



**Oyende v Shaiya (Environment & Land Case 54 of 2018)
[2025] KEELC 5210 (KLR) (13 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 5210 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 54 OF 2018**

**MD MWANGI, J
JUNE 13, 2025**

BETWEEN

STEPHEN TRUFIMO OYENDE PLAINTIFF

AND

MOHAMMED ABDILLAHI SHAIYA DEFENDANT

RULING

[In respect of the Notice of Motion dated 17th December 2024 seeking to review the judgement delivered on 5th November 2024]

Background

1. This ruling is in respect of the Plaintiff's Notice of Motion dated 17th December 2024 seeking to review the judgement delivered on 5th November 2024. The motion is principally brought under the provisions of Order 45 rule 1[b] of the Civil Procedure Rules. The Plaintiff/Applicant prays for an order that the Honourable Court to vary, set aside and or review the judgement of the court delivered on 5th November 2024. Further that judgement be entered in favour of the Plaintiff against the Defendant as pleaded in the plaint dated 17th April 2018 and the Defendant's counter-claim dated 2nd November 2018 be dismissed with costs.
2. The grounds upon which the application is premised on are on the face of the application and in the supporting affidavit of Stephen Trufimo Oyende sworn on 17th December 2024. The Applicant asserts that there is an error apparent on the face of the record. He points out that at paragraph 9 of its judgement, the court indicated that though counsel had said that they had filed submissions, it did not see any on record. However, both parties had indeed filed their submissions as per the court's directions.
3. The Applicant further points out that the court erroneously relied on the evidence of a "surveyor" who had admitted in his testimony that he was not a surveyor. His evidence was therefore inadmissible in



accordance with the provisions of the Evidence Act. Again, the Applicant averred that the court had in error associated the exhibits produced by the Defendant to be the Plaintiff's and treated them as such. Finally, the Applicant asserted that the court had addressed issues that were not raised by the parties especially the issue of acquisition of the property yet the main issue before the court was the location of each party's property on the ground.

4. The Defendant in spite of service did not respond to the application. It was therefore unopposed.

Issues for determination

5. The two issues for determination are whether the Plaintiff/Applicant has established the grounds for review and if so, whether he is entitled to the orders sought.

Analysis and determination

6. The circumstances under which a court can review its own decision is specified in Section 80 of the Civil Procedure Act as well as Order 40 Rule 1 of the Civil Procedure Rules. They include discovery of new and important matter or evidence, mistake or error apparent on the face of the record and sufficient cause.

7. In the case of *Nyamongo & Nyamongo v Kogo* [2001] EA 170, the court had this to say on an error apparent on the face of the record:

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un 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 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

8. *Mativo J* [as he then was] in *Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 [a Minor] & another [Interested Party]; Kingángá [Exparte] [Miscellaneous Civil Application 59 & 63 of 2019 [Consolidated]] [2021] KEHC 298 [KLR] [Judicial Review] [16 November 2021] [Ruling]*, cited with approval the Supreme Court of India's holding in the case of *Aribam Tuleswar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., [SCC p. 390, para 3] 1 [1979] 4 SCC 389: AIR 1979 SC 1047 to the effect that ‘an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The rationale behind this reasoning is that there is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.’



9. The learned judge concluded that,

“The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.”

10. An error contemplated under Order 45 Rule 1[b] must be such which is apparent on the face of the record and not an error which has to be fished out and searched. In other words, it must be an error of inadvertence. From the impugned judgement of the court, three errors stand out and stare me in the face;

- i. The parties submissions were on record but the court stated that it did not see any such submissions;
- ii. The ‘surveyor’ upon whose evidence the court heavily relied on was not a qualified surveyor; and
- iii. The court mistook the exhibits [mutations] produced by the Defendant to be the Plaintiff’s exhibits.

11. From the foregoing, this is an appropriate case for review; the errors highlighted by the Plaintiff/Applicant are errors apparent on the face of the record. The court hereby sets aside the judgement delivered on 17th December 2024.

12. The 2nd issue is whether judgement should be entered in favour of the Plaintiff against the Defendant as pleaded in the plaint dated 17th April 2018 and the Defendant’s counter-claim dated 2nd November 2018 be dismissed with costs. Whereas the court finds that this is an appropriate case of review, I am of the view that there is need to hear from the Land Registrar to enable it make a conclusive determination of the dispute between the parties in this case.

13. Consequently, this court exercising its discretion under section 22b of the Civil Procedure Act re-opens the case for purposes of taking the evidence of the Land Registrar – Kajiado. The court will accordingly issue witness summons to the Land Registrar – Kajiado to appear as a witness on a date to be issued by the court and to produce the parcel files for the two parcels, the subject matter of this suit being L.R No. Kajiado/Kaputiei -North/17352 and L.R No. Kajiado/Kaputiei -North/5932. The parties will be at liberty to cross-examine the Land Registrar.

14. The costs of the application shall be in the cause.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 13TH DAY OF JUNE 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:



Mr. Muriithi h/b for Mr. Ondabu for the Plaintiff

N/A by the Defendant

Court Assistant: Mpoye

M.D. MWANGI

JUDGE

