



**Terer (Suing as the legal representative of the Estate of Kibiegion Terer (Deceased)) v Kemei (Environment & Land Case 2 of 2013) [2024] KEELC 228 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 228 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 2 OF 2013  
MC OUNDO, J  
JANUARY 25, 2024**

**BETWEEN**

**ESTHER CHEROP TERER ..... PLAINTIFF  
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIBIEGON  
TERER (DECEASED)**

**AND**

**GEOFFREY KEMEI ..... DEFENDANT**

**RULING**

1. By a Notice of Motion dated 13<sup>th</sup> December 2019 which brought under the provisions of Order 45 Rule 1(1) (b), 2 (2) of the *Civil Procedure Rules* and Sections 1, 1A, 3 and 3A of the *Civil Procedure Act, the Constitution* of Kenya and all enabling provisions of law, the Defendant/Applicant herein sought for the following orders.
  - i. Spent
  - ii. Spent
  - iii. That there be and is hereby issued an order of review and or set aside or vary Judgement delivered on 18<sup>th</sup> June 2019 by Lady Justice Jane Onyango and the Decree issued therein and all consequential orders.
  - iv. That pursuant to the granting of prayer (iii) above, the Honourable Court be pleased to list the matter for mention to take further directions on the way forward.
  - v. That the costs be provided for.
2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Geoffrey Kemei, the Defendant/Applicant herein.



3. In summary the basis for seeking the above captioned orders was that the Defendant/Applicant had recently discovered important information and/or evidence which were not within his knowledge at the time of the trial to wit that the Plaintiff/Respondent did not have the locus standi to sue since full letters of administration had already been taken. Further that there was a mistake or error apparent on the face of the record as judgment was entered at the time the Plaintiff had no locus standi.
4. That one Isaiah Kipchirchir Ngeno who was DW2 had recently discovered that at the time the Plaintiff/Respondent filed her suit, PW1, one James Kipkorir Ngeno had already taken out Letters of Administration which had been filed in court on 26<sup>th</sup> May, 2010, three (3) years before the filing of the instant suit.
5. That the Defendant/Applicant had no knowledge that the said Letters of Administration had been taken out even after exercising due diligence and that the said discovery changed the capacity of the Plaintiff/Respondent in bringing the instant suit against him since it meant that the Plaintiff/Respondent lacked the locus standi to file the instant suit and therefore the judgement was entered in error of facts.
6. That had the above fact been availed in court, the court would not have held the matter as it did since the provisions relating to Limited Grant was only acceptable where no full Letters of Administration had been taken but once the Letters of Administration to the estate of the deceased were taken, the Limited Grant for whatsoever purpose ceases to have any force of law and the full grant takes effect.
7. That since the full grant as filed bore different names of the Administrators, the Plaintiff/Respondent's right to sue on behalf of the deceased's estate was extinguished.
8. He thus urged the court to review the judgement, set aside the order of eviction and give further directions as to the hearing of the Defendant's Preliminary Objection.
9. In response and in opposition to the application, the Plaintiff/Respondent through her Replying Affidavits sworn on 5<sup>th</sup> February 2020 and 12<sup>th</sup> February, 2020, deponed that the instant Application was incompetent, fatally defective, an abuse of the court's process and ought to be struck out.
10. That she obtained a Limited Grant of Letters of Administration ad Litem dated 11<sup>th</sup> April, 2011 and thereafter filed the instant suit against the Defendant/Applicant herein on 13<sup>th</sup> January, 2013 which suit she successfully prosecuted culminating in a sound reasoned Judgement dated 18<sup>th</sup> June, 2019.
11. That the instant application was an afterthought that could not change the sound reasoning of the court and was merely inviting the court to an academic exercise as the Defendant/Applicant had not explained why it took him more than 6 months to file the instant application contrary to the provisions of Article 159 (2) (b) of *the Constitution*.
12. That the existence of the grant dated 15<sup>th</sup> July, 2014 did not automatically cancel the grant issued to the Plaintiff/Respondent on 11<sup>th</sup> April, 2011 but it meant that the administrators so appointed should have taken over the proceedings but since the said administrators failed to take up the matter, she was free to pursue the same to its logical conclusion. Further that even if the said administrators took up the matter, the outcome would have been the same.
13. That the instant application was an attempt by the Defendant/Applicant to re-litigate, on procedural technicalities, a matter that had been heard and determined on its merits contrary to the express provisions of Article 159 (2) (d) of *the Constitution*. That it was not true that James Kipkorir Ngeno had taken out Letters of Administration 3 years before the filing of the instant suit since the said James



- Kipkorir Ngeno and Joel Biegon became administrators on 15<sup>th</sup> July, 2014 more than 1 year and 6 months after she had filed the instant suit.
14. She further deponed that the Defendant/Applicant had not disclosed the exact time that the said Isaiah Ngeno discovered the existence of the grants dated 11<sup>th</sup> March 2016 and 15<sup>th</sup> July, 2014. That she was not aware of the existence of the said grants, otherwise she would have sought the intervention of the said administrators in the suit herein.
  15. That from the foregoing it was evident that the Defendant/Applicant had brought the instant application in bad faith, hence was underserving of the orders sought thus the same ought to be dismissed forthwith.
  16. Directions were given that the application be canvassed by way of written submissions to which only the Defendant/Applicant complied and filed written submissions dated 23<sup>rd</sup> October 2023 to which he submitted, while relying on his affidavit and the provisions of Order 45 Rule 1 that he had demonstrated that he had discovered new and important evidence. That the court ought to find out whether the evidence given supported the pleadings not whether the two documents the Applicant was referring to conflicted. That the document that was earlier filed in court seeking locus standi took precedent over the later document.
  17. Regarding the existence of an error on the face of the record, the Defendant/Applicant submitted that one of the Plaintiff/Respondent's witnesses, James Kipkorir Ngeno testified on cross-examination that his claim to the suit property was unfounded as they had not yet applied for a full Grant of Letters of Administration.
  18. He reiterated that after the delivery of the judgment, Isaiah Kipchirchir Ngeno who had testified as DW2 had recently discovered that at the time the Plaintiff/Respondent filed her suit, PW1, one James Kipkorir Ngeno had already taken out Letters of Administration which had been filed in court on 26<sup>th</sup> May, 2010, which had been three (3) years before the filing of the instant suit. That at the time the matter had proceeded for hearing of the Plaintiff's case, he had no knowledge that a Probate and Administration Cause had been filed. His evidence therefore contributed to an error or mistake by the court. He thus urged the court to peruse the proceedings, exhibits produced and the judgement.
  19. The Defendant/Applicant, while placing reliance on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules submitted that the court had powers to review a judgement or orders hence he implored the court to consider the pleadings, evidence filed with it, evidence adduced at the hearing and the newly discovered evidence and interrogate it in light of the provisions of Order 45 of the *Civil Procedure Rules*.
  20. He further submitted that even if the Plaintiff/Respondent's suit was good in law at the time of filing, the said Plaintiff ought to have been substituted with the correct party who had the authority to deal with the deceased property at the time of issuance of the Certificate of Confirmation of Grant which was way before the judgment was rendered. That the judgment rendered to the Plaintiff was thus erroneous and the Plaintiff was not deserving of the same. Reliance was placed on the decided case of *Republic vs. Advocates Disciplinary Tribunal Ex-parte Apollo Mboya* [2019] eKLR.
  21. The Defendant/Applicant further placed reliance on the decided case of *Julian Adoyo Ogunza v Francis Kiberenge Abano Migori* Civil Appeal No. 119 of 2015 and Kericho ELC No. 64 of 2003 *Tigisey Kipngeno Koech vs. The Attorney General & Others (sic)* to submit that since the Plaintiff filed a suit while there was an existing Grant issued to a different party, she lacked the capacity or locus standi to institute the suit hence the suit instituted therein was bad in law and could not stand.



22. From the foregoing, the Defendant/Applicant prayed that the instant Application be allowed, the Court do review its judgement and dismiss the Plaintiff's case with costs.

**Determination.**

23. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that a party who fails to file his submissions on an application as ordered by the court is deemed as a party who has failed to prosecute and/or defend an application and therefor that application is either liable for dismissal or considered unopposed. Directions on the filing of submissions having been received by counsel for the parties and there having been no compliance by the Respondent to exercise the leave granted to him to file written submissions within the stipulated period clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness. To this effect the court shall consider the Application as unopposed but this does not mean that the merits of the same cannot be tested.
24. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides 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.”
25. 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
26. From the above provisions, it is clear that whereas Section 80 of the [Civil Procedure Act](#) gives the court the power to review its orders, Order 45 Rule 1 of the [Civil Procedure Rules](#) sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;
- i. discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time when the decree was passed or the order made or;
  - ii. on account of some mistake or error apparent on the face of the record, or
  - iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.



27. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.
28. The Applicant's application is pegged on "new evidence" to the effect that the Plaintiff herein had no locus standi to file suit against him she having taken out Limited Grant of Letters of Administration ad Litem whereas PW1, one James Kipkorir Ngeno had already taken out Letters of Administration which had been filed in court on 26<sup>th</sup> May, 2010, three (3) years before the filing of the instant suit. The Applicant's argument was that the Limited Grant for whatsoever purpose ceased to have any force of law and the full Grant took effect. That the said Plaintiff ought to have been substituted with the correct party who had the authority to deal with the deceased property at the time of issuance of the Certificate of Confirmation of Grant which was way before the judgment was rendered.
29. From the Applicant's application and submission, his contention was that at the time the matter proceeded for hearing of the Plaintiff's case, he had no knowledge that a Probate and Administration Cause had been filed and therefore his evidence had also contributed to an error or mistake by the court. That even if the Respondent's suit was good in law at the time of filing, the said Plaintiff ought to have been substituted with the correct party who had the authority to deal with the deceased property. That the judgment rendered to the Plaintiff was thus erroneous and the Plaintiff was not deserving of the same. The Applicant sought that the Court reviews its judgment and thereafter "and dismiss the Plaintiff's case with costs."
30. In the decided case of *Ajit Kumar Rath vs State of Orisa & Others* on 2 November, 1999 Court at Page 608 the Supreme Court of India had this to say:-
- ‘the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule”
31. I have considered the reason herein advanced by the Applicant in her quest to have the court review its judgment of 18<sup>th</sup> day of June, 2019. I have also noted that at paragraph 1 of the introduction of the impugned judgment, the court had stated as follows:
- “The Plaintiff instituted this suit in her capacity as the widow and administrator of the estate of Kipyegon Terer- Deceased. In her Plaint dated 16<sup>th</sup> January 2013 she claims that the Defendant has illegally occupied her land parcel number Kericho/Kiptugumo/227 and tried to evict James Ngeno, one of her step-sons therefrom. She therefore seeks the following reliefs:”
32. I also find that the Grant of letters of Administration were Granted to Joel Byegon and James Ngeno on the 15<sup>th</sup> July 2014 and therefore could not have been filed in court on 26<sup>th</sup> May, 2010, three (3) years before the filing of the instant suit as the Applicant would want us to believe. I further find that from the Applicant's submission, that there was no material from which I can conclude that there was



discovery of new and important matter or evidence which, after the exercise of due diligence, was not within their knowledge or could not be produced at the time when the judgment was passed.

33. Indeed the Court of Appeal in *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243 explained a mistake or error as follows:

“In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said that 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 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 or wrong view is certainly no ground for a review although it may be for an appeal.”

34. The grounds herein brought forth by the Applicant in my considered view are not grounds as envisaged under Order 45 of the *Civil Procedure Rules*. The Applicant has in fact sought for a review of the Plaintiff's case and thereafter the same be dismissed with costs. Indeed it is important to distinguish grounds of appeal and grounds for review.

35. In the case of *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR , the Court of Appeal had held as follows:-

“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.”

36. Quite obviously from the Applicant's argument, the major bone of contention was whether the court had the jurisdiction to hear the Plaintiff's case when she allegedly had no locus standi, the Letters of Administration allegedly having been issued to different administrator after her Limited Grant of Letters of Administration ad Litem. That the learned Judge had therefore erred and through this review, the Plaintiff's suit be dismissed.

37. It is trite and going by the authorities herein above cited that for review purposes, an error or omission on record must be self-evident on the part of the court and should not require elaborate argument in order to be established. That further, a wrong appreciation of the law cannot be a ground for review. It is evident that the Applicant seeks that the court reconsiders the law and the “new evidence” and come to a different decision. This in effect would be tantamount to sitting on appeal on its own judgment.

38. I find that the matters in dispute had been fully canvassed before the learned Judge who made a conscious decision on the matters in controversy and exercised her discretion in favour of the Respondent. The proper way to correct the alleged misapprehension of the procedure or the substantive law, or the judges' alleged wrongful exercise of discretion, as was brought out in the Applicants application and argument in the submission, was to Appeal the decision and not to seek



for review for reason that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. I therefore find no merit in this application and proceed to dismiss it in its entirety with no costs.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 25<sup>TH</sup> DAY OF  
JANUARY 2024**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

