



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**CIVIL SUIT NO. 12 OF 2016**

**THE EXECUTIVE COMMITTEE CHELIMO**

**PLOT OWNERS WELFARE GROUP & 288 OTHERS.....PLAINTIFFS**

**VERSUS**

**LANGAT JOEL**

**PATRICK LANGAT**

**FANCIS MREFU**

**CHARLES RONO**

**SIMON CHEROROT (Sued as the Management Committee**

**of Chelimo Squatters Group).....DEFENDANTS**

**RULING**

1. This Ruling determines the plaintiffs application dated 2<sup>nd</sup> February 2017 in which the applicants seek the following orders:

**1. That this honourable court be pleased to review and set aside the order issued on 25<sup>th</sup> November 2016.**

**2. That the costs of this application be provided for.**

2. The application is supported by the grounds stated on the face of the Notice of Motion and the supporting affidavit of Richard Kipkoech Lang'at sworn on the 2<sup>nd</sup> February 2017. The grounds in support of the application are as follows:

*i. That there is an error apparent on the face of the record*

*ii. That the suit ought not to have been struck out against the party whose suit was properly instituted or the authority had been properly obtained*

*iii. The order is extremely prejudicial to the applicants herein*

*iv. The suit as brought by the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs is properly in court.*

3. The application is opposed by the defendants through the Replying Affidavit of Petroliner Cheronoh sworn on the 17<sup>th</sup> May 2017.
4. The court directed that the application be canvassed by way of written submissions and filed their submissions.
5. In the supporting affidavit the applicants depone that on 11<sup>th</sup> July 2016 the defendants filed an application dated 11<sup>th</sup> July 2015 seeking to strike out the Amended Plaintiff dated 19<sup>th</sup> May 2016. The grounds upon which the application was based were that the suit was statute barred, the same was incompetent and that it did not disclose any reasonable cause of action. The last ground was that the Richard Kipkoech Langat and the Chairman of the 1<sup>st</sup> Plaintiff/ applicant had not obtained the authority of the other plaintiffs to file the suit on their behalf.
6. The court struck out the Amended plaintiff on the ground that no written authority of the plaintiffs had been filed as required by the provisions of Order 1 Rule 13 of the Civil Procedure Rules.
7. It has been submitted on behalf of the applicants that the court did not consider the fact that the suit was not a representative suit and each plaintiff had a claim against the defendants thus the suit by the 1<sup>st</sup> and 4<sup>th</sup> plaintiffs was competent as they swore the affidavit in support thereof.
8. On the other hand, it has been submitted on behalf of the Respondents that the applicants have not met the threshold for review.

The court is now called upon to determine the following issues:

- i. Whether the applicant have met the threshold for review of the court's Ruling dated 25<sup>th</sup> November 2016*
- ii. Whether the failure to attach a copy of the said Ruling is fatal to the application*
- iii. Who is entitled to the costs of this application*

Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review as follows:

**“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”.**

9. From the applicants application, there is no new and important matter that could not be produced by the applicants at the time when the Ruling was made. Indeed, all the issues raised in the present application were same ones raised when the application was canvassed and upon which the court arrived at its ruling.

In the case of **Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006** cited fin the case of **Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016)** eKLR the Court of Appeal Held as follows:

***“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”***

10. The second question that this court ought to consider is if there is any mistake or error apparent on the face of the record. The applicants maintain that the suit by the 1<sup>st</sup> to the 4<sup>th</sup> plaintiffs ought not to have been struck out and that striking the entire suit amounted to an error apparent on the face of the record. They have cited the case of **Hezekiah Kipkorir Maritim & 10 Others V Philip Kipkoech Tenai & 2 Others** where the court held as follows:

***“From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is authorized to so in writing and the authority is filed in such proceedings. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority must be filed in the proceedings. It would seem that lack of such an authority does not necessarily void the proceedings, what it does is to incapacitate the persons purporting to represent his co-plaintiffs or defendants from doing so. The case by his co-parties remains unprosecuted. They have to appear themselves and prosecute the matter. It is quite clear that a Plaint must be accompanied by a Verifying Affidavit. The lack of a proper, valid or any Verifying Affidavit does not render a Plaint void, it only renders it voidable. This is so by virtue of Order 4 Rule 1(6) which provides that a Plaint that does not comply with inter alia sub-rule (3) and (4) may be struck out by the court on its own motion or on the application of any party”***

11. I concur with the above decision. Be that as it may, the argument that the court ought not to have dismissed the suit against the party whose suit was properly instituted may be an erroneous conclusion of law but it cannot form the basis of a review since it would amount to asking this court to sit on appeal against a Ruling of a judge of concurrent jurisdiction.

In **Origo & Another V Mungala (2005) 2KLR** cited in **Jameny Mudaki Asav V Brown Otengo Asava & Another (2015) eKLR** the court held as follows:

***“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal, they were proceeding in the wrong direction. They have now come to a dead end.”***

12. Similarly, in the case of **Nyamogo & Nyamogo v Kogo (2001) EA 170** cited in **Veleo (K) Limited** the court held as follows:

***“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness 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”***

13. Lastly the court has to consider if there is sufficient reason to review the court’s earlier ruling. The applicants have not elaborated any sufficient reasons to warrant a review of the court’s ruling.

In the case of **Sadar Mohamed V Charan Singh and Another** it was held that

***“Any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter”)***

14.The fourth condition that the applicant have to satisfy under order 45 of the Civil Procedure Rules is whether the application has been made without undue delay. The Ruling sought to be reviewed was delivered in November 2016 whereas the application for review was made in February 2017. Whereas three months appears not to be unreasonable, failure to explain the delay may nevertheless cause the delay to be construed as unreasonable. See the case of **Abdulrahman Hassan V National Bank of Kenya Ltd.**

15.Lastly the court has to determine whether the failure to attach the order sought to be reviewed renders the application fatally defective. I am guided by the case of **Suleiman Murunga V Nilestar Holdings Limited & Another (2015) eKLR** the court held as follows:

***“The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendants application was fatally defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order”***

16.The upshot of the foregoing is that the application lacks merit and is dismissed with costs.

**Dated, signed and delivered at Kericho this 13<sup>th</sup> day of March 2018**

**J.M ONYANGO**

**JUDGE**

In the presence of :

Miss Chelimo for Mr Orina for the Plaintiffs/Applicants

Respondents present in person

Court Assistant: Rotich