REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L PETITION NO. 4 OF 2016

(Formerly High Court Petition No. 7 of 2012)

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PETITIONERS' CONSTITUTIONAL RIGHTS UNDER ARTICLE 19, 20, 21, 22, 23, 35, 40, 47 AND 165 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

SIRIKWA SQUATTERS GROUP……..……..
…….PETITIONERS

VERSUS

THE COMMISSIONER OF LANDS…….....……1ST
RESPONDENT

THE CHIEF REGISTRAR OF TITLES…….....……..…2ND
RESPONDENT

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT…….....…….3RD
RESPONDENT

DIRECTOR OF SURVEY…….....…….4TH
RESPONDENT

DISTRICT LANDS OFFICER, UASIN GISHU DISTRICT.....……5TH
RESPONDENT

LONRHO AGRI BUSINESS (EA) LTD…….....……..…6TH
RESPONDENT

MARK KIPTARBEI TOO…….....……..….7TH
RESPONDENT

DAVID K. KORIR…….....…….……8TH
RESPONDENT

HIGHLAND SURVEYORS LTD…….....……..……...9TH
RESPONDENT

KENNEDY KUBASU…….…….…….10TH RESPONDENT

RULING

The Honourable Attorney General has come to court by way of Notice of Motion praying that the Judgment dated 9.2.2017 be reviewed to the extent that this Honourable court does make an order specifically excluding all public utilities such as the Eldoret International Airport, Moi University, public roads, public primary and secondary schools and all administrative centers among other units established on or falling within the suit parcels of land from the lands which the petitioners are entitled to pursuant to the judgment of 9.2.2017. The application is based on grounds that there is an error apparent on the face of the record that warrants review of the judgment dated 9.2.2017 as the judgment is silent on the fate of public utilities falling within the suit parcels of land. That prima facie the court vested land measuring 24,933 acres to the petitioners yet on the ground there are several public utilities housed within the lands vested to the petitioners. That even after finding that some lands were compulsorily acquired by the Government of Kenya, the learned Judge failed to make a definite finding that all land compulsorily acquired by the Government of Kenya was and remains not part and parcel of the petitioners' land. That it is in the interest of justice and public at large that the judgment be reviewed so as to exclude all that land housing public utilities from the petitioners' reach and a finding be made that all land housing public utilities is public land which cannot be alienated whatsoever. That this court has inherent powers to recall and review its own judgment and give effect to its manifest intention. That none of the parties herein stands to suffer any prejudice by grant of the orders herein.

The application is supported by the affidavit of Joseph Ngumbi who states that the office of Attorney General is established under Article 156(1) of the Constitution of Kenya with mandate of inter alia, defending, promoting, protecting and upholding rule of law and public interest under Article 156(6). That he is aware of this dispute involving the petitioners and respondents herein wherein judgment was delivered on 9.2.2017 vesting a number of parcels of land to the petitioners herein by virtue of a direct presidential allocation. That he is reliably informed that within the suit parcels of land which were vested to the petitioners by virtue of judgment delivered on 9.2.2017, there are several public utilities such as the Eldoret International Airport, Moi University, public roads, public primary and secondary schools and other administrative centres among other units established on or falling within the suit parcels of land.

That he is also aware that the learned Judge rightly found that part of the land making up the 24,933 acres which was vested to the petitioners had been compulsorily acquired by the Government of Kenya for public purposes which included the establishment of the aforestated public infrastructures and learning institutions. That in the final reliefs which were granted to the petitioners, it is apparent that save for the around 67 acres which was vested to the 7th respondent the learned Judge did not make a definite finding on the fate of the said public utilities.

That there is fear that the petitioners may interpret to mean that all the 25,000 acres excluding 67 acres reserved for the 7th respondent was vested to the petitioners thus putting the operations of the public utilities which fall within the remaining 24,933 acres under threat of invasion and interference by the petitioners.

That it is therefore safe that the court clears this anomaly/error by clearly defining and ordering that all public utilities falling within the 24,933 acres are reserved as public land and therefore excluded from the petitioners' reach. That it is in the interest of justice that the judgment herein be reviewed to exclude all that land housing public utilities from the petitioners' reach and a finding be made that all land housing public utilities is public land which cannot be alienated whatsoever.

That this application discloses sufficient grounds warranting review of the judgment delivered on 9.2.2017 and this court has inherent powers to order for a review. That none of the parties herein stands to suffer any prejudice by grant of the orders herein as the orders are intended to protect public interest in the said public utilities. That it is trite law that public interest outweighs personal interest hence the need to preserve the public utilities herein tilts in favour of granting the order for review sought herein.

The petitioners are not opposed to the application as prayed by the Attorney General. The 6th and 8th respondents are opposed to the application as the matter is in the Court of Appeal and therefore, the court lacks jurisdiction to review a judgment which is before the Court of Appeal.

Sophie Jelimo, the widow of the late Hon. Mark Kiptalei Too states that the court cannot be moved to review its own decision if any party has appealed against the decision in the higher court as the lower court is *functus officio*. The firm of Nyairo & Company Advocates filed grounds of opposition stating that the prayers for review are ambiguous as they do not state which parcel of land is intended to be excluded. I have considered submissions of all counsels on record and do find that the issues for determination are:

1. ***Whether the court has jurisdiction to hear this application***.

2. ***Whether the application meets the threshold for grant of review under Order 45 of the Civil Procedure Rules.***

Section 80 of the Civil Procedure Act which is the substantive law relating to Review provides: -

> **"Any person who considers himself aggrieved as by a decree or order from which an appeal is allowed by this Act, <u>but from which</u> <u>no appeal has been preferred.</u>**
>
> **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 order therein as it thinks fit".**

On the other hand, the procedural provisions of order 45 (1) of the Civil Procedure Rules provides that: -

> "**45 (1) Any person considering himself aggrieved- (a) by a decree or order from which an appeal is allowed, <u>but from which no appeal has been preferred; or</u>**
>
> **(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 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.**
>
> **<u>(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being responded, he can present to the appellate court the case on which he applies to the review".</u>**

From the above provisions of Section 80 of the Civil Procedure Act and order 45 of the Civil Procedure Rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same judgment/decree or order. One must elect either to file an appeal or to apply for a review however**, a party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being responded, he can present to the appellate court the case on which he applies to the review. It is worth noting that the Attorney General has come to court due to public interest and it cannot be said that he was the advocate for the 1st to 5th respondents and therefore he could have brought out the public interest in respect of the public utilities because the issue before the court was different and did not involve the public utilities.**

I have perused the record herein and do find that it has not been shown that the Honorable Attorney

General has appealed against the judgment of the court and therefore he has the right to apply for review in the best interest of his client. Though the Attorney General was not a party in the suit, it is worth noting that the rules give any person including the Attorney General the right to apply for review under Order 45 whether he was a party or not so long as he is aggrieved by the decision of the court. The upshot of the above is that an appeal does not automatically disqualify the court from hearing the matter in view of the provision of Order 45, Rule 1 subrule 2.

I have carefully considered the submissions of Steve Biko, learned counsel for the 7th respondent, on the import of Order 45 of the civil procedure rules and do find that he has misapprehended the provisions of order 45 rule 1 sub rule 2. I have also carefully read the Court of Appeal authority of ***Kisya investments vs R.L Odupoy*** an appeal from the ruling of the High Court of Kenya at Nairobi (**Hon Justice Shah**) as he then was being appeal no 31 of 1995 and do find the facts therein can be distinguished from the facts of this case. In the Kisya investments case, the Attorney General was a party in the lower court being a defendant who was sued for general damages and special damages for breach of contract.

The honorable attorney general entered appearance in the said ***Kisya's Case*** but failed to file defense and therefore leave was sought by the appellant to enter interlocutory judgment against the attorney general which was consequently granted and the suit was to be set down for assessment of general damages. The Attorney General filed a defence subsequently which was struck out. No application was made to set aside the order and no appeal was preferred against it. After formal proof judgment was delivered in favor of the appellant. The attorney general filed a notice of appeal out of time but with the leave of the court and obtained the leave of the court to file a record of appeal out of time but failed to comply with the said order. The notice of appeal was struck out on application which was not opposed by the attorney general. It is upon this background that the Attorney General applied for review under Order XVIV of the civil procedure rules they then were. On Appeal, the main ground was that the Attorney General having filed a notice of appeal which was struck out he could not by a subsequent application made thereafter proceed by way of a review. The distinction between the matter under dispute and the authority referred to by Mr. Biko is that the Attorney General was not a party in this dispute and that even if he was a party he has not appealed as opposed in the Kisha's Case where the attorney General was a party and appealed and on the striking out of the appeal he applied for review. Moreover, it has not been demonstrated that **the grounds of the appeal are common to the applicant and the appellant or that the applicant can present to the appellate court the case on which he applies to the review**

It is therefore a misconceived view that after delivery of judgment, the court becomes *functus officio* as it has jurisdiction to review judgment under the provision of section 80 the Civil Procedure Act Cap 21 Laws of Kenya and order 45 of the Civil Procedure Rules.

The second issue is whether there is an error apparent on the face of the record that warrants review of the judgment dated 9.2.2017 as the judgment is silent on the fate of public utilities falling within the suit parcels of land. The only public utility brought to the courts attention during the hearing of the petition was the Moi international Airport Eldoret which was compulsorily acquired by the government.

In the case of ***Draft and Develop Engineers Limited – v- National Water Conservation and Pipeline Corporation, Civil Case No. 11 of 2011***, the High Court correctly stated 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 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 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"***.

The Court of Appeal in **Muyodi v Industrial & Commercial Development Corporation & Anor., (2006) 1 EA 243***)* held that:

> ***"For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay".***

I do find that failing to make a finding on the status of the public utilities when it was clear that they were compulsorily acquired was an error apparent on the face of record and specifically having found that part of the EATEC land was compulsorily acquired by the Government of Kenya in the year 2000 for the public purpose of the setting up and construction of the Moi Eldoret International Airport which is registered as L. R. 20631, it was an error not to exclude the same from the parcels of land affected by the judgment of the court. I do hereby review the judgment by finding that the parcel of land being occupied by the Moi Eldoret International Airport thus LR 20631 and, Moi University, public roads, public primary and secondary schools and all administrative centers among other units established on or falling within the suit parcels of land which the petitioners are entitled to pursuant to the judgment of 9.2.2017 were not subject to the petition herein and therefore not affected by the decision of this court. Orders accordingly. Each party to bear own costs. The application dated 28th March 2017 will require highlighting and therefore a date will be given.

Dated and delivered at Eldoret this 10th day of November, 2017.

A. OMBWAYO

JUDGE