



REPUBLIC OF KENYA



**Kackyema v Itinga & 2 others (Environment & Land Case
E011 of 2020) [2024] KEELC 513 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E011 OF 2020
TW MURIGI, J
JANUARY 31, 2024**

BETWEEN

REUBEN KIOKO KACKYEMA PLAINTIFF

AND

KIOKO WAMBUA ITINGA 1ST DEFENDANT

JAMES KYALO WAMBUA 2ND DEFENDANT

NATIONAL LAND COMMISSION 3RD DEFENDANT

RULING

1. This ruling is with respect of the Notice of Motion dated 22nd November 2022 brought under order 45 rule 1 & 5, order 51 rule of the *Civil Procedure Rules 2010* and section 1A, 1B, 3 & 3A of the *Civil Procedure Act* in which the Applicants seeks the following orders:-
 1. Spent.
 2. That the Honourable Court be pleased to review, clarify and/or rectify the ruling delivered herein on June 29, 2022 by Hon T. Murigi to reflect and narrow the orders granted therein to achievable conditions for appeal in the interest of availing justice to the 1st and 2nd defendants/ applicants.
 3. That the Honourable court be pleased to review conditions set out in paragraph 41 (b) requiring the 1st and 2nd defendants to pay thrown away costs to the Plaintiff and thereby reviewing conditions set out in paragraph 41(c) and (d).
 4. The Honourable court be pleased to review the conditions set out in paragraph 60(ii) and be pleased to extend the stay of execution issued in paragraph 60(i) for a further 30 days.
 5. Costs be provided for.



2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Kioko Wambua Itinga sworn on even date.

The Applicants' Case

3. The Applicants averred they are unable to comply with the conditions set out by the court in its ruling dated June 29, 2022 because they are persons of low means. It is the Applicants case that they were represented by Counsel who ought to have filed a defence on their behalf. They argued that they were willing to meet any conditions set by the court. They urged the court to review the terms so as to enable them to access justice and have their day in court.

The Respondent's Case

4. In opposing the application, the Respondent filed a replying affidavit dated December 19, 2022. According to the Respondent, the instant application is misconceived, frivolous and is intended to deprive him from enjoying the fruits of his judgment. He averred that there has been inordinate delay of 5 months in presenting this application which delay has not been explained.
5. Explaining the delay, the Respondent averred that; That the order for furnishing security for costs lapsed on July 29, 2022 while the leave to file the appeal lapsed on 29th August 2022 That the order for thrown away costs be paid in 14 days lapsed on July 13, 2022
6. The Respondent argued that the Applicants are persons of means as evidenced by their ability to change representation He urged the court to dismiss the application
7. The parties were directed to canvass the application by way of written submissions.
8. The Respondent's submissions were filed on 11th Jan 2023 which I have duly considered.
9. As at the time of writing this ruling the Applicants had not filed their submissions.

Analysis and Determination

10. Having considered the application, the respective affidavits and the Respondent's submissions, the only issue for determination is whether the court should review the ruling delivered on June 29, 2022.
11. The Applicants are seeking a review of the ruling delivered by this court on June 29, 2022.
12. The ruling at the centre of this application was in respect of two applications.
13. As regards the application dated 26th of October 2021, the court admitted the Defence on the following conditions:-
 - a. Leave be and is hereby granted to the 1st and 2nd Defendants to file and serve their statement of Defence out of time within the next 7 days from the date of this ruling.
 - b. The 1st and the 2nd Defendants/Respondents shall pay to the Plaintiff Kshs 20000 thrown away costs within the next 14 days from the date of this ruling.
 - c. The 1st and the 2nd Respondents to pay the Applicant the cost of this application
 - d. If the orders made in (A), (B) and (C) above are not complied with, the order admitting the defence will be vacated forthwith and the matter will proceed for hearing as undefended.
14. As regards the application dated October 1, 2022, the court granted a stay of execution in the following terms:-



- i. The Stay of execution of the Order dated 2nd of September 2021 is granted provided that the Applicants lodge his appeal within 60 days from the date of this ruling.
 - ii. The Applicants shall deposit Kshs. 100,000/- as security for costs in Court within 30 days from the date of delivery of this ruling.
 - iii. That in default of any of the clauses (i) and (ii) above, the stay granted automatically lapses.
 - iv. Each party to bear its own costs.
15. The law that governs applications for review is set out in section 80 of the *Civil Procedure Act* and in order 45 rule 1 of the *Civil Procedure Rules*.
16. Section 80 of the *Civil Procedure Act* provides as follows: -
- 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.
17. Order 45 rule 1 of the *Civil Procedure Rules, 2010* 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.
18. The Applicants averred that they have been unable to comply with the terms of the order because they are persons of low means. They further alleged that they should not be condemned to pay thrown away costs since they were represented by Counsel who ought to have filed a defence on their behalf. The Applicants have not shown that there is discovery of new and important matter of evidence that they could not have placed before the court during the hearing of the application.
19. As regards the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of *Nyamogo & Nyamogo v Kogo* [2001] EA 170 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 indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is 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.”

20. For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established. The Applicants have not pin pointed the errors that are apparent on the face of the record.
21. The Court is also mandated to consider if there are sufficient reasons to review the Court’s ruling. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of *The Official Receiver and Liquidator v Freight Forwarders Kenya Limited* [2000] eKLR held as follows: -

“Indeed, these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice “be limited to the discovery of new and important matters or evidence, or the occurring of a mistake or error apparent on the face of the record.”
22. The Applicants have not demonstrated any sufficient reason to warrant a review of the Court’s order.
23. Finally, the Applicants must demonstrate that the application has been made without unreasonable delay. The order sought to be reviewed was made on June 29, 2022. The instant application was filed on 24th November 2022. That duration is far from reasonable and the same has not been explained.
24. In the end I find that the application dated October 11, 2022 is devoid of merit and the same is dismissed with costs to the Respondent.

HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF JANUARY 2024.

IN THE PRESENCE OF:-

Court assistant - Mr. Kwemboi.

Ms. Kyania holding brief for

Dr. Musau for the Plaintiff/Respondent

