Songole & another v Kwenya & another (Civil Appeal 211 of 2019)
[2025] KECA 1778 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1778 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 211 OF 2019

MSA MAKHANDIA, PO KIAGE & HA OMONDI, JJA

OCTOBER 24, 2025

BETWEEN

JESSICA SONGOLE ..... 1ST APPELLANT

BENARD SONGOLE ..... 2ND APPELLANT

AND

CHARLES A MUYUNZU KWENYA ..... 1ST RESPONDENT

GEORGE BWOTERE AKOTO ..... 2ND RESPONDENT

(Appeal from the ruling and order of the Environment and Land Court at Kakamega (N. A. Matheka, J.) dated 23rd July, 2019 in ELC Case No. 13 of 201)

JUDGMENT

1. By this appeal, the appellants challenge the ruling and order of the Land and Environment Court at Kakamega (Matheka, J.) by which the learned Judge found as unmerited and dismissed their application dated 24th June 2016, for review of the judgment of Mukunya, J. of 11th May 2016, which found their suit to be res judicata. In dismissing the application, Matheka, J. was of the view that the applicants had failed to show any mistake or error apparent on the face of the record and/or any sufficient reason to enable the court to set aside its decision.

2. The grounds on the face of the application were that there was an error apparent on the face of the record since the suit was commenced on advice by the Chief Magistrate's court; the award of costs was harsh on the plaintiff; and, there was sufficient cause warranting review of the court's judgment.

3 The motion was supported by an affidavit sworn on 24th June 2016 by the 2nd appellant, on his behalf and that of the 1st appellant. The affidavit is long-drawn-out with 56 paragraphs some of which are illegible. The applicants averred that on 13th December 1985, land parcel Kakamega/soy/77 (suit property) was charged to Standard Bank, therefore its title deed was not available for the court to

compare with its certified copy. It was claimed that the court never issued an order for sub-division of the suit property on 13th December 1985 and the defendants' action of sub-dividing the suit property using orders for land parcel Soy/lumino/77 constituted a dangerous precedent on land matters. The applicants went on to contend that the defendants had concealed from the court the fact that the land control board had refused to give consent and they never appealed against that decision. Further, under section 7 of the *Limitation of Actions Act*, an action to recover land cannot be brought by a person after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. The defendants were accused of fraudulently and illegally obtaining a letter of consent from the Land Control Board on 28th June 2007, some 22 years after the orders of 13th December 1995.

4. The application was canvassed by way of written submissions and on 23rd July 2019, the learned Judge dismissed the application as aforestated.

5. Aggrieved by that decision, the appellants have filed a memorandum of appeal before this Court containing four (4) grounds, which in their written submissions they summarised under two issues, namely;

    a. Can an error that is self-evident and does not require elaborate arguments to be established, be sufficient reason to justify review of a ruling?

    b. Is there such mistake or error on the face of the record?

6. The appellants prayed that we set aside the impugned ruling and make a just decision.

7. During the hearing of the appeal, learned counsel Ms. Achieng and Mr. Masaviru appeared for the appellants and the respondents, respectively. Counsel highlighted their written submissions which they had filed prior.

8. Ms. Achieng contended that the initial purchaser of the suit property, Serah Lwenya, (Serah) made an application for consent from the land control board on 28th October 1994, but the consent was not granted. She invoked section 6 of the *Land Control Act*, which mandates the Land Control Board to give consent in all transactions affecting agricultural land. Pursuant to section 8(2) of the same Act, the Land Control Board can either give or decline to give its consent and, subject to any right of appeal, its decision is final. Counsel further invoked section 22 of the Act which prescribes the punishment for a person who fails to obtain the consent. She contended that since Serah's application for consent was denied, the agreement for the sale of the suit property became void and therefore the court orders that were obtained were unenforceable. The learned Judge was faulted for making a finding that Hon. J.M Khamoni (PM, as then was) had already dealt with the issue of failure to obtain consent from the Land Control Board in his ruling of 18th August 1987. Ms. Achieng argued that the issue has not been dealt with by any court of competent jurisdiction, and thus it was not res judicata. She submitted that on 10th November 2005, a consent was recorded in the absence of the vendor of the suit property, Laban Songole (Mr. Songole) to the effect that Standard Chartered Bank Limited do release the original title deed of the suit property together with a discharge of charge instrument. Counsel contended that the process was done fraudulently and no court of competent jurisdiction has determined that issue.

9. Reference was made to the High Court decision in Paul Mwaniki Vs. National Hospital Insurance Fund Board Of Management [2020] KEHC 7414 (KLR), where the court held that 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, and the error or omission must be self-evident and not require elaborate argument. In the same decision, the court adopted the holding of the court in Nyamogo & Nyamogo Vs. Kogo [2001] EA 170 on what constitutes an error on the face of the record. Ms. Achieng further drew our

attention to the decision in Evan Bwire Vs. Andrew Nginda Civil Appeal No. 103 of 2000, as cited with approval in Paul Mwaniki Vs. National Hospital Insurance Fund Board Of Management (supra), in which the court held that an application for review can only be allowed on very strong grounds particularly where it can amount to re-opening an application. The court also enumerated principles which should be considered in evaluating an application for review. The learned Judge was faulted for holding that the appellants had failed to show that there was an error apparent on the face of the record, which was that when the initial purchaser of the suit property applied to the Land Control Board for consent, it was denied thus rendering the sale agreement void. In the end, Ms. Achieng implored us to set aside the impugned ruling and reinstate the suit.

10. We pointed out to counsel that the error indicated on the face of the application was different from the one that she was arguing before us. According to the application, the first ground on which the application is premised is, 'That there is an error apparent on the face of the record since the suit was commenced on advise by the Chief Magistrate's Court.' Ms. Achieng acknowledged that the two grounds were different. She, however, went on to state that she was relying on the application as drafted by the previous counsel on record and the grounds outlined in the supporting affidavit. We probed counsel whether her contention was essentially that, the learned Judge misapprehended or misunderstood the matter and therefore made an error of assessment, which she conceded, as she had to. We then inquired whether then the case before the learned Judge was one fit for review or for appeal, but she insisted that the matter was for review as well.

11. In opposition to the appeal, Mr. Masaviru affirmed the learned Judge's finding that the appellants had failed to show that there was any mistake or error apparent on the face of the record or any sufficient reason to warrant reviewing the decision of the late Mukunya, J. He defended the learned Judge's refusal to review a decision of a court of concurrent jurisdiction, as it would have amounted to sitting in an appellate posture, and improperly so. Counsel contended that the appellants failed to point out with precision, the error apparent on the record that would have warranted a review. He asserted that the alleged error must be so clear that it does not require a long-drawn process of reasoning to ascertain it. To buttress this argument, Mr. Masaviru cited the holding of this Court in Muyodi Vs. Industrial And Commercial Development Corporation & Another [2006] 1 EA 243 which was adopted with approval in Nyamogo & Nyamogo Vs. Kogo (supra). Counsel submitted that since the appellants failed to show the error on the face of the record and instead, questioned the correctness of the ruling, the appropriate route for them to pursue was an appeal. For this proposition, he relied on this Court's decisions in Fred Wafula Ngichabe & 2 Others Vs. Evans Wafula Wepukhulu & 7 Others [2017] Eklr And Pancras T. Swai Vs. Kenya Breweries Limited [2014] eKLR.

12. Turning to the issue of consent, Mr. Masaviru submitted that the panel of elders in Civil Award No. 64 of 1995 awarded the suit property to the 1st respondent. However, the appellants' father who was the plaintiff at the time, declined to execute transfer forms so that the property could be passed over to the 1st respondent. Consequently, the court made an order directing the Executive Officer of the court to sign the transfer documents for the suit property. To counsel then, the issue of consent did not arise because the transfer was done by virtue of a court order. Further, the issue was properly determined by Hon. Khamoni and later by Mukunya, J. hence it could not be the basis for a review application.

13. Mr. Masaviru argued that even though the appellants had introduced the ground of discovery of new evidence in their affidavit, they had not demonstrated that the evidence that they sought to tender was actually new and was not within their knowledge, even after the exercise of due diligence, as was held in Rose Kaiza Vs. Angelo Mpanjuiza [2009] eKLR. On whether there were other sufficient reasons to review the court's decision, counsel relied on Auto Selection (kenya) Limited Vs. Ann Cherono Cheruiyot & 2 Others [2019] eKLR, where the High Court observed that a review on this ground

means a reason analogous with those specified under Order 45 rule 1 of the Civil Procedure Rules. It was asserted that the learned Judge correctly considered the application in light of the submissions that had been filed by parties and the relevant law.

14. Mr. Masaviru urged that the appellants had failed to establish any of the grounds set out under section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules. He contended that the appellants were only trying to re-open the matter and re-litigate issues that had been determined by another competent court, against the prescribed objective of a review application. For this proposition, counsel relied on the Nigerian Supreme Court case of Citec International Estate Ltd. & Others Vs. Francis & Others (2014) LPELR-22314 (SC) as cited with approval by our own apex court in Hussein Khalid And 16 Others Vs. Attorney General & 2 Others [2020] eKLR. In the end, we were urged to dismiss the appeal with costs.

15. The appellants are inviting this Court to interfere with the discretion of the learned Judge. We are cognizant of the fact that this Court can only interfere with the judicial discretion of the learned Judge if satisfied that she misapprehended the facts; or misdirected herself on law; or that she took into account matters of which she should not have; or failed to take into account considerations which she should have; or that her decision was plainly wrong. See Shah Vs. Mbogo & AnotheR [1967] EA 1116.

16. Having carefully perused the record, the evidence and submissions by parties, we think the questions for determination in this matter are, whether the contention about the Land Control Board consent was addressed by Mukunya, J. and whether Matheka, J. had a basis upon which to review the court's decision. The grounds upon which the relief of review can be obtained are prescribed under Order 45 rule 1 of the Civil Procedure Rules as follows;

> Any person considering himself aggrieved;
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> 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."

17. The appellants' main argument is that the learned Judge failed to observe that there was an error apparent on the face of the record to the extent that the purchaser of the suit property failed to get the land control board consent. At our instigation however, counsel for the appellants agreed that the said error was not manifest on the face of the record. In Paul Mwaniki Vs. National Hospital Insurance Fund Board Of Management (supra), a decision that was cited by the appellants' counsel, the court was categorical that the power of review, based on the ground that there is an apparent error on face of the record, can only be available where the said error is conspicuous upon a cursory look at the record. The court rendered itself as follows;

> 39. Review is impermissible without a glaring omission, evident mistake or similar ominous error. 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. Where an alleged error is far from self-evident and if it can be established, it has

to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review."

18. This Court was of a similar view in National Bank Of Kenya Limited Vs. Ndungu Njau [1997] KECA 71 (KLR) where it 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. 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."

19. We note that the alleged error was not only unapparent but it was in fact not existent, Mukunya, J. having addressed the issue of the land control board consent in his judgment in the following terms;

> 4. In his Ruling on 18/8/87 J.M Khamoni PM (as then was) dealt with all the issues raised including the argument advanced against, including lack of the consent of the land control board, the effect of the magistrates' jurisdiction (Amendment) Act No. 4 of 1981 and section 6 of the *Land Control Act* and section 143 (1) of *Land Control Act*."

20. We accordingly cannot fault the learned Judge as there was no basis upon which she would have exercised the power of review without doing violence to the applicable principles.

21. In the premises, this appeal is without merit and we dismiss it with costs.

DATED AND DELIVERED AT KISUMU THIS 24TH DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR