



**Munywoki v Kaloki & another (Civil Miscellaneous Application
23 of 2008) [2024] KEMC 27 (KLR) (10 July 2024) (Ruling)**

Neutral citation: [2024] KEMC 27 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
CIVIL MISCELLANEOUS APPLICATION 23 OF 2008
CN ONDIEKI, PM
JULY 10, 2024**

BETWEEN

KAMENE MUNYWOKI APPLICANT

AND

MUTUKU KALOKI 1ST RESPONDENT

VERONICA WATHOME KALOKI 2ND RESPONDENT

RULING

1. The Application before me is rare. It arises once in a blue moon. Man is to error. Conversely, error is to man. The basic philosophy inherent in the power and concept of amendment of Judgments, Rulings, Orders and Decrees, is driven by human fallibility, acknowledgement of frailties inherent in human nature and possibility of perversion that may lead to miscarriage of justice. And as Lord Atkin so elegantly put it in *Ambard v Attorney General for Trinidad and Tobago* (1936) AC 322, at page 35, “Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

Part II: The Applicants’ Case

2. On 30th January 2024, the Applicant filed a Notice of Motion dated 24th January 2024 – based on section 99 of the *Civil Procedure Act*- primarily seeking amendment of the order of the Court (by Hon. M.O. Okuche) which was issued on 13th August 2008, adopting the finding of the Land Disputes Tribunal at Yatta, directing the Registrar of Lands Machakos to nullify the title deed of Matuu/ Ikatini 1106 bearing the name of Munini Kaloki and transfer the property to Kamene Munywoki, by specifically stating its title number.
3. This Application is predicated on the grounds set out on the face of the Motion and the Supporting Affidavit sworn by the Applicant on 24th January 2024.



4. On the face of the Motion, the Applicant claims that after the dispute was decided in favour of the Applicant by the said Tribunal, it was adopted by the Court on 13th August 2008. It is averred that unfortunately, the order which was issued by the Tribunal failed to state the title number of the suit property. It is averred further that the order which adopted the decision also failed to make mention of the title number of the suit property, rendering it difficult to be enforced by the said Land Registrar.
5. In the said Supporting Affidavit, the substance of the motion is rehashed. The Applicant exhibited a copy of proceedings and Ruling of the said Tribunal marked KM1; and a copy of the order of Hon. M.O. Okuche marked KM2.
6. In her Further Affidavit dated 24th April 2024, the Applicant deposes that the said order which was adopted by the Court has never been set aside by the Court and thus enforceable. It is reasoned that the said Appellate Tribunal had no jurisdiction to set aside the order of the Court.
7. In her written submissions dated 30th April 2024 and filed on even date, learned Counsel Ms. Metto, instructed by the Firm of Messieurs Waithaka & Muthusi Advocates, for the Applicant, submits that the facts upon which the Application is premised are undisputed.
8. It is submitted that this Court has jurisdiction to amend the said order, under section 99 of the *Civil Procedure Act*, based on the slip rule. In this connection, reliance is placed upon *Fredrick Otieno Outa v Jared Odoyo Okello & 3 others* [2017] eKLR; *Republic v Attorney General & 15 others Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR; *Newmont Yandal Operations PTY Ltd v The J. Aron Corp & The Goldenman Sachs Group Inc* [2007] 70 NSWLR 411; *Lakhamshi Brothers Ltd v R. Raja & Sons* [1966] EA 313; and *Steve Onyango v Techspa General Supplies Ltd & 2 others* [2020] eKLR.
9. It is finally urged that there is no limitation of time in respect to the power of amendment, citing *Steve Onyango v Techspa General Supplies Ltd & 2 others* [2020] eKLR, to buttress this proposition.

Part III: The Respondents' Case

10. The Application is opposed. In their joint Replying Affidavit sworn on 12th February 2024 and filed on even date, the Respondents depose that the this Application is frivolous, vexatious, scandalous and an abuse of the Court process. It is deposed that the suit property (Matuu/Ikatini/1106) belongs to Lusia Munini Kaloki (deceased), the Respondents' biological mother and that it was allocated to the Respondents and their siblings and is subject to succession. It is deposed that the Applicant was allocated her own piece of land separately.
11. The Respondents depose that they lodged an appeal against the said order of the Yatta Land Disputes Tribunal and it was ultimately set aside by The Eastern Province Provincial Land Appeals Tribunal on 5th November 2010, in Appeal No. 77 of 2008. In this connection, a copy purported to be the decision of the said appellate Tribunal is exhibited marked MK1.
12. In his written Submissions dated 14th May 2024 and filed on even date, learned Counsel Mr. Mwangela instructed by the Firm of Messieurs Joseph Mwangela & Company Advocates, representing the Respondents, reiterates the substance of the Replying Affidavit.
13. For the Respondents, it is submitted that since the Applicant failed to lodge an appeal in the High Court within 60 days prescribed by section 8(9) of the Land Disputes Tribunal Act (in force then but now repealed), the said decision of the said decision of The Eastern Province Provincial Land Appeals Tribunal on 5th November 2010, in Appeal No. 77 of 2008, stands.



14. Reliance is placed upon *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR; *Joseph Malakwen Lelei & another v Rift Valley Land Appeals Committee & 2 others* [2014] eKLR; and *M'Marete v Republic & 3 others* [2004] eKLR.

Part IV: Points for Determination

15. Gleaning from the Notice of Motion; the Replying Affidavit; and the rival written Submissions, this Court has distilled only one issue for determination: whether this Application meets the threshold for amendment of the Order of the Court dated 13th August 2018.

Part V: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

16. I now embark on analysis of the law, examination of facts, evaluation of evidence and determination of the only question namely whether this Application meets the threshold for amendment of the Order of the Court dated 13th August 2018.
17. What are the grounds of amendment of a Judgment, Ruling, Decree or Order of the Court? There are two broad classes of grounds which can necessitate an amendment of a Judgment, Ruling, Decree or Order of the Court. First, a clerical or arithmetical mistake in the judgment, ruling, decree or order. Second, an error arising from any accidental slip or omission. See section 99 of the *Civil Procedure Act*.
18. The said section 99 embodies the slip rule, a brainchild of the common law.
19. Typically, once a Court renders a Judgment or Ruling or issues an order or decree, it becomes functus officio, apart from review, the slip rule is one of the key exceptions. See *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR, where the Court rendered itself as follows: “27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and Application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the Court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section. 28. Some of the Applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on. The Australian Civil Procedure has provisions in pari materia with section 99. As was stated in the case of *Newmont Yandal Operations Pty Ltd v The J. Aron Corp & The Goldman Sachs Group Inc* [2007] 70 NSWLR 411, the inherent jurisdiction extends to correcting a duly entered judgment where the orders do not truly represent what the Court intended. 29. Nearer home the predecessor of this Court in *Lakhamshi Brothers Ltd v R. Raja & Sons* [1966] EA 313 endorsed that Application of the rule, that is, to give effect to the intention of the Court when it gave its judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted. Spry JA in *Raniga Case* (supra) also stated as follows: - A Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. 30. What is certainly not permissible in the Application of section 99, is to ask the Court to sit on appeal on its own decision, or to redo the case or Application, or where the amendment requires the exercise of an independent discretion, or if it involves a real difference of opinion, or requires argument and deliberation or generally where the intended corrections go to the substance of the judgment or order.”



20. The purpose of the slip rule is to give effect to the intention of the Court when Judgment or Ruling or Order or decree was rendered. It follows that the test and threshold of this rule is that a Court should only invoke it whenever it is fully satisfied that it will give effect to the intention of the Court at the time when judgment or ruling or order or decree. In the Court of Appeal of East Africa decision in Vallabhdas *Karsandas Raniga v Mansukhlal Jivraj and others* [1965] 1 EA 700, Newbold V-P, Duffus & Spry JJA pronounced themselves as follows: “A Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, we feel no doubt that if the facts had been before the Court when judgment was given on the appeal, the Court would, on Application or indeed of its own motion, have made the order for refund now sought, which was, in our opinion, necessarily consequential on the decision on the main issues.”
21. A year after the Raniga decision, the Court of Appeal of East Africa rendered a decision in *Lakhamshi Bros Ltd v R Raja & Sons* [1966] 1 EA 178, where Duffus Ag VP, Spry and Law JJA, clarified the essence of the slip rule further as follows: “Quite apart from the Chemelil case (1) there is also another decision by this Court which has been reported, that is the case of *Raniga v. Jivraj* (2), given on an Application to remedy a mistake or omission in a judgment of this Court. Indeed, there has been a multitude of decisions by this Court, on what is known generally as the slip rule, in which the inherent jurisdiction of the Court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the Court is asked in the Application subsequent to judgment to give effect to the intention of the Court when it gave its judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted.”
22. The Supreme Court of Kenya (hereinafter “the SCORK”) adopted the purpose, test and threshold which was laid down in the said Raniga decision. See [Outa v Okello & 3 others](#) (Petition 6 of 2014) [2017] KESC 25 (KLR) (24 February 2017) (Ruling) {also cited by NCLR as [Fredrick Otieno Outa v Jared Odoyo Okello & 3 others](#) [2017] eKLR}, at paragraphs 85 & 86; and [Kenya Bureau of Standards v Geo Chem Middle East](#) (Application 33 of 2020) [2021] KESC 60 (KLR) (17 March 2021) (Ruling) (also reported by NCLR as [Kenya Bureau of Standards v Geo Chem Middle East](#) [2021] eKLR).
23. This slip rule has an exclusive standard of proof, ‘beyond doubt’. In the other words, the satisfaction aforesaid should be beyond doubt that upon invoking the rule, the Court should be satisfied beyond doubt that it will give effect to the intention of the Court at the time when judgment or ruling or order or decree. See the said Raniga decision where Newbold V-P, Duffus & Spry JJA held that “A Court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the Court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made had the matter been brought to its attention. In the present case, we feel no doubt that if the facts had been before the Court when judgment was given on the appeal, the Court would, on Application or indeed of its own motion, have made the order for refund now sought, which was, in our opinion, necessarily consequential on the decision on the main issues.”
24. However, cautionary principles have been laid to guide this rule. The first cautionary principle was subject of an in-depth discourse by the SCORK in [Outa v Okello & 3 others](#) (Petition 6 of 2014) [2017] KESC 25 (KLR) (24 February 2017) (Ruling) {also cited by NCLR as [Fredrick Otieno Outa v Jared Odoyo Okello & 3 others](#) [2017] eKLR}, while interpreting the purport of a similar provision namely section 21(4) of the [Supreme Court Act](#), which provides that “Within fourteen days of delivery of its Judgment, Ruling or Order, the Court may, on its own motion or on Application by any party



with notice to the other or others, correct any oversight or clerical error of computation or other error apparent on such Judgment, Ruling or Order and such correction shall constitute part of the Judgment, Ruling or Order of the Court.” The first principle that while exercising the power reposed by slip rule, a trial Court should avoid the temptation of constituting itself as an appellate Court or a review Court. In other words, the Court should be alive to the grounds which inform either an appeal or a review, and avoid falling for them. The SCORK rendered itself as follows at paragraphs 85 & 86: “85. This Section as quoted, embodies what is ordinarily referred to as the “Slip Rule”. By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it. Indeed, as our comparative analysis of the approaches by other superior Courts demonstrates, this is the true import of the Slip Rule. 86. We therefore hold that, Section 21(4) of the *Supreme Court Act*, does not confer upon this Court, jurisdiction, or powers, to sit on appeal over its own Judgments. Neither, does it confer upon the Court, powers to review any of its Judgments once delivered, save to correct any clerical error, or some other error, arising from any accidental slip or omission, or to vary the Judgment or Order so as to give effect to its meaning or intention. Indeed, any corrections made pursuant to this section become part of the Judgment or Order as initially rendered. The main purpose therefore, of Section 21(4) of the *Supreme Court Act*, is to steer a Judgment, decision, or Order of this Court, towards logical, or clerical, perfection.” The SCORK restated this principle in *Kenya Bureau of Standards v Geo Chem Middle East* (Application 33 of 2020) [2021] KESC 60 (KLR) (17 March 2021) (Ruling) (also reported by NCLR as *Kenya Bureau of Standards v Geo Chem Middle East* [2021] eKLR).

25. It follows, therefore, that the remit of the slip rule power is decidedly restrained. It should not be deployed to extensively review the decision or order or decree in a magnitude that substantially alters it. In this connection, while applying the said cautionary principle and interpreting a similar provision applicable in the Court of Appeal namely Rule 35 of the *Court of Appeal Rules* in *Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another* [2019] eKLR, the Court of Appeal (Okwengu, Sichale & Kantai, JJA) rendered themselves as follows: “As we have stated, the Supreme Court while considering a slip rule under a provision of the *Supreme Court Act* found that the slip rule did not confer upon any Court jurisdiction or powers to sit on appeal over its own judgment or to extensively review such judgment as to substantially alter it. The Court of Appeal Rules, particularly Rule 35 thereof allows for correction of errors in the same manner and in a similar situation as the said provision of the *Supreme Court Act*. The slip rule does not allow or permit a Court to give an order which alters the judgment or orders made earlier. It is for purposes of correcting clerical errors and giving effect to the judgment of the Court. The total effect of the 2nd Ruling was to take away rights that had been granted to the appellant in the Ruling delivered on 28th May, 2017. The learned Judge had no jurisdiction or power in the Application for review to give orders that substantially altered the said orders. The effect of Ruling No. 2 was that the learned Judge sat on appeal against his earlier orders, something that the law did not allow him to do.” Also, in *Lakhamshi Bros Ltd v R Raja & Sons* [1966] 1 EA 178, Duffus Ag VP, Spry and Law JJA, stated that “The circumstances, however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the Court is asked in the Application subsequent to judgment to give effect to the intention of the Court when it gave its judgment or to give effect to what clearly would have been the intention of the Court had the matter not inadvertently been omitted.” See also *Republic v Attorney General & 15 others, Ex-Parte Kenya Seed Company Limited & 5 others* [2010] eKLR.



26. The slip rule is unaffected by limitation of time. See [Steve Onyango v Techspa General Supplies Ltd & 2 others](#) [2020] eKLR, where the Court reasoned that the operative words applied are “at any time”.
27. See also [James Mwashori Mwakio v Kenya Commercial Bank Ltd](#) [1998] eKLR; [Musembi & 13 others \(Suing on their own behalf and on behalf of 15 residents of Upendo City Cotton village at South C Ward, Nairobi\) v Moi Educational Centre Co. Ltd & 3 others](#) (Application EO19 of 2021) [2022] KESC 19 (KLR) (Civ) (19 May 2022) (Ruling); [Mwangi v Kenya Commercial Bank Ltd](#) (Commercial Case 552 of 2003) [2024] KEHC 3283 (KLR) (Commercial and Tax) (21 March 2024) (Ruling); [Peter Maina Munina v Anne Wanjiru Wachira \(Suing as Attorney of Samuel Nduati Njuguna\)](#) [2021] eKLR; [Diploy Plastics Limited v Kennedy Onwonga Mokaya](#) [2019] eKLR; [Nyakinyua and Kange’ei Farmers Company Limited v Kariuki and Gatecha Resources Limited](#) [1983] eKLR, *et alia*.
28. Having discussed the broad principles, this Court now proceeds to determine the question in that context.
29. This Court has read the proceedings and the final order of the said Yatta Land Disputes Tribunal, it is discernible from the proceedings that the land in dispute was Matuu/Ikatini/1106. However, this title number was not captured in the final order, apparently by omission.
30. Whereas it is without doubt that the omission has surmounted the threshold and test of the slip rule, having addressed my judicial mind to the Respondent’s Affidavit evidence – including the decision of the said appellate Tribunal which was exhibited as MK1 - to the effect that they lodged an appeal against the said order of the Yatta Land Disputes Tribunal and it was ultimately set aside by The Eastern Province Provincial Land Appeals Tribunal on 5th November 2010, in Appeal No. 77 of 2008, and having paid due consideration to the Applicant’s position that the said order of Hon. Okuche has never been set aside, this Court is unpersuaded that the Applicant’s position can stand scrutiny of the law. In accordance with section 8(9) of the [Land Disputes Tribunal Act](#) (Repealed), the Applicant was at liberty to lodge an appeal in the High Court against the decision of the said appellate Tribunal but apparently she elected not.
31. Having been set aside by the said Appellate Tribunal, it follows that the order which was adopted by the Court was rendered void and as Lord Denning elegantly put it in *Benjamin Leonard Mcfoy v United African Company Limited* (UK) [1962] AC 152, “If an act is void, then it is in law a nullity. It is not only bad ...and every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.
32. The principal decision was rendered a nullity, paraphrasing Lord Denning, it is not only bad in law but also, every proceeding which is founded on it is also bad and incurably bad. One cannot put something on nothing and expect it to stay there. It will collapse. In this regard, a Court of law cannot properly so enforce a nullity.

Part VI: Disposition

33. This Application is consequently dismissed with costs to the Respondents.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 10TH DAY OF JULY, 2024.

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C.N. ONDIEKI

PRINCIPAL MAGISTRATE



Advocate for the Defendants/Applicants:.....

Advocate for the Defendant/Respondent:.....

Court Assistant:.....

