



**Masters Kenya Limited & another v Desert Runners Services Company Limited & 5 others
(Environment & Land Case 916 of 2013) [2024] KEELC 921 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 916 OF 2013
EK WABWOTO, J
FEBRUARY 22, 2024**

BETWEEN

MASTERS KENYA LIMITED 1ST PLAINTIFF

STEPHEN KAMAU NDUNGU 2ND PLAINTIFF

AND

DESERT RUNNERS SERVICES COMPANY LIMITED 1ST DEFENDANT

JOHN SALEH OKETCH 2ND DEFENDANT

SYLVIA ALIVISTA LITUNDA 3RD DEFENDANT

HOUSING FINANCE CORPORATION OF KENYA 4TH DEFENDANT

THE NGONG LAND REGISTRAR 5TH DEFENDANT

THE CHIEF REGISTRAR – NAIROBI 6TH DEFENDANT

RULING

1. The application coming for consideration in this ruling is dated 20th November, 2023 brought under Order 45 rule 2 of the [Civil Procedure Rules](#). The application was filed by the 2nd Plaintiff Stephen Kamau Ndungu and it seeks the following orders:
 - i. Spent ..
 - ii. This Court in the interim do issue temporary injunction restraining the 4th Respondent (HFCK) by themselves not to sale by private treaty L.R. No. Ngong/Ngong/20987, through any auctioneering firm, agents) and servants from executing Court’s decree arising from the judgment dated 19th September, 2023 pending the hearing and determination of this application.



- iii. This Court be pleased to amend Order No. 3 of its judgment by insertion of a monetary figure of sum of Kshs 8,000,000/- at the end of the said order to give effect to the finding and holding at paragraph 58 of the judgment.
 - iv. That the Honourable Court does indicate full names of the 3rd Defendant on the 1st page of the Court Judgment to read as Silvia Alivista Litunda instead of Silvia Litunda to avoid denial of either names during execution.
 - v. That this Honourable Court does indicate the Caveat name of the 1st Defendant as Desert Runners Services Company Limited and not Desert Runners (K) Ltd.
2. The application is based on the grounds that the 1st Defendant has failed to comply with the terms of the Court Order No. 3 thereof by denying an award of the sum of Kshs 8,000,000/= to the Plaintiffs in the final orders of the judgment. It was also averred that the judgment of the Court need to be reviewed to the extent that a mandatory figure is determined in order No. 3 of the judgment to facilitate execution process against the 1st Defendant and Co-defendants who are jointly liable in payment of the balance of the purchase price of L.R. No. Ngong/Ngong/20987. It was also averred that without a determined monetary figure disclosed in the decree of the Court, it will be an uphill task for the Plaintiffs to carry out execution process against the 1st to 3rd Defendants and thus rendering this application necessary.
 3. The application was supported by an affidavit sworn by the 2nd Plaintiff on 20th November, 2023 where it was deposed that the Plaintiffs have made attempts to demand the 1st Defendant to comply with the judgment of the Court under Order No. 3 thereof to settle the outstanding balance but the 1st to 3rd Defendants have failed to honour it for non-disclosure of the said sum of Kshs 8,000,000/= in the final orders in the judgment. it is important for the court to review its decision under Order 3 by insertion of the amount of Kshs 8,000,000/= to facilitate execution. The 2nd Plaintiff also deposed that the application ought to be allowed for ends of justice to be met to the Plaintiffs.
 4. The application was opposed by the 1st and 4th Defendants. The 1st Defendant filed a Replying Affidavit sworn on 21st November, 2023. The 1st Defendant contended that the Court dismissed both the Plaintiffs' cases and the 1st Defendant's case as the 1st Defendant had breached the agreement dated 1st March, 2013 which lead to the entering of the agreement dated 15th March, 2013 by only paying Kshs 323,376/= thus forcing the 1st Defendant to pay Kshs 2,366,524/=. It was argued that the Court at paragraph 77 of its judgment pointed out that it would not be re-writing either of its judgment the net result of the breach being as follows:
 - a. $Kshs\ 8,000,000 - Kshs\ 7,000,000 - Kshs\ 2,366,524 + Kshs\ 327,376 = Kshs\ 1,039,148/=$.
 - b. As such the amount meant in paragraph 78 (ii) is Kshs 1,039,148/= owed to the Plaintiffs by the 1st Defendant.
 - c. In terms within paragraphs 78(iii) a decree for Kshs 1,039,148/= can issue in favour of the 1st Defendant as against the Plaintiffs.
 5. Parties also filed written submissions in support to and in opposition to the application. The 2nd Plaintiff filed written submissions dated 5th December, 2023 and 17th January, 2024. the 1st Defendant filed written submissions dated 19th December, 2023.
 6. The 2nd Plaintiff argued that this Court ought to re-look at its final judgment and indicate the amount figure plus interest from the date of purchase of the suit property and that the Court decree will not be enforceable without insertion of the sum of Kshs 8,000,000/=.



7. It was also submitted that despite the findings and holdings at paragraph 58 of the judgment that the 1st Defendant owe the Plaintiff balance of Kshs 8,000,000/= being the purchase price of L.R. No. Ngong/Ngong/20987, the 1st Defendant has failed, refused and or ignored to comply with the Court's judgment.
8. The 1st Defendant argued that there is no mistake or error apparent on the face of the record or any other sufficient reasons to warrant review of the Court's judgment delivered on 19th September, 2023 and reliance was made to the Case of Nairobi Disciplinary Cause Number 17 and 26 of 2016 [*Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya*](#) [2019] eKLR.
9. It was further submitted that the Court reached its decision after proper examination of facts, evidence and the materials placed before it including the agreements dated 1st March, 2013 and 15th March, 2013. The 1st Defendant argued that the Court's holding at paragraph 60, 61, 62, 75 and 77 of its judgment was not an error apparent on the face of the record as contemplated under Order 45 of the [*Civil Procedure Rules*](#) and the Court was urged to dismiss the application.
10. During the plenary hearing of the application the 2nd Plaintiff appeared in person and made oral submissions in support of the application while Learned Counsel Mr. Makumi submitted on behalf of the 1st Defendant and Learned Counsel Mr. Ayieko for the 4th Defendant also made brief oral submissions opposing the application for the reasons that no plausible reasons had been given to warrant the grant of the injunctive orders sought.
11. This Court has considered the application, affidavits filed, written and oral submissions made by the parties and is of the view that the following are the key issues for determination:
 - i. Whether the application has met the threshold for grant of a temporary injunction.
 - ii. Whether the application has met the threshold for review.
12. In respect to the temporary injunctive orders sought, it is worth noting that the same are not hinged on any proceedings and considering that the court has already rendered its judgment, there is no basis upon which this court can grant the same.
13. In respect to the review orders sought, the Applicant argues that the judgment of this Court delivered on 19th September, 2023 ought to be reviewed to the extent that a monetary figure is determined in Order No.3 to facilitate execution process against the Defendants. It was also argued that without a monetary figure in the decree of the Court, it will be an uphill task to carry out execution process against the 1st to 3rd Defendants.
14. Under section 80 of the [*Civil Procedure Act*](#) and order 45 rule 1 of the [*Civil Procedure Rules*](#), the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See [*Paul Mwaniki v NHIF Board of Management*](#) [2020] eKLR; Is there any such mistake or error on the face of the record?
15. In respect to the issue raised by the Applicant, the Court has perused its judgment delivered on 19th September, 2023 and it is evident that the following pronouncement was stated at paragraph 78 of the judgment:

“In the agreement dated 15th March, 2013, the 1st Plaintiff had accepted receiving Kshs 7,000,000/= as loan and had further agreed to service the same. It is also not clear as to what amount and arrears was in dispute as between the parties herein. Hence therefore,



the 1st Defendant herein has also not been able to prove the Cross-Petition to the required standard.”

16. There was not an error apparent on the record but a finding by this Court and as such the Court cannot superimpose the payment of Kshs 8,000,000/= in respect to Order 3 of the final judgment delivered by the Court. There is no error apparent on the face of the record save for the citation of the names of the 1st and 3rd Defendants which the correct will proceed to correct the same. In the case of *Nyamogo & Nyamogo v Kogo* (2001) EA 170, the Court of Appeal stated as follows:-

“As was stated in the *AIR commentaries on the code of civil procedure by Chitale and Rao (4th ed) Volume 3 at page 3227*; “a point which may a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is not ground for a review though it may be a good ground for an appeal”.

17. In the end the Plaintiffs’ application dated 20th November, 2023 is disposed of in the following terms.
- a. The name of the 1st Defendant appearing in the judgment of this Court is corrected to read Desert Runner Services Company Limited and not Desert Runners Services (K) Limited.
 - b. The name of the 3rd Defendant as appearing in the judgment of this Court is hereby corrected to read Silvia Alivista Litunda instead of Silvia Litunda.
 - c. All the other reliefs not expressly granted are declined.
 - d. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2024.

E.K. WABWOTO

JUDGE

In the virtual presence of:

Stephen Kamau 2nd Plaintiff acting in person.

Mr. Makumi for 1st Defendant.

Ms. Mutinda h/b for Mr. Ayieko for 4th Defendant.

N/A for the other parties.

Court Assistant: Caroline Nafuna.

