



Koinange & 2 others v Mitithiru Company Limited (Environment and Land Case E333 of 2022) [2025] KEELC 7229 (KLR) (23 October 2025) (Ruling)

Neutral citation: [2025] KEELC 7229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E333 OF 2022
OA ANGOTE, J
OCTOBER 23, 2025**

BETWEEN

PETER MBIYU KOINANGE 1ST PLAINTIFF

ISABELLA WANJIKU KARANJA 2ND PLAINTIFF

SAMUEL KARUGA KOINANGE 3RD PLAINTIFF

AND

MITITHIRU COMPANY LIMITED DEFENDANT

RULING

Introduction

1. Before this court for determination is the Defendant/Applicant's Notice of Motion application dated the 21st June, 2024 brought pursuant to the provisions of Section 80 of the *Civil Procedure Act*, Orders 45 Rules 1, and Order 2 Rule 1(d) of the Civil Procedure Rules, 2010 seeking the following reliefs:
 - i. The order made on 14th March 2024 be reviewed and set aside.
 - ii. The order made on 14th March 2024 be substituted with an order striking out Environment and Land Court Case No. E333 of 2022.
 - iii. In the alternative, the amended plaint dated 7th June 2024 be struck out.
 - iv. The costs of this application be provided for.
2. The application is based on the grounds on the face thereof and supported by the Affidavit of Eric Murungi, a director of the Defendant of an even date, who stated that on 14th March 2024, the court delivered its ruling dismissing the 3rd Plaintiff's Motion dated 17th November 2022 seeking to strike out the suit.



3. He stated that as advised by Counsel, there is an error apparent on the face of the record for the following reasons. At paragraph 26 of the aforesaid ruling, the court held that the suit ought to be struck out as it was filed without the consent of the 2nd and 3rd Plaintiffs' who are co-administrators of the estate of Charles Karuga Koinange.
4. Further, at paragraph 27 of the ruling, the court then finds that it should interrogate why there seems to be a disparity between the co-administrators of the estate of the deceased, despite having reached a conclusion that the suit should be struck out. He opines that the order made on 14th March 2024 should be reviewed and set aside and be substituted with an order striking out the present suit.
5. According to Mr. Murungi, the 1st Plaintiff filed an amended plaint dated 7th June 2024 allegedly filed pursuant to the ruling of 14th March 2024. He asserts that the aforesaid Ruling did not grant him leave to amend the Plaint and as such the same should be struck out.
6. In response, the 1st Plaintiff filed a Replying Affidavit on 31st July, 2024. He deponed that the Defendant has not established how the orders of the court affects him and as such, he cannot be said to have been aggrieved within the meaning of Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. In any event, it was deposed, it will have a chance to prosecute its case on merit in the hearing thereof.
7. The 1st Plaintiff further deponed that the Motion discloses no sufficient grounds to justify a variation of the orders. Instead, it improperly seeks to invoke the court's appellate jurisdiction, which is impermissible. He stated that as advised by Counsel, the grounds advanced do not amount to an apparent error or omission on the part of the court warranting a review. In any event, it was deposed, the issues as raised are neither straightforward nor self-evident and will require detailed arguments to establish the truth.
8. He asserted that an alleged misinterpretation of the law or an erroneous conclusion is a matter for appeal, not review; that there is no error apparent on the face of the record, and the Defendant cannot not isolate paragraph 26 of the impugned ruling without considering the court's reasoning in paragraphs 27 to 32 in which the court clearly laid out the reasons for its decision.
9. The 1st Plaintiff deponed that the court has on several occasions granted leave for the amendment of pleadings and assertions to the contrary are untrue; that the directions for the enjoinder of Hon A.G necessitates amendment of various parts of the Plaint to make it sound in view of the said directions and that in any event, pleadings have not closed and nothing prevents him from amending the Plaint to aid the court in the administration of expeditious justice through clearer and more concise facts set out in the Plaint.

Submissions

10. The Defendant/Applicant's counsel filed submissions on 3rd April, 2025. It was submitted that in the circumstances, review is sought on account of error on the face of the record, and that a
11. According to counsel, as explained by the Court of Appeal in *Multipurpose Co-operative Society Ltd vs Serser & 3 others* (Civil Appeal 160 of 2018) [2023] KECA 441 (KLR), there is a real distinction between a mere erroneous decision and an error apparent on the face of the record and that 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.
12. It was submitted that the court at paragraph 26 of its ruling concluded that the suit ought to be struck out for having been filed without the consent of the 2nd and 3rd Plaintiffs, who are co-administrators of



the estate of the deceased and that however, at paragraph 27, the court pivoted to suggest that it was necessary to "interrogate" the disparity between the co-administrators, despite having already reached a definitive conclusion that the suit was improperly instituted.

13. This contradiction, it was urged, constitutes an error apparent on the face of the record, as defined by the Court of Appeal in *Nyamogo & Nyamogo Advocates vs Kogo* (Supra). Reliance was also placed on the case of *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR.
14. Counsel submitted that the amended Plaint dated 7th June, 2024 ought to be dismissed for reasons that no leave was sought for its amendments. Further still, it was stated, the amendment introduces a new and independent cause of action, fraud, which was not pleaded in the original Plaint. Reliance was placed on the case of *Mukuha vs Naivas Limited & 2 others* (Civil Appeal 39 of 2017) [2021] KECA 344 (KLR), and *Central Kenya Limited vs Trust Bank Limited* [2000] KECA 367 (KLR).
15. The 1st Plaintiff did not file submissions within the timeframe granted by the court.

Analysis and Determination

16. Having considered the Motion, responses and submissions, the issues that arise for determination are:
 - i. Whether the Defendant/Applicant has met the threshold for the grant of review sought?
 - ii. Whether the 1st Plaintiff's Amended Plaint should be struck out?
17. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act*, and Order 45, Rule 1(1) of the Civil Procedure Rules, 2010. Section 80 of the Act provides as follows:

“ 80. 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.”
18. Whereas Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 provides as follows:

“ Rule 1 (1) 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 judgment to the court which passed the decree or made the order without unreasonable delay.”



19. Discussing this, the Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR observed that:

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.

20. By way of a brief background, the 3rd Plaintiff filed a Motion dated the 17th November, 2022, seeking inter-alia, to have the suit struck out, a declaration that the firm of Ashford and Co Advocates were not appointed to act for them and that the aforesaid firm together with the 1st Plaintiff personally pays the costs incurred in the suit.

21. It was the 3rd Plaintiff's case in this regard that the suit was instituted in his name and that of the 2nd Plaintiff, who, together with the 1st Plaintiff, are the Administrators of the Estate of Charles Karunga Koinange without their consent and that the suit property does not form part of the deceased's estate.

22. The 2nd Plaintiff supported the Motion but only to the extent that their consent was not sought before the filing of the suit. She maintained that the suit property belonged to the deceased's estate.

23. The Defendant supported the Motion stating that having been filed without the authority of two out of three Administrators, the suit was invalid and ought to be dismissed. Vide its determination of 14th March, 2024, the court dismissed the Motion prompting the present application.

24. Moving to the pre-requisites for review, the court will first consider whether the Motion has been brought without unreasonable delay as this is a crucial aspect pursuant to Order 45 Rule 1 of the Civil Procedure Rules. This was buttressed by the Court of Appeal in the case of *Francis Origo & another vs Jacob Kumali Mungala* [2005] eKLR when it held thus:

“...most importantly, the applicant must make the application for review without unreasonable delay.”

25. What constitutes unreasonable delay is a matter-of-fact dependent on the circumstances of the case. The Ruling in issue was delivered on the 14th March, 2024 whereas the present Motion was filed on the 21st June, 2024, approximately 3 months later. There has not been any allegation that this period is inordinately long and the court considers that it is not so late as to warrant the court declining to entertain the same.

26. The Defendant's Motion for review is based on the grounds of error apparent on the face of the record. Explaining this, the Court of Appeal in *National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996 (UR)* stated:

“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.”



27. In a more recent exposition, the Court of Appeal in *Associated Insurance Brokers vs Kenindia Assurance Co. Ltd* [2018] KECA 809 (KLR) noted:

“It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record

“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.” (Emphasis added)

In *Nyamogo and Nyamogo Advocates v. Kogo* [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:

“An error apparent on the face of the record cannot be defined precisely and 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.”

28. Further, in *Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the Court of Appeal held that:

“It bears emphasizing that the phrase “mistake or error apparent” by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, *Indian Civil Procedure Code*, 14th Edition pg 2335-36 as follows:

“The courts in India have for many years had to consider what is constituted by “an error apparent on the face of the record” in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions “manifest” and “apparent”. The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be



seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]...”

29. In view of the foregoing, the question that arises is this: has such an error been demonstrated here. According to the Defendant, in paragraph 26 of the impugned Ruling, the court stated that the suit should be struck out having been filed without the consent of two of the three co-Administrators.
30. According to the Applicants, at paragraph 27, the court then found that it should interrogate why there seems to be a disparity between the co-Administrators of the Estate despite having found that the suit ought to have been dismissed. This contradiction, it is urged, constitutes an error on the face of the record.
31. The court has considered the Ruling. Indeed, the court noted therein that no evidence had been adduced showing that all co-Administrators had consented to the filing of the suit. The court noted that whereas this would ordinarily warrant the striking out of the suit, in the circumstances, it was important to further interrogate the disparity amongst the Administrators especially as regards whether or not the suit property formed part of the Estate and whether there was a larger conspiracy at play.
32. The court further noted that the 2nd and 3rd Plaintiffs could be excluded from the proceedings not being in support of the same and that it could only make a determination on the propriety of the suit after hearing the 1st Plaintiff.
33. In the circumstances, the court does not consider that there is any error apparent as alluded to by the Defendant. The court’s findings reflect the court’s deliberate assessment of the facts and the issues before it. It appears that the Defendant is dissatisfied with the court’s determination and what he considers contradictions therein. His recourse in this respect falls within the realm of an appeal rather than a review.
34. Accordingly, it’s the finding of the court that the application fails to meet the legal threshold for review on the basis of an error apparent on the face of the record.
35. The law with respect to striking out of pleadings is found in Order 2 Rule 15(1) of the Civil Procedure Rules. It stipulates:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

 - (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”



36. In *D. T. Dobie & Company (K) Ltd. vs Joseph Mbaria Muchina & Another* [1982] KLR1, Madan J. A. stated as follows regarding the exercise of the power to strike out pleadings:
- “No suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”
37. The Defendant seeks to have the amended Plaintiff struck out on the grounds that no leave was granted for its amendment. It is also contended that the amendment introduces a new cause of action and the same is impermissible.
38. Amendments are governed under the provision of Order 8 of the Civil Procedure Rules. Under Order 8 Rule 1, a party is permitted to amend their pleadings without leave at any time before pleadings are closed. After pleadings are closed however, leave is required. This is set out in Order 8 Rule 3 of the Civil Procedure Rules.
39. The amended Plaintiff is indicated to have been brought pursuant to the court orders issued on the 14th March, 2024. The issue of amendment was however not the subject of the Motion giving rise to this Ruling and no such orders were issued in this regard.
40. Nonetheless, as at the time of the amendment on 7th June 2024, the Defendant had not filed a Defence, which was only filed much later on 27th June 2025. Guided by Order 2 Rule 13 of the Civil Procedure Rules, 2010, pleadings had therefore not closed. Consequently, the 1st Plaintiff did not require leave of the court to amend the Plaintiff.
41. As regards the contention that the amendment introduces a new cause of action, a reading of the same leads to a finding that it has not. The Plaintiff sought inter-alia cancellation of the certificate of lease in the Defendant’s name on account of the fact that the same was procured fraudulently. It cannot therefore be said that “fraud” is a new cause of action brought vide the amended Plaintiff. The plea for the striking out of the amended Plaintiff is unwarranted.
42. Ultimately, this Motion is found to be unmerited. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 23RD DAY OF OCTOBER, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Ashford for the Plaintiff

Ms Muthiani for Makori for Defendant

Court Assistant: Tracy

