

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELC CASE NO.E013 OF 2022

DAMARIS WANJUGU WANYOIKE (Suing for and on behalf of the estate of MWANGI NJAGI).....PLAINTIFF/APPLICANT

-VERSUS-

GLADYS WANJIKU NDIRANGU.....RESPONDENT

AND

KATHERINE WANJIKU.....1ST INTERESTED PARTY/APPLICANT

KENYA NATIONAL

HIGHWAY AUTHORITY.....2ND INTERESTED PARTY

THE HON. ATTORNEY GENERAL.....3RD INTERESTED PARTY

R U L I N G

1. Before the Court is the Notice of Motion dated 1st March 2024, seeking the following **ORDERS:**

1. **Spent.**

2. **Spent.**

3. **THAT this Honourable Court be pleased to review, vary and/or set aside the ruling of the Court delivered on 19th January 2024, and specifically the order allowing prayer no.2 of the Plaintiff's application dated 7th June 2022.**

4. **THAT the costs of this application be provided for.**

2. The application is supported by the Affidavit of Katherine Wanjiku Wachira, the 1st Interested Party/Applicant and the grounds on the face of the application. The Applicant states that the Hon. Justice Olola J delivered a

Ruling on 19th January 2024 without notice of delivery to her Counsel. She was therefore unable to plan to take action on the outcome of the Ruling. On 24/2/2024, she sent her representative to get her animal feed from the suit property, and he was informed that there was a court order restraining her from dealing with the suit property.

3. The Applicant called her advocate immediately to inquire about the matter, but he found out from the registry that a ruling was delivered and that the court had issued an injunction.
4. It was deposed by the Applicant that she has been in possession and use of the suit parcel of land for over 20 years where she has planted crops. She claims that the effect of the court order was to deny her the right to access the property and her crop, which is in danger of wasting away. She claims that she holds title to the land as an administrator of the estate of her late husband, in whose name the suit land is still registered, and the title has not been revoked.
5. The Applicant states that the order of the court was made at an interlocutory stage when the substantive suit had not been heard, yet she has been restrained from dealing with the property. She further states that the Plaintiff was fully aware of the purchase of the suit plot by the Applicant, but did not disclose to her as an interested party the existence of the suit to enable her to participate in the same.
6. She added that searches conducted on the property did not disclose any prohibition on the title, in which case, her late husband cannot be faulted for having purchased the property and that he was a necessary party to the suit.
7. As such, the Applicant believes that there is sufficient ground for the court to review its decision and vary the orders to allow the Applicant access and possession of the property pending the determination of the dispute.

The Plaintiff's Grounds of Opposition

8. In response to the Interested party's application, the Plaintiff/Respondent filed grounds of opposition dated 18th June 2024 stating that:
 1. **THAT the 1st Interested Party/Applicant's application dated 1st March 2024 is incompetent, fatally defective and inadmissible, and the same ought to be dismissed forthwith.**
 2. **THAT the Plaintiff/Respondent's application dated 7th June 2022 was conclusively determined by this Honourable Court.**
 3. **THAT in the circumstances, this Honourable Court has no jurisdiction to entertain the 1st Interested Party/Applicant's application as it has become functus officio having fully discharged its duty in the matter.**
 4. **THAT the 1st Interested Party/Applicant has not moved the court within a reasonable time for reasons that the ruling was entered on 19th January 2024, and the Applicant did not prefer an appeal against said ruling.**
 5. **THAT if the Applicant was dissatisfied with the court's decision in the Plaintiff/Respondent's application dated 7th June 2022 by Hon. Justice J.O. Olola, the correct approach should have been an appeal.**
 6. **THAT the application is a gross abuse of court process and should be dismissed with costs.**

The 1st Interested Party/Applicant's Submissions

9. Counsel for the interested party/Applicant gave a brief background of the instant application, stating that the Plaintiff/Respondent filed an application dated 7th June 2022, seeking temporary orders of injunction preventing the 1st Interested Party from dealing with the suit property, LR Kinyu/Baricho/1393, measuring 0.40Ha pending the hearing and determination of this suit.

10. The Applicant highlighted that the Plaintiff had averred that the suit property was initially owned by one Mwangi Njagu, and that sometime in 1980, one Meshack Mbogo Wambugu filed a case, being Nyeri RMCC No.214 of 1980, claiming purchaser's interest, and a ruling was delivered sometime in 1980 in favour of the said Meshack Mbogo, and the suit property was transferred to him.
11. The Applicants averred that the said Meshack Mbogo then transferred the property to other third parties, and that the property was subsequently registered to one Duncan Wachira Kabethi, the 1st interested party's husband, in 1997. The aforesaid original owner, Mwangi Njagu, filed an appeal in the High Court, whose decision of appeal overturned the decision of the lower court, reverting the property to the deceased Mwangi Njagu. This judgment was delivered on 15th February 2018 and was the basis for the Plaintiff's application dated 7th June 2022.
12. Counsel for the Applicant highlighted that this Court delivered the impugned Ruling on 19th January 2024 without notice to the Applicant, and she was unable to take the appropriate action regarding the ruling. Counsel stated that the ruling amounted to restraining the Applicant from accessing the property; effectively evicting her despite Duncan Wachira (Deceased) having both proprietary rights and physical possession of the property for a period of 20 years.
13. Counsel submitted on 2 issues for determination, being whether the Ruling dated 19/1/2024 is not interlocutory in nature but amounts to a decree. The 2nd issue is whether the court should stay, review, vary or set aside its Ruling of 19/1/2024. Counsel's submission is that by seeking to restrain the Applicant, the Plaintiff, in essence, was seeking a mandatory injunction. Counsel relied on the authority of **Peter Mwangi Mwaura vs. Geoffrey**

Kamau Waweru(2018)eKLR, where the court held that a Court should not grant a conclusive determination of a dispute at an interlocutory stage.

14. The Applicant's submission is that the question of ownership of the suit property can only be determined after a full hearing, and that the interlocutory orders have resolved this dispute prematurely.
15. The Applicant submits that, to safeguard the competing interests over the suit land until the case is heard and determined, an order to maintain the status quo would be more appropriate, as was issued in the case of **Joel Kipkurui Arap Koech v. Alice Wambui Magandu & 3 others(2018)eKLR**.
16. Counsel also submitted that the late Duncan Wachira acquired the suit property from a third party, and not from the Plaintiff, but was not included as a party in **HCCA No.239 of 1990, Mwangi Njanu vs Meshack Mbogo Wambugu**. It is submitted that the principle for granting a mandatory injunction is that there must be special circumstances. Counsel relied on the following authorities on this: **Kenya Breweries Ltd & Another vs. Washington O. Okeyo (2002)eKLR, Nation Media Group & 2 others vs John Harun Mwau(2014)eKLR, Mawe Mbili Ltd vs. Standard Chartered Bank of Kenya Ltd & Another(2020)eKLR, Kimani v. Kenyatta University & Another(2024)KEHC 253KLR**.
17. Counsel also highlighted that this Court noted in its ruling that *“the suit property has remained in the hands of the 1st Interested party for an incredible period of time”*, which amounts to *status quo ante* that cannot be justified at this interlocutory stage as there are no special circumstances or evidence for the same.
18. Counsel quoted Order 45 of the Civil Procedure Rules 2010 on the parameters for reviewing an order, and submitted that there is a clear error apparent on the face of the record, which warrants this Honourable Court's intervention.

They relied on the authorities of: Muyodi vs Industrial and Commercial Development Corporation & another(2006)1EA 243, Stephen Wanyoike Kinuthia(suing on behalf of John Kinuthia Marega(Deceased)) vs Kariuki Marega & another (2018)eKLR, Paha Enterprises Limited v. Kenya Alliance Company Limited(2024)KEHC 5185(KLR)

19. It was concluded that the Courts have judicial discretion to review injunctive orders where their effect creates unreasonable/unjust outcomes, as in this case, since the Plaintiff, who was not in possession of the suit property, cannot usurp the Applicant's proprietary rights at an interlocutory stage.
20. Counsel added that the application has been made without unreasonable delay, as the Applicant acted promptly upon becoming aware of the ruling since it was delivered without notice and submitted that the costs of this application follow the event as per Section 27(1), while urging the Court to grant the orders sought with costs.

The Plaintiff/Respondent's Submissions

21. Counsel for the Plaintiff/Respondent filed submissions in opposition to the application. They submit that the suit property was family land owned by the late Mwangi Njagu and has a long history of litigation dating back to 1980 when Meshack Mbogo Wambugu (now deceased), filed a case being Nyeri RMCC No 214 of 1980 claiming purchaser's interest against the late Mwangi Njagu. The trial court rendered judgment in Nyeri RMCC No 214 of 1980 confirming that the late Meshack Mbogo Wambugu was the rightful owner of the suit property. The late Mwangi Njagu lodged an appeal (High Court Civil Appeal No. HCCA No. 239 of 1990) against the judgment of the lower court.
22. That after a protracted dispute at the High Court of Kenya in Nairobi, Justice A. Mbogholi Msagha delivered a judgment on 15th February 2018 allowing

the appeal and setting aside the judgment of the lower court. The net effect of the judgment was that ownership of the suit property reverted to Mwangi Njagu (deceased).

23. However, in the intervening period before the appeal had been determined, Meshack Mbogo Wambugu transferred the suit property to third parties, including the 2nd interested party herein, with a view to defeating justice. The 1st interested party encroached on and demolished a building that was constructed by the Plaintiff on the suit property and began fencing the property with the intention to develop it. Soon after, the 2nd interested party herein commenced the process of compulsorily acquiring a section of the suit property and declared via gazette notice No 7661 that it intends to compensate the 1st interested party. This prompted the Plaintiff/Applicant to file the application dated 7th June 2022 seeking restraining orders against the Applicant.
24. The Plaintiff/respondent highlighted that the 1st Interested Party/Applicant herein was aware and fully participated in the hearing and determination of the Plaintiff's Application dated 7th June 2022, whose ruling was delivered by the Honourable Justice Olola on 19th January 2024. It is their submission that the 1st Interested Party claims that she is unsatisfied with the Ruling delivered by Justice Olola, but did not file an appeal against the said Ruling, instead of filing an application for review.
25. Counsel referred to Section 80 of Order 45 Rule 1 of the Civil Procedure Rules, 2010 of the Civil Procedure Act, submitting that it is trite law that review proceedings ought not to be used as an alternative to an appeal. Counsel relied on the authorities in the following cases:

Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018, Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243
Telkom Kenya Ltd v John Ochanda (suing on his behalf and on behalf of 996 former Employees of Telkom Kenya Ltd, mission & 3 Others [2013] eKLR

26. The Plaintiff submits that the 1st Interested Party's allegation that the crops which were on the farm will be wasted is not true since the same were harvested before the determination of this application on mutual consent of the parties, and that the issue is now spent.
27. The Plaintiff, therefore, holds the view that if this Honourable Court determines this matter by setting aside the orders of 19th January 2024, it would be sitting on appeal on its own ruling. The court, having made a reasoned determination on the issues before it, could not reopen deliberation on its directions, submitting that the Court is now *functus officio* on the matter.
28. With regards to the fact that no notice was served giving notification of the delivery of the Judgment on the said 19th January 2024, the Plaintiff submits that nothing in law would have prevented the Applicant herein from seeking to file an appeal out of time.

Analysis and Determination

29. The Court has considered the instant application dated 1st March 2024, the reply and submissions by Counsel. The application seeks to review, vary and/or set aside the Ruling of this Court delivered on 19th January 2024 by

J.O. Olola J., and specifically the order allowing Prayer No.2 of the Plaintiff's application dated 7th June 2022.

30. The Plaintiff's application dated 7th June 2022 sought the following orders:
- 1) **THAT the matter be certified urgent and ex parte orders do issue in the first instance.**
 - 2) **THAT this Honourable Court be pleased to issue temporary orders preventing the 1st interested party and her servants, employees or agents from encroaching, alienating or in any way dealing with all that property known as Land Reference No. Konyu/Baricho/1393 (the suit property) measuring 0.40Ha, pending the hearing and determination of this suit.**
 - 3) **THAT this Honourable Court be pleased to grant a temporary injunction preventing the 2nd interested party from paying out compensation relating to the suit property to the 1st Interested Party, her agents and/or servants.**
 - 4) **THAT the costs of and incidental to this application be provided for.**
31. The 1st and 2nd Interested Parties filed Replying Affidavits sworn on 30th September 2022 and 19th April 2023, respectively. Thereafter, the Plaintiff filed a further Affidavit sworn on 3rd May 2023. The Court delivered its Ruling on 19th January 2024, in which only Counsel for the Plaintiff made an appearance. In the Ruling, J.O. Olola J observed that on 16th September 1985, the Magistrates' Court made a determination that Meshack Mbogo Wambugu was the owner of the suit property. An Appeal, being Nairobi HCCA No.2397 of 1990, was preferred against the trial court's determination. However, immediately after the determination by the lower court, the suit property was

transferred to the said Meshack Mbogo Wambugu, who then transferred it to third parties during the pendency of the appeal.

32. The Learned Judge observed that the 1st interested party asserted that the suit property was purchased by her husband, the late Duncan Wachira Kabethi, on 1st August 1997 from one Michael Kareri Kanyotu, but it was unclear how this was done when the Appeal was still undetermined. The Judge was satisfied that the Plaintiff had fulfilled the requirements for the grant of an injunction and allowed the application in terms of Prayers Number 2 and 3.
33. The statutory provisions that govern orders of review and setting aside are Section 80 of the Civil Procedure Act, CAP 21 and Order 45 of the Civil Procedure Rules, 2010. Section 80 of the Act provides that:

“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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit”

34. Order 45 Rules 1 of the Civil Procedure Rules provides that:

“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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

35. In the case of Ganijee Glass Mart Ltd (In Receivership) & 2 Others V First American Bank (K) Ltd & 2 others [2010] eKLR, the Court quoted the finding in Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243 as follows:

“In Nyamogo and 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 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 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 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 for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

36. Mativo J's decision (as he then was) in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** elaborated the principles of review to the effect that:

“My finding is fortified by the holding in the case of Evan Bwire vs Andrew Nginda, where the court held that 'an application for review will only be allowed on very strong grounds, particularly if its effect will amount to re-opening the application or case afresh. The principles which can be culled out from the above-noted authorities are:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.*
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record, justifying exercise of power under Section 80.*
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for*

declaring the initial order/decision as vitiated by an error apparent.

- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detailed examination. In the present case, the petitioner has not been able to point out any error apparent on the face of the record.*
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof, and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.*
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”*

37. In the present case, the Applicant’s claim is that there was an error apparent in the face of the Ruling of 19th January 2014. She argues that the court was in error in issuing an order of interlocutory injunction, well knowing and

acknowledging that she was the person in possession of the suit land. She claims that the orders issued were tantamount to a mandatory injunction to evict her from the suit property.

38. The Court has looked at the Replying Affidavit, the Applicant herein filed in opposition to the application dated 7th June 2022 and the Ruling of the court dated 19th January 2024. The court is of the view that all the issues raised in the present application were raised in the Replying Affidavit. In the Court's view, the Honourable Justice J.A. Olola J considered all the necessary elements for the issuance of an injunction. In particular, the Judge was well aware of the previous cases Nyeri RMCC 214 of 1980 and HCCA 239/1990 and the judgments entered therein. The Judge was also aware of the fact that neither the 1st Interested Party nor her deceased husband was a party to the earlier suits. The Judge was also aware and considered the claim that the Applicant herein held the title deed to the suit land and was in possession of the land.
39. There is nothing to indicate that the Learned Judge J.O. Olola J made an error in making the Ruling dated 19th January 2024. He reviewed the facts of the case, the law and exercised discretion. This Court is well aware that no two courts will exercise their discretion in the same manner.
40. The Judge concluded that the Applicant had established a *prima facie case* with a probability of success. He also concluded that the Plaintiff stood to suffer irreparable loss as the suit property remained in the hands of the 1st Interested Party and thus allowed the application.
41. The court is not convinced that there is a mistake or an error apparent on the face of the record as was defined in the above-cited authorities, **Muyodi v Industrial and Commercial Development Corporation** and **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya** (supra). The

courts are in agreement that the error envisaged under Order 45 of the Civil Procedure Rules means a mistake or an error, which is prima-facie visible and does not require any detailed examination.

42. Further, the Applicant has not been able to point out any error apparent on the face of the record on a substantial point of law that stares one in the face, on which there could reasonably be no two opinions.
43. What the court sees is that the Applicant was dissatisfied with the decision of the court in the ruling of 19th January 2024, and she seeks to overturn it. As was found in the above-cited authority of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya** (supra), this court finds that the mere fact that the Applicant believes that the orders made were erroneous does not entitle her to an order of review. The court in the above case stated that ***“An erroneous order/decision cannot be corrected in the guise of exercise of power of review”***.
44. In the Court's view, making the orders sought in the present application would be akin to this Court sitting on Appeal on its own decision. Mativo J(as he then was) in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR)** found that:

“A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. 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.

45. The Judge further stated that:

“To put it differently, an order, 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.”

46. From the foregoing, the Court finds that the application dated 1st March 2024 lacks merit and it is hereby dismissed. Costs of this application shall abide the outcome of the main suit.

Delivered, Dated and Signed at Nyeri on 14th the day of October, 2025

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

Ms. Kendi - Court Assistant

Onyango for the 1st Interested Party/Applicant

Situma for the Plaintiff/Respondent.

No attendance for the 2nd & 3rd Respondents