



ARJ Capital Limited v Njeru & 3 others (Environment and Land Case E041 of 2022) [2024] KEELC 323 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 323 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E041 OF 2022
JA MOGENI, J
JANUARY 24, 2024**

BETWEEN

ARJ CAPITAL LIMITED PLAINTIFF

AND

FRANCIS N. NJERU 1ST DEFENDANT

SIESTA INVESTMENTS LIMITED 2ND DEFENDANT

TAJ MALL LIMITED 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

1. Coming up before me for determination is the Plaintiff/Applicant's Notice of Motion Application dated 25/07/2023. It is brought pursuant to Section 1A, 1B, 3A and Section 80 of the [Civil Procedure Act](#), Order 51 and 45 of the [Civil Procedure Rules 2010](#), Article 50 (1), 159 (2)(d) & (e) of the [Constitution](#) of Kenya and all other enabling provisions of the law. The Applicant is seeking the followings orders:
 1. Spent
 2. That this Honorable Court be pleased to review and set aside the direction/ decision/ Order made on a mention date of the Honorable Lady Justice J.A. Mogeni, delivered at Nairobi on the 9th May, 2023 and the Stay Order herein be lifted and/ or set aside.
 3. That this Honorable Court be pleased to hear and determine the pending Plaintiff/Applicant's unopposed Consolidation Application dated 24th February 2023 on its merit.
 4. That the Court be pleased to grant such other orders/ directions or further reliefs as it may deem fit and necessary in the circumstance.



5. Cost of the Application be provided for.
2. The Application is supported on the grounds on the face of the application as listed in paragraph 1-12 and the annexed Affidavit sworn by Enock N. Namude Advocate, on behalf of the Plaintiff/Applicant on 25/07/2023. I do not need to reproduce them here.
3. The Application is opposed by way of grounds of opposition. The 1st Defendant, Francis Nyaga Njeru filed his Grounds of Opposition dated 21/11/2023. The 1st Defendant opposes the present application on the following grounds:
 1. The Application is incompetent, without merit, frivolous and vexatious.
 2. The Application is misconceived and legally untenable and an abuse of the Court process.
 3. The Order issued by the Honorable Court on 9/05/2023 is *functus officio*.
 4. The Applicant has failed to satisfy the conditions for grant of orders for review and setting aside the court order.
 5. There is no prejudice that will be occasioned upon the Applicant.
 6. The Application ought to be struck out or dismissed with costs to the 1st Defendant.
4. The 2nd Defendant, Siesta Investments Limited also filed its Grounds of Opposition dated 22/11/2023. It was the 2nd Defendant's position that the present application is superfluous and a clog in judicial time and processes as the Plaintiff was enjoined as a third party to ELC No. 766 of 2016 and has the platform and opportunity to pursue its claim as filed.
5. When the Application came up for determination on 23/11/2023, the Court granted the 3rd Defendant leave of 7 days to file its response to the application. By 4/12/2023, the 3rd Defendant had not filed its response to the present application. The Court further gave directions that the application be canvassed through written submissions and a Ruling date was reserved. By the time of writing this Ruling, none of the parties had duly submitted.

Issues for Determination

6. Having carefully read and considered the application and the grounds of opposition by the 1st and 2nd Defendants, I find that the following issues stand out for determination: -
 - i. Whether the Plaintiff's Application dated 25/07/2023 was properly defended.
 - ii. Whether the directions given on 9/05/2023 should be reviewed and set aside.

Analysis and Determination

Whether the Application is Properly Defended

7. The Application before the Court was only defended by both the 1st and 2nd Defendants by way of Grounds of opposition. The Court granted the 3rd Defendant leave of 7 days to file its response on 23/11/2023 and by 4/12/2023 when the 7 days leave lapsed, the 3rd Defendant had not filed its response to the impugned application. The Respondents did not file any Replying Affidavits in opposition to the present Application.



8. The legal provision on ways of opposing an application is Order 51 rule 14 of the *Civil Procedure Rules* which provides that;

“Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

- (a) A notice preliminary objection: and/or;
- (b) Replying affidavit; and/or
- (c) A statement of grounds of opposition;”

9. I have considered the Court of Appeal’s decision in the case of *Daniel Kibet Mutai & 9 others v Attorney General* [2019] eKLR where the Court cited with authority the case of *Peter O. Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another* [2016] eKLR which stated:

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition which were filed are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath”.

10. Further in the case of *Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited* [2010] eKLR the court held as follows: -

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant”.

11. From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application, they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.

12. However, though having held as such, the application by the applicant should not be deemed as having been allowed. This court has a duty to consider the application and proceed to determine it on its merits.

Whether the Directions of 9/05/2023 Should Be Reviewed and/or Set Aside

13. It is correct that a Court can under certain circumstances, review its decisions or set aside one. But the two terms are not synonymous with each other. They refer to two different actions or steps which occur different spheres. But my understanding of what the Applicant wants this Court to do is set aside its



orders/directions given on 9/05/2023. I say so because the entire prayer has to be interpreted as a whole. It states that “that this Honourable Court be pleased to review and set aside the direction/decision/order made on a mention date of the Honourable Lady Justice J.A Mogeni, delivered at Nairobi on the 9/05/2023 and the stay order herein be lifted and/or set aside”. The following prayer is one where the Applicant seeks to have its Application dated 24/02/2023 heard and determined on its merit. This means that the desire of the Applicant is to have the decision set aside meaning that the order of stay is lifted and the proceedings to continue wherein the Applicant’s application is heard on merit.

14. Thus, starting with the main desire of the Applicant, the law governing an application for review is set out in Order 45 Rule 1 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act*.

15. Section 80 of the *Civil Procedure Act* provides: -

“ 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.”

16. Further, Order 45, rule 1 (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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

17. The Honourable court is vested with the power and discretion to issue review orders on its judgments or rulings. In addition, the Court of Appeal held that “...the court has unfettered discretion to review its own decrees or orders for any sufficient reason.” Sufficient reasons have been explained not to be analogous to the grounds in the Rule since that would fetter the discretion of the Court [see *Wangechi Kimita & Another vs Mutahi Wakabiru* CA No. 80 of 1985 (unreported)]. However, while the Court has such wide discretion, that discretion must be exercised judiciously.

18. The conditions to be satisfied are derived from the said Order 45 Rule 1 (1). They are basically three limbs which are discernible from part (b) above and which must be looked at jointly with the fourth one, as summarized below;

- a. Discovery of new and important matter or evidence.
- b. Mistake or error apparent on the face of the record.
- c. Any other sufficient reason.
- d. Application must be made without unreasonable delay.

19. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* gives the Court the power to make orders for review, Order 45 sets out the conditions to be met in a review. The pertinent



issue for determination herein therefore, is whether the applicant has brought itself within any of the above conditions and their relationship as explained.

20. In the present application, the basic reason why the Applicant wants the decision of the Court reviewed is that there is an error apparent on the record.
21. The Applicant avers that the Judge erred in failing to hear and determine the Applicant's unopposed consolidation application on merit that this Court be pleased to order a consolidation of this suit with ELC Case No. 766 of 2016 and ARJ Capital Limited as the Plaintiff dated 24/02/2023. That the Plaintiff herein is not a party to the said suit ELC 766 of 2016 and had made the Application for consolidation so that it can get an opportunity to be heard because both suits deal primarily with the issue of ownership of the same land being LR No. 20273 situate in Nairobi measuring approximately 1.591 Hectares.
22. It is the applicant's further contention that the unopposed application dated 24/02/2023 was filed and served upon the Respondents and an Affidavit of service of the same dated 28/02/2023 was filed in this court. The directions date before the Judge for 9/05/2024 was served on 8/05/2023 a 1522 hours to all Respondents who all attended Court via a mention notice dated 5/05/2023 from the applicant's advocate official email address. That the said application was neither heard nor determined on merit by the Judge on 9/05/2023 and only granted the prayers sought by the 1st Respondent's Application dated 6/02/2023 having been opposed at paragraph 8 of the Applicant's Supporting Affidavit dated 24/02/2023.
23. Further, the Applicant deposed that the Judge erred in failing to determine and/or consider by checking the record that the 1st Defendant's counsel on 9/11/2023 misdirected the Court that it's Application dated 6/02/2023 is unopposed. That the Court failed and/or declined to consider the Applicant's consolidation application in her directions bearing in mind that the Applicant's counsel one Mr. Namude's connection had hitches as he could be seen talking but could not be heard and marked him absent and the 2nd Respondent's advocate one Mr. Koyokko raised the Applicant's consolidation Application in Court.
24. The Applicant contended that the Judge erred in failing and/or failing to give audience and/or hear the Applicant's counsel one Mr. Namude on 9/05/2023 thus violating Article 159(2) (d) and (e) of the Constitution of Kenya. That the Judge erred in failing to consider and/or peruse the proceedings of her sister Hon. Diana Orago dated 8/03/2023 where the 2nd and 3rd Respondent's counsel stated that the 1st Respondent had not served them with the Application dated 6/02/2023 and the same service was not proved in Court on 9/05/2023. The Applicant averred that the application has been brought in good faith and it is not an appeal in guise of a review.
25. It is not in dispute that the Court gave directions on 9/05/2023 staying this present case pending the hearing and determination of ELC No. 766 of 2016. I note that the Plaintiff seeks to now review the said orders on grounds that there is an error apparent on the face of the record. According to them, the Judge erred in failing to consider and/or peruse the proceedings of her sister Hon. Diana Orago dated 8/03/2023 where the 2nd and 3rd Respondent's counsel stated that the 1st Respondent had not served them with the Application dated 6/02/2023 and the same service was not proved in Court on 9/05/2023.
26. I have perused the Court record and I note that the 1st Defendant filed an Application dated 6/02/2023 on 7/02/2023. The 1st Defendant also filed a Hearing notice for the said Application on 22/02/2023 and also filed a Return of Service of the said application and the hearing notice on the even date. The Plaintiff filed an Application dated 24/02/2023 on the even date. In its supporting affidavit, the



Plaintiff averred that their application dated 24/02/2023 was also in response to the 1st Defendant's Application dated 6/02/2023.

27. Once again, the legal provision on ways of opposing an application is Order 51 rule 14 of the Civil Procedure Rules which provides that;

“Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

- (a) A notice preliminary objection: and/or;
- (b) Replying affidavit; and/or
- (c) A statement of grounds of opposition;”

28. It is my considered view that opposing an Application by filing another Application is not provided for under the law, Order 51 Rule 14 of the Civil Procedure Rules 2010 and therefore the 1st Defendant's counsel did not misdirect the Court when he stated that his Application dated 6/02/2023 was not opposed when the parties were before me on 9/05/2023.

29. It is the Applicant's contention, without prejudice, that the orders/directions of the Court delivered on 9/05/2023 was baseless, illegal and a clear infringement, violation of the Applicant's rights to fair hearing as enshrined under Article 50 (1) of the Constitution of Kenya 2010. This is why I need to reproduce a short summary of the court proceedings to be able to highlight the occurrences of this case right before the matter was stayed pending the determination of ELC 766 of 2016 before Lady Justice Omollo.

30. From the Court record, all the parties herein appeared before Hon. Orago, the Deputy Registrar on various dates. Particularly, all the parties appeared before the Deputy Registrar on 4/10/2022 wherein the Deputy Registrar was informed that the parties were awaiting directions from Justice Okong'o on the issue of consolidation in ELC 766 of 2016. On 5/12/2022, all the parties appeared before the Deputy Registrar once again and they informed her that Justice Okong'o was to deliver a decision on enjoining the Plaintiff herein in ELC 766 of 2016 on 1/12/2022 but the ruling was not delivered. On 27/02/2023, all the parties were before the Deputy Registrar wherein they informed her that the ruling in ELC 766 of 2016 was delivered. The plaintiff thereafter informed the court that he had filed an application on consolidation. The parties were given a PTC date for 8/03/2023.

31. The Plaintiff did not appear before the Deputy Registrar on 8/03/2023. I note that this date was taken by consent. Further, the Plaintiff was also aware of the given mention date as he served a mention notice upon the Defendants as seen on their return of service filed on 3/03/2023. One Mr. Thuku for the Defendant informed the Court that the matter had been mentioned severally for the Plaintiff to amend its plaint but they had not done the same. He therefore he sought for a date before a Judge for directions on hearing. The Deputy Registrar gave the Defendant a date to appear before me for directions on 9/05/2023. It was only the Defendants who appeared before me on 9/05/2023. The Plaintiff did not make an appearance on 9/05/2023 despite being aware of the mention date. I say so because there is a return of service of the mention notice dated 5/05/2023 which was filed by the Plaintiff on 9/05/2023 at 15.02pm. Further, I note that the Plaintiff was also aware of the mention date for 9/05/2023 from their advocate's own admission.

32. On the given date that is the subject of this application, the Defendants informed the Court that the Plaintiff had been enjoined as a third party in ELC 766 of 2016 through the ruling of Justice Okong'o on 19/12/2022. The case is now before my sister Judge Omollo. Mr. Koyokko, appearing for the 2nd



Defendant also informed the Court that there is an application for stay of the suit filed by the 1st Defendant. Mr. Opiyo, for the 1st Defendant informed the Court that he filed an application dated 6/02/2023 seeking to stay this suit until ELC 766 of 2016 is heard and determined. That there is no response from any other party. The Court thereafter stayed the suit pending the determination of ELC 766 of 2016.

33. The power to review is a creature of statute. It must be conferred by law either specifically or by necessary implication. Review is not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules of procedures or technicalities of the law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review was under mistake and the earlier judgment or decision would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice, nothing would preclude the Court from rectifying the error. The power to review can be exercised for the correction of a mistake and not to substitute a view. Once a review is dismissed no further review can be entertained.
34. The rectification of an order stems from the fundamental principle that justice is above all since the power of review is exercised to remove an error and not for disturbing finality. If reasoning in the decision is at variance with the clear and simple language in a statute or it suffers from manifest error of the law or if there is an error apparent on the face of the record which is liable to be rectified the powers of review can be exercised. The review Court cannot sit as an appellate Court. It is beyond the purview of the executing Court to scan or review the reasoning provided by the Court in decreeing the suit. The execution Court is a creature of a decree. It cannot be allowed to be above it. A wrong decision can be subject to appeal to a higher forum, but the review is not permissible on the ground that the Court proceeded on wrong proposition of the law. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the later can only be corrected by exercise of the review jurisdiction.
35. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. In the case of *Brown vs Dean* (1910) AC 373, Lord Loreburn stated that the new evidence must at least be such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgement. The provision relating to review contemplates grounds which would alter or cancel the decree.
36. A review can be done based on an error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident,



and does not require an elaborate argument to be established. See the case of *West Bengal vs Kamal Sengupta* AIR 2009 SC 476.

37. In the case of *Muyodi v Industrial and Commercial Development Corporation and Another* EALR (2006) EA 243, the Court of Appeal while dealing with an issue of review and describing an error apparent on the face of record, held 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 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. This laid down principle of law is indeed applicable in the matter before us.”

38. Thus, an error apparent on the face of record must be one that is obvious to the eye, and it must be one which when looked at does not yield two results. It shows itself to the read ordinary reader of the record and not the one looking for something hidden or obscure: yeah,

“...an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.”

(See *Chandrakhant Joshibhai Patel v R* [2004] TLR, 218).

39. The third ground for review is for any other sufficient reason. The expression means a reason sufficiently analogous to those specified in the rule though cannot be held limited to the first two reasons.
40. Turning back to the application at hand, it is clearly manifest that the applicant has neither shown to the satisfaction of the Court that there is a new and important matter of evidence that has been discovered, an error apparent on the face of the record of the Court’s directions, and/or there is ground for review for any other sufficient reasons. Having analyzed the application in depth, it would appear to the Court that it is a disguised appeal. The law is clear that if the applicant is aggrieved by the decision of the Honourable Court it is open for him to proffer an appeal. Otherwise this Court is now *functus officio*. Lastly, this application was filed on 2/08/2023 which is 59 days since the Court gave its directions on 9/05/2023. It cannot be said that the application was brought without inordinate delay.
41. Aside from the foregoing, I need not delve into this but the Court has been informed that the Plaintiff herein has been enjoined as a third party in ELC 766 of 2016. The Plaintiff on the other hand has averred that it is not a party to ELC 766 of 2016 hence the application seeking for consolidation of the two suits and for the Plaintiff to be made the plaintiff in ELC 766 of 2016. I note that the Plaintiff herein admits that both suits deal primarily with the issue of ownership of the same land. The Plaintiff was aware that there was a pending decision on consolidation in ELC 766 of 2016. From the record, counsels had agreed to await the same to be delivered. It has been brought to the Court’s attention that the Plaintiff was enjoined as a third party.



42. I am of the considered view that third party proceedings are not solely about contribution or indemnity by the third party to the defendant. That is only one aspect of it. Sub rule (b) and (c) of Order 15 Rule (1) of the Civil Procedure Rules envisage other scenarios. Sub rule (c) thereof is particularly instructive. It foresees issues that may arise not only between the third party and the defendant but between all the three parties in the suit viz: the plaintiff, defendant and third party. Strange as it may seem, Sub rule (c) envisages a situation where an issue may arise between the third party and the plaintiff, with the defendant not necessarily being centrally involved. This becomes clearly manifest when one considers the language used in Sub rule (c), which, in the relevant part, is as follows:

“...determined not only as between the plaintiff and the defendant and the third party or between any or either of them.”

43. In my view, a third party can file a counterclaim and defence in the suit once enjoined. Order 1 Rule 17 provides as follows:

“If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the “third party”) desires to dispute the plaintiff’s claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained by consent or otherwise, and his own liability to contribute or indemnity, as the case may be, to the extent claimed in the third party notice: provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit” It is crucial here that the rules foresees a situation where the third party may wish to dispute the plaintiff’s claim against the defendant (please note the underlined words in the provision).

44. All suits instituted by way of a plaint are responded to either by way of filing a defence or by filing a defence and counterclaim. The third party can choose the latter if he wishes and therefore file a defence and a counterclaim. The law then is clear: Order 1 rule 15 (a) (b) and (c) is relevant in delineating the range of issues that third party proceedings can cover. Order 1 rule 17 on the other hand is all about what the third party can do and it is clear that he can enter appearance and, among other things, dispute the plaintiff’s claim. The court is saying that the third party can dispute such claim either by way of filing a defence or by filing a defence and counter-claim.

45. To this end, the upshot is that the Plaintiff/Applicant has not demonstrated any errors apparent on the face of record to warrant the review and or setting aside of the orders given on 9/05/2023.

46. It is against the foregoing that I find the Plaintiff’s Application dated 25/07/2023 is unmerited and proceed to dismiss it with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF JANUARY 2024

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MOGENI J

JUDGE

In the virtual presence of:



Namude for the Applicant

Onyango Opiyo for 1st Defendant

Mr .Oyoko for the 2nd Defendant

Ms. Jseve for the 3rd Defendant/Respondent

Mr Kamau for the 4th Defendant/Respondent

