



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC PETITION NO. 4 OF 2019

NANCY WANGARI KIMANI.....APPLICANT

-VERSUS-

COUNTY EXECUTIVE COMMITTEE MEMBER, LANDS HOUSING,

PHYSICAL PLANNING AND URBANIZATION.....1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI.....2ND RESPONDENT

RULING

A. INTRODUCTION

1. By a notice of motion application dated 26th October 2020, brought under the provisions of **Order 45 of the Civil Procedure Rules (the Rules) and all other enabling provisions of the law**, the Petitioner sought a review of the ruling of the honourable court delivered on 30th September 2020. The application was supported by the affidavit of Francis Mutiga Kabui sworn on 26th October, 2020. The application was based on the ground that there were two errors apparent on the face of record namely:

*(i) That the application dated 23rd October 2019 was part of the constitutional petition and was therefore filed under **Order 51 of the Rules and Article 22 of the Constitution and the provisions of Order 53 of the Rules** did not therefore apply to it.*

*(ii) That the Petitioner was not in breach of any physical planning or land use laws nor had there been any enforcement order issued against the petitioner as provided for under **Section 72 of the Physical and Land Use Planning Act, 2019**. The letter temporarily suspending her construction had been incited by a third party on an alleged issue of land ownership which had nothing to do with land use or physical planning.*

2. The application was further based on the ground that the 1st Respondent was fully aware that he had acted contrary to **Articles 40 & 47 of the Constitution and Section 4 of the Fair Administrative Action Act**.

3. The supporting affidavit was sworn by Francis Mutiga Kabui who deposed that he was a relative to the Petitioner and he was the one in charge of the construction on behalf of the Petitioner. He stated that he was the one who was served with a letter dated 4th October 2019 signed by the 1st Respondent suspending the development approval. The reason given in the letter for the suspension was that a 3rd party had requested the suspension to enable him confirm the authenticity of the plot ownership documents. The deponent contended that the action by the 1st Respondent was not based on any law. He asserted that the Petitioner had complied with due process including applying for development approval and a change of user. The Respondents had not at any one time served the Petitioner with an enforcement notice either under the **Physical Planning Act** (now repealed) or the **Physical and Land Use Planning Act, 2019**.

B. THE RESPONDENTS' RESPONSE

4. The Respondents' response was by way of a notice of preliminary objection dated 5th November 2020. The objection by the Respondents was to the effect that the Petitioner's application offended the provisions of **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Rules** since the Petitioner has already preferred an appeal by lodging a notice of appeal. The Respondents therefore termed the application as an abuse of the court process.

C. PETITIONER'S SUBMISSIONS

5. The Petitioner's first submission was on the issue of whether her application offended the provisions of **Order 53 of the Rules**. The Petitioner submitted that the court erred in holding that her application offended **Order 53 Rules 1, 2 and 3 of the Rules**. It was her submission that her application was based on the provisions of **Order 51 of the Rules and Article 22 of the Constitution of Kenya** hence leave of the court was not necessary. She cited various authorities to support her arguments.

6. In **Suchan Investment Ltd – vs – Ministry of National Heritage & Culture and 3 Others [2016]eKLR** the Court of Appeal held that under the provisions of **Article 22 (3) and 22 (4)**, violations of fundamental rights or freedoms can be entertained by way of statutory judicial review. On the new horizons for judicial review the Petitioner further relied on the cases of **Republic – v – Commissioner of Lands, Kenya Agricultural Research Institute Ex-parte Renege Project Ltd (2018)eKLR**, **Nelson Muturi Dumbeya – vs County Government of Kajiado [2020]eKLR** and **Gathoni Park Farm Ltd – v – National Land Commission & 7 Others [2020]eKLR**.

7. On the purported temporary suspension of development approval, the Petitioner submitted that the action of the 1st Respondent was not backed by any law and was therefore arbitrary and unlawful. It was contended that the 1st Respondent has no mandate to handle land ownership disputes. Further, the Petitioner submitted that no enforcement notice was ever issued to her under **Section 72 of the Physical and Land Use Planning Act, 2019**.

8. In regard to the preliminary objection by the Respondents, the Petitioner argued that the issue raised was a mere technicality. In her view, it did not qualify to be a preliminary objection as defined in **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**. She prayed that the court should not shut the door on her based on a legal technicality. She cited the case of **JSK vs VKW (2019) eKLR** to support her argument.

D. THE RESPONDENTS' SUBMISSIONS

9. The Respondents phrased two issues for determination and submitted in regard to each of the issues. On the aspect of whether the Petitioner's prayer for review met the threshold set by the law, the Respondents cited the provisions of **Section 80 of the Civil Procedure Act and Order 45 of the Rules**.

10. The Respondents submitted that the Petitioner's application was not based on discovery of any new matter nor premised on some mistake on the face of the record. The Respondents' view was that the Petitioner was challenging the merits of the ruling of the court and an attempt to have the court sit on appeal of its own ruling.

11. In their submissions, the Respondents relied on the case of **Grace Akinyi – v Gladys kemunto Obiri & Another [2016]eKLR** where Justice Ombwayo relied on the case of **National Bank of Kenya – v – Ndungu Njau (Civil Appeal No 2111 of 1996)** whereby the Court of Appeal held that a review may only be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The said error must be self – evident and should not require an elaborate argument to be established. It was further held that it is not sufficient ground for review that another Judge would have arrived at a different view of the matter nor was it a ground that the court had proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law.

12. The second issue that the Respondents phrased was whether the notice of preliminary objection was merited. They submitted that an application for review cannot subsist where a party has preferred an appeal against the same decision. The subsequent withdrawal of an appeal in the Respondents' view did not in any way cure the defect in the application. The Respondents pointed out that the Petitioner only withdrew the appeal after they filed their preliminary objection.

E. ISSUES FOR DETERMINATION

13. The court is of the opinion that the following issues arise for determination herein:

(a) *Whether the Respondents' notice of preliminary objection has merit.*

(b) *Whether the Petitioner's application has satisfied the grounds upon which an order for review may be granted.*

F. ANALYSIS AND DETERMINATION

(a) Whether the Respondents' notice of preliminary objection has merit

14. **Order 45 Rule (1) of the Rules** provides that a person aggrieved by a decree or order from which an appeal is allowed, **but from which no appeal has been preferred** may apply for a review of the decree or order to the court which passed the decree or made the order without unreasonable delay. The Respondents' preliminary objection was premised on this provision. They contended that the Petitioner had already preferred an appeal against the ruling of this court to the Court of Appeal by lodging a notice of appeal dated 30th September 2020 filed in court on 2nd October 2020.

15. The record of the court indeed shows that the Petitioner filed a notice of appeal dated 30th September 2020 that was lodged in court on the 2nd October 2020. The Petitioner gave notice that she intended to appeal to the Court of Appeal against the decision of Hon. Lady Justice M.C. Oundo delivered on the 30th September 2020.

16. Again the record shows that a notice of withdrawal of notice of appeal dated 6th November 2020 was filed in court on the 16th November 2020. The notice of withdrawal is expressed to have been made under the provisions of **Rule 81 of the Court of Appeal Rules**. All the parties in this matter acknowledge both documents in their respective submissions.

17. The question that the court must now consider is whether the Petitioner's application offends the provisions of **Order 45 rule 1 of the Rules**. It is not in doubt that the Petitioner had filed a notice of appeal expressing an intention to appeal against the ruling of Hon. Justice Oundo. However, whether prompted by the notice of preliminary objection by the Respondents or on her own volition, the Petitioner later withdrew the notice of appeal. The law allows withdrawal of a notice of appeal by notice in writing to all parties concerned. So, it is a matter of fact acknowledged by even the Respondents that the notice of appeal was indeed withdrawn. It is clear to all that the notice of appeal is no more.

18. By withdrawing the notice of appeal, the Petitioner pre-empted the Respondents' preliminary objection. The court agrees that an appeal once taken ousts review. But the Petitioner herein promptly moved and withdrew the notice of appeal. Accordingly, the Respondents' preliminary objection fails.

(b) Whether the Petitioner's application has satisfied the grounds upon which an order for review may be granted

19. The Petitioner's application is based on the premise that there are two errors apparent on the face of the record namely:-

(i) That the Petitioner's application dated 23rd October 2019 being part of a constitutional petition was brought under Order 51 of the Rules and Article 22 of the Constitution hence Order 53 of the Rules was not applicable.

(ii) That the Petitioner was not in breach of any physical planning or land use laws nor had she been issued with an enforcement notice as required under Section 72 of the Physical and Land Use Planning Act therefore Sections 32(d) and 5 of the Physical and Land use Act, 2019 cited in the ruling of this court do not apply.

20. In the case of *Nyamogo & Nyamogo Advocates – v – Moses K. Kogo [2001] 1E.A. 170* the Court of Appeal expounded on the meaning of an error apparent on the face of record.

“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 a 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 a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error on the face of the record. Again, if a view was 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 a ground for appeal.”

21. Similarly in the case of *National Bank Ltd – vs – Ndungu Njau [1997] eKLR* the court's opinion was that, a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self – evident and should not require elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter.

22. Applying the reasoning in the above cited cases and the provisions of the law – **Section 80 of the Civil Procedure Act and Order 45 (1) of the Rules**, the court is of the opinion that the Petitioner's application does not disclose any error apparent on the face of the record. In fact, what the Petitioner attempts through the supporting affidavit in support of the application is to bring to the fore, facts and evidence which she thinks the court ought to have considered differently. Further the Petitioner's application and submissions clearly question the Hon. Judge's exposition and understanding of the law as regards the application of the cited provisions of the law and the extent of the remedy of judicial review. Her submissions were that the court erred in law in holding that the Petitioner's application offended **Order 53 Rules 1, 2 and 3 of the Rules**.

23. The issues raised by the Petitioner may well be good grounds for an appeal but definitely not review. This court agrees with the holding in *National Bank Ltd – v – Ndungu Njau (1997)eKLR* that a perceived incorrect exposition of the law or misconstruing a statute or other provision of the law cannot be a ground for review.

G. CONCLUSION AND DISPOSAL

24. The upshot of the foregoing is that the court finds no merit in both the Respondents' preliminary objection and the Petitioner's application for review. Accordingly, the court make the following orders for disposal of the application:

(a) The Respondents' notice of preliminary objection dated 5th November, 2020 is hereby overruled.

(b) The Petitioners' notice of motion dated 26th October, 2020 is hereby dismissed.

(c) There shall be no order as to costs.

It is so ordered.

Ruling dated and signed in chambers at Nyeri and **delivered** via Microsoft Teams platform this **14th** day of **July 2021**.

In the presence of:

Mr. Karoki holding brief for Mr. Kimondo for the Petitioner

Ms Swaka holding brief for Mr. Muhuni for the Respondents

Court assistant - Wario

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Y. M. ANGIMA

ELC JUDGE