EPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION No. 7 OF 2020

JOHN NGIMOR & 554 OTHERS.....APPLICANTS

VERSUS

NORTHERN RANGELANDS TRUST & 3 OTHERS.....RESPONDENTS

RULING

1. Vide a ruling delivered by the court on the **25th March 2021 on the Applicants/Petitioners' application dated the 16th December 2021, seeking interim orders of injunction against the Respondents jointly and severally, the court held that the application was** partly merited and granted partial orders to the extent that:

> ***i. Pending the hearing and determination of the instant Petition a conservatory order is hereby issued restraining the respondents while acting under or pursuant to the document entitled "Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County" signed in December, 2019 between the 4th respondent and 1st - 3rd respondents from any further mapping surveying or delineation of community land and any importation of wildlife to or eviction of community members from the community land comprised in Endugh, Kasei, Sekerr, Masol, Lomut and Weiwei Wards within West Pokot County.***
>
> ***ii. This Petition raises substantial questions of law under Article 165 (3) (b) and (d) of the Constitution of Kenya 2010.***
>
> ***iii. The file record regarding this Petition shall be transmitted with utmost dispatch by the Deputy Registrar of this court to the Hon the Chief Justice for the empanelment in her discretion of a bench to hear and determine the main Petition in accordance with Article 165(4) of the Constitution.***
>
> ***iv. The costs of the application shall be in the cause.***

2. Following the granting of the said orders the Applicants/Petitioners have yet again filed another application dated the 7th October 2021 brought under the provisions of Section 3A and 80 of the civil procedure Act and Order 45 Rule 2 of the Civil Procedure Rules, citing an error apparent on the face of the ruling and seeking inter alia that the said ruling be amended to read as follows;

> ***'Pending the hearing and determination of the instant Petition a conservatory order is hereby issued restraining the Respondents while acting under or pursuant to the document entitled "Memorandum of Understanding for Collaboration in Conservation, Management, Sustainable Use of Natural Resources and to Promote Community Development Initiatives in West Pokot County" signed in December, 2019 between the 4th Respondent and 1st - 3rd Respondents from any further mapping, surveying or delineation of community land and any importation of wildlife to or eviction of community members from the community land comprised in Endugh, Kasei, Sekerr, Masol, Lomut and Weiwei Wards within West Pokot County and any other activity under the MOU.'***

3. The said application was supported on the grounds therein and the sworn supporting affidavit of John Ngimor the 1st Applicant/Petitioners herein dated the 7th October 2021.

4. The said application was opposed by the 1st -4th Respondents grounds of opposition dated the 13th October 2021 and 2nd November 2021 respectively.

5. Directions were subsequently taken that the said application be disposed of by way of written submissions to which the Applicants/Petitioners in support of their application a filed their written submissions dated the 26th October 2021 to the effect that pursuant to their application dated the 16th December 2021, that a ruling by the court delivered subsequently on the 25th March 2021 had omitted the words '**and any other activity under the MOU'** which had been the second prayer in their application, which the Applicants now seek that

the court reviews its ruling to include the omitted sentence herein above stated.

6. They based their arguments on three issue for determination hence;

i. The law on review of court orders and jurisdiction of court on slip rule.

ii. Whether the application satisfies the grounds for reviews.

iii. Whether the application is incompetent and an abuse of the court process or delayed.

7. On the first issue for determination the Applicants relied on the provisions of Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules as well as the decided case in **National Bank of Kenya vs Ndungu Njau - Civil Appeal No. 2111 of 1996** (sic) to submit that the court had inherent powers to review its decision and correct an apparent error where sufficient grounds for review are submitted, so as to give the effect to its manifest decision.

8. On the second issue for determination, the Applicants submissions is that pursuant to the provisions of Order 45 (sic) and the rules therein that the court had power to review its judgment or order on an application by a person upon 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.

9. That in the present instance, the activities relied upon by the Petitioners was information on the ***''Ustahimilivu program''*** which encompassed the vaccination of livestock and which information was outside their knowledge as it had happened on a later date and therefore would not be discerned or produced during the hearing of the application. That this program was based on the impugned MOU and therefore no new evidence was being adduced by the Petitioners who are apprehensive that the implementation of the specific action scheduled for implementation of the impugned MOU remained unknown to them and therefore ought to be injuncted accordingly.

10. It was their submission that there was an error apparent on the face of the record as they had sought that the court injuncts all the activities under the MOU. That the omission of the words ''**any other activity under the MOU''** undermined the intention of the court to maintain the status of pending the hearing and determination of the Petition.

11. The Applicant Petitioners further submitted that ''any other sufficient reason'' meant a reason sufficiently analogous to those specified in the rules. That they had therefore demonstrated to the satisfaction of the court that there had been discovery of new and important matter or evidence which was not within their knowledge and could not be provided at the time when the order to be reviewed was made.

12. On the last issue for determination, the Applicants/Petitioners submitted that the application had been brought in good faith, without prejudice and in the greater interest of justice; that the rectification of the order to include the words ''**any other activity under the MOU''** did not substantially or extremely vary the ruling of the court; that since the MOU was entirety the subject of the Petition, and any activity whatsoever pursuant to it ought to be injuncted; that unless the court amended its ruling, the entire proceedings would be rendered nugatory; that the Respondents jointly and severally would not be prejudiced in as far as their rights were concerned.

13. They further submitted that there was no delay in bringing the application as the actions complained against were ongoing and continuing; that following the ruling of the Court, the file was transferred to the office of the Chief Justice when there was no substantive Chief Justice; that the actions complained about continue to be done in secrecy and are only revealed through social media posts; that the application is sustainable in law and ought to be upheld.

1st, 2nd and 4th Respondents' submissions

14. The Respondents in their submissions in opposition to the Applicants/Petitioners' application and in reliance to their grounds of opposition framed their issue for determination to wit that there had been no error for rectification.

15. On this issue the Respondents submitted that there was no error whatsoever in the ruling on interim orders issued by the court for reasons that the court had issued conservatory orders which were specific and limited to ***"…any further mapping, surveying or delineation of community land and any importation of wildlife to or eviction of community members from the community land……..."*** **which reasoning was crystal clear to underpin the conservatory orders.**

16. That the Petitioners had adopted a tenuous, piecemeal and self-serving interpretation of the orders which was manifestly incongruent with the court's reasoning and findings on the scope of conservatory orders. That the Petitioners had by craft of innovative interpretation, erroneously imputed an intention upon the court to issue a catch-all conservatory orders simply because of the benevolent activities derived from the MOU they seek to assail.

17. The second issue for determination was the Respondents' submission that the Petitioners/Applicants sought that the court extensively reviews and substantially varies its ruling and orders whereas it lacked jurisdiction to do so under the slip rule; that Constitutional Petitions were *sui generis* litigation and therefore governed by the Constitutional of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and therefore the Petitioners' Motion ought to have been predicted on Rule 25 under which the court may discharge, vary or set aside conservatory orders; that the Petitioners' Motion was therefore misconceived and incompetent. Reliance was placed on amongst others, the decided case in Frederick Otieno Outa vs Jared Odoyo Okello & 3 Others [2017] eKLR to buttress their submissions.

18. The Respondents further opposed the application on the ground that it sought far reaching orders that would significantly alter the parties

rights and position on matters already canvassed and in respect of which the court was *functus officio*; that pursuant to the ruling of the court, the Respondents had planned and undertaken benevolent activities that the learned judge had adverted to in reliance to the orders; that the court should therefore be steadfast and certain in their decision; that the orders sought raise fresh and substantive legal questions concerning the rights of the parties which was argumentative and had already been settled by the conservatory orders, pending the hearing and determination of the Petition.

19. The Respondents further submitted that the Applicants/Petitioners were seeking a second bite at the cherry and that as their application was tantamount to an Appeal; that the extent of the court's power under the slip rule was limited to correcting obvious errors incapable of generating any controversy; that such errors must not change the substance of the ruling or alter the clear intention of the court. That the Petitioners on the contrary had raised fine points of interpretation, added fresh evidence and regurgitated the same alleged violation complained of in the motion by disguising it as a clerical error. The Respondents submitted that the court could not review, sit on appeal or substantively alter its own decision that any challenge to its ruling on adjudication must be taken to a higher court if the right is available.

20. The respondents averred that the Petitioners/Applicants did not plead or demonstrate any irreparable injury or harm if the orders sought were not varied and neither had they demonstrated that the benevolent activities the court in its wisdom had permitted, had transformed in character and/or were detrimental to the community.

21. Lastly, the Respondents submitted that the Applicants were guilty of inordinate and unexplained delay and did not deserve the courts discretion in their favour; that the ruling was delivered on 25th March 2021 wherein the current application was filed on 7th October 2021, approximately seven months later and only because it had become apparent that their threatened sanctions for alleged contempt of court would not obtain the required outcome of stopping any and all activities under the MOU including the benevolent initiatives permitted to continue with the court's sanction; that pursuant to the holding in the case of **Francis Origo & Another vs. Jacob Kumali Mungala [CA Civil Appeal No 149 of 2020]** the Court of Appeal had held that it was mandatory and essential for a party seeking a review to file the application without unreasonable delay. The Respondents urged the court to find that Applicants' application was wholly incompetent, misconceived, lacked merit and to dismiss it with costs.

4th Respondents' submissions.

22. The 4th Respondent relied on the holding in the case of **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** to submit that the Applicants herein sought for orders to amend the ruling of the honorable court delivered on 25th March 2021; that the provisions of Order 8 of the Civil Procedure Rules were clear in that a ruling cannot be amended but rather the pleadings; that the Applicant's application herein was therefore incompetent and an abuse of the court process.

23. The respondent's further submission was that parties were bound by their pleadings and that the Applicants herein sought to amend the ruling and not to review the same as envisaged in their submissions; that the court was alive and fully conscious of the orders termed herein "*as any other activities''* hence there was no apparent clerical mistake on the ruling. Thus they sought that the application to be dismissed with costs.

Determination.

24. This court has carefully considered the grounds in support of and against the application herewith as well as the submissions by both parties, the relevant law and authorities and the peculiar facts of this Petition. In our considered opinion the key issue that emerges for determination is w*hether the Applicant has satisfied the conditions set down for review of the court's orders as herein prayed.*

25. Order 45 Rule 1 of the Civil Procedure Rules, provides the circumstance under which an application for review of decree or Order may be brought and provides as follows: -

> ***"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 review of judgement to the court which passed the decree or made the order without unreasonable delay."***

26. Order 45 Rule 2 of the Civil Procedure Rules, under which the application is brought is clear as to whom the applications for review may be made to, and provides as follows;

> ***(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.***
>
> ***(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.***
>
> ***(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the***

Chief Justice may designate.

27. 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

28. From the above provisions, it is clear that whereas Section 80 of the Civil Procedure Act gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

> **i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;**
>
> **ii. on account of some mistake or error apparent on the face of the record, or**
>
> **iii. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.**

29. In order to appreciate the provisions of Order 45 of the Civil Procedure Rules and the reason given by the Applicants/Petitioners' to the effect that the court in its the ruling delivered on **25th March 2021**, inadvertently failed to include the words ***''and any other activity under the MOU''*** as per the prayers sought in their application, thereby undermining the intention of the court to maintain the status quo pending the hearing and determination of the Petition, we shall have to revisit the impugned court's ruling. It is not in contestation that before the court made its final determination, it had considered the matter as follows;

> *"I find that there is at least one vital question to be determined in this Petition as to whether the impugned MOU was subjected to public participation before its implementation, and, if not, whether any of the Petitioners' rights and fundamental freedoms under the constitution have been threatened or violated and whether the MOU should be declared unconstitutional and revoked. As stated earlier this court cannot make any definitive findings at this interlocutory juncture to avoid prejudice to the trial of the main Petition. Nevertheless, the Respondents' activities under the MOU are intended to be carried out, or to continue being carried out, on land which the Petitioners' claim to be unregistered community land governed by the CLA and therefore, however well-intentioned the Respondents are, the activities and their mode of execution must be tested for conformity to the Constitution and the statutes at the hearing of the main Petition. For example, while admitting that the suit land is unregistered community land, the 1st Respondent has also expressly admitted that there are plans for the 2nd and 3rd Respondents to provide for proposed wildlife sanctuaries in the future; however, it would appear that some of the professed actual and planned activities of the 1st and 4th Respondent bear some aspect of benevolence to the community that cannot be overlooked for instance, the improvement of access to water, health and education, promoting peace and security, combating illegal wildlife trade, measures for mitigating human wildlife conflict, and some aspects of conserving natural resources. These would be supplemental to the duties of the national and devolved governments; these are in the opinion of this court severable from the MOU; obviously, some can be undertaken by the 4th Respondent under its constitutional obligations even in the absence of any MOU whether with or without the external support from any other body. While considering the foregoing facts, what this court must therefore do at this interlocutory stage is to strike a balance and assert proportionality in determining what activities to permit or injunct……."*
>
> *In the light of the foregoing this court is therefore persuaded that there is need to issue conservatory orders in this matter pending the hearing and* ***determination of the instant Petition, and that only in so far as they will protect the community land in the areas mentioned in this Petition from any further mapping, delineation or surveying, eviction of residents and importation of any animals into the land which may threaten the rights of the Petitioners' over the land****.''(Emphasis ours)*

30. With this in mind, can we therefore say that there was an apparent error or omission on the part of the Court, in its ruling in not including the words *"**and any other activity under the MOU",*** and therefore the said ruling ought to be reviewed? The answer is definitely in the negative.

31. The Court of Appeal had the following to say in an application for review in the case of **National Bank of Kenya Ltd vs Ndungu Njau**. **[1996] KLR 469**

> ***"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 an 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. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for* review."**

32. The Court of Appeal further held that:-

> ***"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of***

incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).

33. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 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."*

34. Having looked at the reasons herein advanced by the Petitioners/Applicants seeking that this court reviews the ruling of **25th March 2021 so as to include the words** *"**and any other activity under the MOU''*** did not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules but amounted to seeking that the court alters its view in the determination of its ruling. The Petitioners'/Applicants' application to our understanding is that the court exercised its discretion wrongly in the case. An error on a substantial point of law stares one in the face, but in the present instance what the Petitioners/Applicants are terming as an error is something that requires an elaborate argument to be established in which case, the proper avenue to redress their grievance would have been to Appeal the decision. We therefore dismiss the application dated **7th October 2021** with costs to the Respondents.

DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 18TH DAY OF NOVEMBER 2021.

M.A ODENY

ENVIRONMENT & LAND COURT – JUDGE

M.C. OUNDO

ENVIRONMENT & LAND COURT – JUDGE

MWANGI NJOROGE

ENVIRONMENT & LAND COURT – JUDGE