Kagunza Adaji v Maiyo & another (Environment & Land Case 35 of 2016) [2022] KEELC 13390 (KLR) (4 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13390 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 35 OF 2016

FO NYAGAKA, J

OCTOBER 4, 2022

BETWEEN

PETER KAGUNZA ADAJI ..... PLAINTIFF

AND

SIKUKUU MARTIN MAIYO ..... 1ST DEFENDANT

MARGARET CHESANG MAIYO ..... 2ND DEFENDANT

RULING

1. By an application dated July 4, 2022 and filed the same date, the 2nd defendant (as I deem it) moved this court for various orders. The application was brought under certificate of urgency and was supported by the 2nd defendant's affidavit sworn on July 4, 2022. It was brought under sections 80 and 63(e) of the *Civil Procedure Act*, order 45 rule 1(a) and (2) of the *Civil Procedure Rules*, 2010 and all enabling provisions of law. I would state that the outset that the phrase "all provisions of the law" does not make any sense before the court unless it is clarified by being specific or by submissions which of the said provisions intended to be referred to that the application is based on. Nevertheless, the application sought the following orders:

   (1) ...spent

   (2) ...spent

   (3) That this honourable court be pleased to review and/or set aside the judgment delivered on December 20, 2017 together with all the order(s) and decree(s) emanating therefrom.

   (4) That costs of this application be provided for.

2. The application though filed on behalf of the plaintiff, as was stated on the body of it, seems to have been designed to be for the defendants. This is because it was drawn by Ms Simiyu & Kirorey Advocates, LLP and indicated that the said law firm acted for the "plaintiff/applicant" at the time.

However, from the record, and the supporting affidavit respectively, two facts point out to the contrary. First, on July 4, 2022 the said law firm entered into a consent and filed it to come on record for the 2nd defendant and it filed a Notice of Change of Advocates from the law firm that represented both defendants prior to and after the judgment impugned. Second, the Supporting Affidavit of the application was sworn by one, Margaret Chesang Maiyo, the 2nd defendant. Lastly, the body of the application referred to the said 2nd defendant. All I can say is that such a grave and glaring error should, ordinarily be noted by a party and corrected before presenting a pleading to court if parties were to be keen on drawing pleadings. Otherwise, if it were during the days of absence of article 159(2)(d) of the *Constitution* of Kenya, 2010, such an application was a proper candidate of instant dismissal. Granted that grace can be extended to such lackadaisical conduct, this court applies the 'cleansing detergent of the said provision of the *Constitution* to cure the error, glosses over the anomaly and moves onto the merits of the application.

3. Thus, the application was based on six (6) grounds extensively outlined on the face of it. I will summarize them as follows: that there was sufficient reason to review the judgment; there was an error apparent on the face or record (I will, immediately here below, give the details thereof as were given by the 2nd defendant); execution had been commenced hence the urgency of the application; justice and fairness called for a review; delay though long was not deliberate and should be admitted by the court; and the judgment was yet to be satisfied either in the whole or in part.

4. Regarding the error apparent on the face of record, the applicant explained that:

    i. At paragraph 18 of the judgment the court faulted the 2nd defendant for not calling the Land Registrar to disprove the fact that the 1st defendant was the sole registered proprietor.

    ii. The trial judge admitted in evidence a copy of the Green Card in respect of the suit property without any objection from the plaintiff/respondent.

    iii. Entries numbers 2 and 3 recorded on the face of the Green Card on January 20, 2005 indicated that both the 1st and 2nd defendants were joint owners of the property and as a result title was issued.

    iv. The title deed produced in court indicated that the 1st defendant was the sole proprietor of the suit property.

    v. The court should have taken judicial notice that of the Green Card being part of public documents and should therefore have noted the discrepancy between it and the title deed hence the 2nd defendant needed not to have called the Land Registrar to prove the contents of the Green Card hence the court was in error in expecting her to do so.

    vi. Had the court taken judicial notice of the Green Card, it could have lodged investigations on the processes and procedures that gave rise to the issuance of the title deed produced in evidence.

    vii. If the investigations alluded to in (vi) above could have been done and which can be done still, it could have perhaps reached a just finding than it did.

    viii. The error noted ought to be corrected since it goes to the root of the matter since if both defendants jointly owned the property, the 1st defendant ought to have sought consent of the applicant before selling the property and that the registration of the property in favour of the 1st defendant was irregular hence he had no good title to the property and could not pass a better one than he had.

5. The applicant having listed the grounds which were in the body of the application as shown, then swore an affidavit which reproduced the same grounds by way of depositions save that she attached to the affidavit a copy of the judgment and marked it as "MCM 1." She then deponed that the court had unfettered discretion to grant the application. She also swore that the delay in bringing the application was not deliberate and beseeched the court to determine the application on merits. She then contended that based on the facts she has stated she has given sufficient reasons to review the judgment.

6. The application was duly served and received by the plaintiff's advocates and an affidavit of service sworn on July 5, 2022 was filed on July 6, 2022 to evidence the same. However, there was no evidence that the same was duly served on the advocates for the 1st defendant, although a consent was entered into between the two law firms before the application was filed. Thereafter, what appears to be purported service were letters dated July 28, 2022 one of which was addressed to the advocates for the plaintiff and another addressed to the 2nd defendant and they were copied to the Deputy Registrar of the court. Both bear the receiving stamp and signature of the plaintiff's advocates on the said date but no other.

7. It bears explaining that the means resorted to by learned counsel to communicate to the court about service of documents is at best least desirable as that are not recognized in the *Civil Procedure Rules*. Sending to court correspondence made to parties and purporting to explain service of orders and directions without providing such information through an affidavit of service is a strange practice to the Rules of Service as provided by order 5 of the *Civil Procedure Rules*, 2010. Without appearing to think on her behalf, the applicant may as well have decided to discard the Rules of Procedure as to service of documents. If so, it would defeat the very purpose of laying down such Rules.

8. It must be restated that whereas Rules of Procedure are handmaids and not mistresses of justice they should not be ignored and trampled down upon as desecrate the hallowed principle of there being law and order in society in the sense of all being subject to the rule of law. Since rules were formulated or enacted for good order and certainty they should never be discarded simply because there is a modern school of thought that they are no longer needed in the era of new Constitutional grace. Article 159(2) (d) of the *Constitution* did not came into existence to wash away all infractions of the law. As much as, "deviations, from, or lapses in form and procedure, which do not go to jurisdiction of the court or prejudicial not to the adverse party in any fundamental respect ought not to be treated as nullifying and the legal instruments, thus effected...(and)...In those instances, the court should rise to its calling to do justice by saving the proceedings in issue" (See, *Microsoft Corporation v Mitsumi Garage Ltd & Another* Nairobi HCC 810 of (2001) (2001) EA 460), only in limited instances and on a case-by-case basis should the provision be invoked.

9. On the above, I am guided by the holding of the Supreme Court of Kenya in *Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others* [2014] eKLR wherein it was stated:

> "Indeed, this court has had occasion to remind litigants that article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls. All that the courts are obliged to do, is to be guided by the principle that "justice shall be administered without undue regard to technicalities." It is plain to us that article 159 (2) (d) is applicable on a case-by-case basis (*Raila Odinga and 5 others v IEBC and 3 others; Petition No 5 of 2013,* [2013] e KLR)."

10. Be that as it may, on July 28, 2022 the applicant filed submissions dated the same date. As a background to the application she reiterated the contents of the grounds of the application and the supporting affidavit. She then reiterated the provisions of law cited and indicated that there was sufficient reason to review the judgment delivered on December 20, 2017. Regarding the need for the court to take judicial

notice of a Green Card as a public document and dispense with the need to call the Land Registrar to disprove it, she relied on the case of *In re Estate of the Late Alice Nyambura Wainaina (Deceased)* [2021 eKLR. She also cited section 59 of the *Evidence Act*, chapter 80 of the Laws of Kenya.

11. She then went on to bring out from the evidence on record that even from the documents she filed, namely, a copy of the membership Register of Amuka Farm and the copy of the certificate of clearance, the 1st defendant's name did not appear in them. She stated that for these reasons there was conflicting evidence regarding ownership, the court should have made the court to investigate the matter further the anomalies in the evidence when a court is faced with evidence of two titles. She relied on the case of *David Joseph Gichamba v Jane Waceke Njoroge & 3 others* [2022] eKLR to buttress her argument that the court should have investigated title further. She urged the court to allow the application.

Analysis, Issues and Determination

12. I have anxiously considered the facts in the instant application and its grounds, the affidavit in support and the relevant law. I have found only two issues that commend to me for determination. These are:

    a. Whether from the grounds and facts the application merited;

    b. What orders to issue and who bears the costs of the application?

13. On whether the application is merited hence the need for a review or setting aside of the judgment, the starting point for this court are the provisions of section 80 of the *Civil Procedure Act* and order 45 rule (1) of the *Civil Procedure Rules*. Settled law is a party cannot succeed in an application for review and setting aside of a judgment, decree, ruling or order of a court, unless he/she proves the following. That:

    i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge and which could not therefore produce at the time the order was made or;

    ii. Some mistake or error apparent on the face of the record or;

    iii. Any other sufficient reason.

14. Besides the above, the application must be brought without undue delay. And even where the delay is not much, it has to be sufficiently explained.

15. In the instant application, the applicant insists that the court ought to review and or set aside the judgment herein on two main reasons, namely, that there was an error apparent on the face of record and that there was sufficient reason. The other grounds are given by the applicant, in the view of the court, peripheral since they are not among the ones summarized into I will analyze the two before making findings on the others.

16. The first point to determine is the applicant's contention that there was sufficient reason for the delay. The applicant gave no reason which the court would analyze and deem sufficient or otherwise. All that she did was to raise that ground and leave it bear. But in the submissions she filed to firm the application, she stated that it was because court failed to take judicial notice of the fact that a Green Card was a public document and act on it without calling for proof to discount it. With due respect, the applicant grossly misunderstood the law of evidence and its application on matters before courts. If it is true that the court failed to take judicial notice of the document in issue and act accordingly, that is a matter the merits of the decision the judge made, and if the applicant was aggrieved by it, she ought to have appealed against the finding but not to apply for review. Any other sufficient reason cannot be one among those that would go to the merits of the decision the court makes. To go back to them

would mean the court sitting on appeal on its decision and that would not only be unjust, unnatural but also against the principles of the rule of law.

17. The next ground was that of the allegation that there was an error apparent on the face of record. A raft of errors the applicant alleged that their constituted such errors were given. But before considering whether or not they constitute errors the nature of which the law contemplates, it is important to understand amounts to such.

18. The phrase "on the face of the record" means that the document constituting the face of the record must actually be in or part of the court record. A judgment or decision of a court made in the proceedings is part of the record.

19. This turns me to discussing what constitutes an error apparent on the record. In *Chandrakhant Joshibhai Patel v R* [2004] TLR, 218 the court defined such an error. It stated that it is one which: "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

20. In the case of *Muyodi v Industrial and Commercial Development Corporation & another*[2006] 1 EA 243, the Court of Appeal described such an error as follows:

> "...In *Nyamogo & 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 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. Therefore, as this court found in *Benson W Kaos & 72 others v Attorney General & 85 others* [2022] eKLR:

> "...an error apparent on the face of record has to constitute two main things: one, there is a record, and two, there is an error, and three, the error is one which is such that a person looking at the record without further inquiries to fill in gaps notes it immediately in such a manner as to shout without hesitation, "Ah! With all this, what happened here?""

22. Additionally, it should not be one that is as a result of what may be termed as a wrong reasoning of the judge. That means, that it is not one which results from the judge applying his mind to the issue and arriving at a conclusion which the aggrieved party is of the view that it was an erroneous conclusion. If that be the case, a challenge from it would lie only on appeal.

23. I have considered the issues, as given in paragraphs (b) of the application and 3 of the supporting affidavit, 3-6 of the submissions and summarized at paragraph 4 above, the applicant contended were errors on apparent on the record. Not an iota of them can constitute an error apparent on the face of record. All of them are complaints or issues on how the learned judge exercised his mind on the evidence before him and, in the view of the applicant, made an error in his findings. That being the

case, they cannot constitute an error apparent on the face of record, as the law considers errors of such a nature to be.

24. On delay or in other words, about the length of time taken before the application of such a nature the court has to decide whether or not there was undue delay. In taking into account what constitutes undue delay, the court will apply its wisdom on a case by case basis. The impugned judgment was delivered on December 20, 2017 and the instant application brought on July 04, 2022. The period is four (4) years and six (6) months. Such a period is not plainly unreasonably. Moreover, the applicant did not in any attempt to explain what took her that long to move the court for review. Absent of an explanation for delay, however, weak is a manifestation of an applicant who is intent to take the court process as casually as she did in bringing the application. It is inexcusable.

25. Regarding the other grounds put forth, the applicant argued that the application out to be granted because execution had been commenced hence the urgency of the application, justice and fairness called for a review, and the judgment was yet to be satisfied either in the whole or in part. The applicant wanted from December, 2017 to July, 2022 to bring the application. She did so after warrants of arrest were extracted and served on her. Indeed, execution had commenced by the time of the instant application. But it was the execution process that cajoled the applicant from sleep. She cannot be heard to say that commencement of execution is a ground for review of the judgment. About justice and fairness being an issue to consider, it bears to note that the plaintiff and the defendants were given equal opportunity by the court to ventilate their cases and they did and the court considered the issues before it and arrived at the judgment as it did. Thus, this principle was satisfied. Lastly, on the issue of no part or the whole of the judgment being satisfied, it is neither here nor there in this application. In actual sense, since the judgment still stands, the applicant is obligated to move with speed to settle it as decreed.

26. The conclusion of the whole matter is that the application dated July 04, 2022 lacks merit. It is hereby dismissed with no order as to costs since the respondents did not participate in it.

27. It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 4TH DAY OF OCTOBER, 2022.

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HON DR IUR FRED NYAGAKA

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JUDGE, ELC, KITALE