

1. By a Petition dated 3rd May 2021, the Petitioner/Applicant filed suit against the Respondents seeking a declaration that the transactions leading to the alienation of land parcel number Kisii Municipality / Block 3/491 and 492 (hereinafter referred to as suit property) and the transfer of the same to the 5th and 6th Respondents respectively was null and void and that the letters of allotment issued to them should be revoked.

2. In response to the Petition, the 5th and 6th Respondents filed a Notice of Preliminary Objection on 26th May, 2021 where they alleged that;

    a. This court is devoid of jurisdiction to adjudicate the Petition.

b. The Petition and the Notice of Motion attached thereto is contrary to the provisions of section 14 of the *National Land Commission Act*, 2012 as read together with Article 67 of *the Constitution* of Kenya, 2020.

c. The matter that is substantially or directly in dispute in the Petition having been dealt with by the National Land Commission, the same is therefore Res judicata.

d. The Petition does not raise justifiable claims and hence is barred by the doctrine of mootness

e. The Petition and the Notice of Motion attached thereto do not disclose any reasonable cause of action whatsoever.

f. The Petition constitute an abuse of the process of the court.

3. The court decided to have the Preliminary Objection filed by 5th and 6th Respondents disposed of first by way of written submission.

4. On 25th November, 2021 the court delivered its ruling allowing the Preliminary Objection and dismissed the Petitioners suit on grounds that the court did not have jurisdiction to deal with a matter that had been decided by the 1st Respondent. The court also held that the Petition did not meet the threshold of a Constitutional Petition.

5. On 8th December, 2021 The Applicant filed an application dated 3rd December, 2021 seeking to review the said ruling. In his application the Applicant sought conservatory orders to preserve the suit properties during the pendency of the suit.

6. In his Supporting Affidavit, the Applicant averred that the court erred by entertaining a Preliminary Objection without the same being raised in the Defence and that the Applicant was ambushed contrary to order 51 rule 14 of the *Civil Procedure Rules*.

7. He also averred that the court erred by referring to the documents attached to the Petition in deciding a Preliminary Objection, an action he felt was draconian. He complained that by dismissing the suit summarily the court went against Article 10, 47, 50 and 159 (2)(d).

8. In response to the application, the 5th and 6th Respondents filed a statement of Grounds of Opposition dated 13th January, 2021. The 5th and 6th Respondents contended that the application was premature, mischievous, misconceived and otherwise bad in law as it failed to disclose material relevant information.

9. They contended that conservatory orders within the proper definition of conservatory orders cannot be issued after a dismissal. They argued that the Applicant had participated in the proceedings relating to the Preliminary Objection that led to the dismissal of the Petition by filing submissions on the same and thus he was estopped from alleging that he was ambushed.

10. The 5th and 6th Respondents further argued that the application amounted to an invitation of this court to sit on an appeal of its own decision or make further contradictory orders ex-post facto. The 5th and 6th Respondents deponed that the grounds raised in support of the application were all issues that should form grounds of appeal and any attempt by the court to review its decision on that basis would amount to it sitting on an appeal against its own ruling.

11. Finally, the Respondent argued that that the application did not meet the requisite conditions set out under order 45 rule 1 of the Civil Procedure Rules 2010.

12. On 23rd March, 2022, this court directed that this application be disposed of by way of written submissions and the Applicants, 5th and 6th Respondents filed their submissions.

Issues for Determination

13. The singular issue for determination is whether the Applicant has met the threshold for review of the court ruling and orders issued on 25th November, 2021.

Analysis and Determination

14. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

> Section 80 "Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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

15. Order 45;

> "1. (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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"

16. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to (a) discovery of new and important matters or evidence, (b) mistake or error on the face of the record and (c) any other sufficient reason.

17. In order to determine whether the Applicant has met the threshold for review, it will be necessary to establish whether the Applicant has satisfied the said three conditions for grant of a review order.

a) Discovery of new and important matters or evidence

18. As pointed out by learned counsel for the 5th and 6th Respondents, there is no single new important matter or evidence that the Applicant has discovered that had not been considered by this court in its determination. In fact, an analysis of the Applicant's submissions reveals that he is merely reiterating the contents of his Petition which he considers were not considered.

19. It is apparent that the court downed its tools and could not proceed any further after discovering that the Applicant's claim in the Petition had already been disposed of by the National Land Commission, the 1st Respondent herein. The court therefore held that it lacked jurisdiction to dispose of the Petition unless it was an application for Judicial Review challenging the decision of the National Land Commission. Additionally, the court could not proceed to entertain the Petition as it did not meet the threshold of a constitutional Petition as was set out in the case of *Anarita Karimi vs Republic* 1976-1980 KLR.

b) Mistake or error apparent on the face of the record

20. In the case of *Muyodi –vs- Industrial and Commercial Development Corporation & Another* [2006] 1EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> "...In *Nyamogo & Nyamogo -vs- 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 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. This laid down principle of law is indeed applicable in the matter before us..."

21. In the instant application, the Applicant avers that the court erred by entertaining a Preliminary Objection without the same being raised in the Defence and that the Applicant was ambushed contrary to order 51 rule 14. He also averred that the court erred by referring to the documents attached to the Petition in determining a Preliminary Objection, an action he felt was draconian. He faulted the dismissal of the suit summarily claiming that the court went against Articles 10, 47, 50 and 159 (2) (d) of *the Constitution*. These are the same issues the Applicant emphasized in his submissions.

22. In response, the Respondents submitted that the Applicant is being dishonest when he claims that he was ambushed as he was an active participant in the proceedings, as he filed his submissions in respect of the Preliminary Objection which were considered by the court in its decision. They contended that the Applicant had the option of appealing against the decision of the court. They maintained that the grounds upon which his application was based are grounds of appeal and cannot be similar to those of review.

23. From the definition given by the Court of Appeal in the case of Muyodi –vs- Industrial and Commercial Development Corporation & Another [2006] highlighted above, the Applicant failed to demonstrate that there was an error apparent on the face of the record. He added that the Applicant

fails to understand that once a court's jurisdiction in a matter is challenged, the court must without proceeding with any other business establish whether it indeed has jurisdiction to hear and determine matter. Nyarangi, JA succinctly stated in the famous case of *Owners of the Motor Vessel Lillian "S" Vs Caltex Oil (Kenya) Ltd*(1989) KLR 1 that jurisdiction is everything and without it, a court has no power to make one more step. He stated that a court of law must down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

24. In the instant case, the court was confronted with a Preliminary Objection challenging its jurisdiction. The court therefore had no option but to consider whether it had jurisdiction. At paragraph 18 of its ruling the court observed that it was common ground that the National Land Commission, the 1st Respondent herein had rendered a decision on the claim raised in the Petition on 28th April, 2017. The said decision had not been challenged by way of a Judicial Review application and thus it did not have any business interfering with the decision of the 1st Respondent in the manner proposed by the Petitioner. The court took cognizance of the doctrine of avoidance that urges it to avoid interfering or directing constitutionally mandated bodies on how to carry out their duties.

25. Additionally, the court had to determine whether the Petition as crafted by the Applicant met the threshold of a Constitutional Petition. The court relying on the threshold that was set out in the case of Anarita Karimi (supra), observed that the Petitioner despite mentioning various articles of *the constitution* in the heading of his Petition, had set out how each of the said articles of *the constitution* had been violated by the Respondents with clarity and precision to enable the court to ascertain whether or not their rights had been infringed by the Respondents.

26. If the Petitioner believes the court erred by downing its tools for lack of jurisdiction, his only option is to appeal against the decision of the court because the court cannot assume jurisdiction in a matter where it had already stated that it had no jurisdiction to interfere with a decision of the 1st Respondent. If the court were to do so it would be sitting on an appeal on its own decision. Further, if the Applicants believe that the court erred in determining that the Petition failed to meet the threshold of a Constitutional Petition, they should have filed an appeal in the Court of Appeal.

c) Any other sufficient reason

27. As correctly submitted by the learned counsel for the 5th and 6th Respondents, there is no other sufficient reason raised by the Applicant analogous to the main grounds that I have discussed hereinabove to warrant a review of the court's ruling.

28. Consequently, the Applicant's application lacks merit and thus the same is disallowed. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF JULY, 2022.

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J.M ONYANGO

JUDGE