



REPUBLIC OF KENYA



**Maina (Suing for and on behalf of his mother Loise Nyaguthii Maina)  
v Kobia & another (Environment and Land Appeal E042 of 2022)  
[2024] KEELC 1006 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1006 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E042 OF 2022  
CK NZILI, J  
FEBRUARY 21, 2024**

**BETWEEN**

**JOB NJERU MAINA (SUING FOR AND ON BEHALF OF HIS MOTHER LOISE  
NYAGUTHII MAINA) ..... APPELLANT**

**AND**

**SOLOMON MURIUNGI KOBIA ..... 1<sup>ST</sup> RESPONDENT  
LAND ADJUDICATION & SETTLEMENT OFFICER TIGANIA EAST  
SUBCOUNTY ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate Court at Tigania  
ELC Case No. 97 of 2018 delivered on 19.8.2021 by Hon. G Sogomo)*

**JUDGMENT**

1. The appellant, who was the plaintiff in the lower court, had sued the respondents, claiming that they fraudulently transferred 9 acres out of his land to the 1<sup>st</sup> respondent as Folio No.5369, Akaiga Adjudication, initially belonging to the late David Maina Kigo, without the deceased or the legal administrator's consent, knowledge or approval. He sought for retransfer of the land to him and for general damages. His plaint dated 20.6.2017 was accompanied by a list of documents witness statements and documents among them a certificate of confirmation of grant dated 30.6.2016, power of attorney donated to the appellant by his mother Loise Nyaguthii Maina, consent to sue from the land adjudication officer and settlement officer dated 12.4.2016 and a search for folio 1542 and 5369.
2. The appellant had also filed an application dated 9.10.2017, in which he sought an inhibition order with respect to Folio No.5369 Akaiga Adjudication Section and stay of issuance of the title deed of the 1<sup>st</sup> respondent following the closure of the adjudication section.



3. The 2<sup>nd</sup> respondent opposed the suit by a written statement of defense dated 4.10.2019. It denied the allegations of fraud but submitted to the jurisdiction of the court. Further, the 2<sup>nd</sup> respondent denied receipt of any notice of intention to sue from the appellant. Though there is no entry of appearance or statement of defense by the 1<sup>st</sup> respondent, the record shows service of hearing notice upon the firm of J.M.G Kaume & Co. advocates who received court processes and went to the extent of filing written submissions dated 9.12.2019 on behalf of the 1<sup>st</sup> respondent.
4. The trial court record indicates that the matter came up for hearing on 28.11.2019 in the presence of advocates for both the appellant and the 1<sup>st</sup> respondent. The trial court directed parties to address it on Section 26 (3) of the [Land Consolidation Act](#), Section 29 (1) of the [Land Adjudication Act](#), and Section 16 of the [Government Proceedings Act](#) on the question of jurisdiction. The appellant and the 1<sup>st</sup> respondent, therefore, complied by filing written submissions dated 22.1.2020 and 9.12.2019, respectively.
5. In a ruling dated 23.1.2020, the trial court held it had no jurisdiction to entertain the suit and struck it out. The appellant filed an application dated 27.1.2021. He sought for review of the ruling dated 23.1.2020 for the matter to start denovo. The reasons given were that the procedure adopted by the trial court was illegal, there was a mix-up of proceedings and effects of covid-19, and unless review was allowed, the appellant stood to suffer irreparable damage. In a supporting affidavit sworn by B.G Kariuki Advocate, he averred the covid-19 restriction impeded access to his client based in Nyeri, that there were apparent errors in the face of the record calling for review and that his client was condemned unheard and without due process.
6. There was no reply made by the respondents to the application, and in a ruling delivered on 19.8.2021, the trial court held the previous ruling would not have been delivered on 23.1.2020 and the reference of that date through an error was a mere misdescription of the date and did not cause any prejudice to parties to call for a review and for the matter to start denovo. The court disallowed the application, but suo moto amended the dates of the previous ruling to read 30.1.2020 in the presence of B.G Kariuki, advocate for the appellant.
7. The appellant appeals to this court on the grounds that the trial court erred in fact and law in dismissing his notice of motion and for failing to allow it; for holding that the ruling was slated for 30.1.2020 and not 23.1.2020; for holding that there was a mere technical error which was not prejudicial to him and for holding that the suit should not start denovo in accordance with the law and lastly for going against the weight of the evidence and the law.
8. In support of the grounds of appeal, the appellant, following directions to canvass the appeal, filed written submissions dated 22.12.2023. It was submitted that by not reviewing the order, the trial court departed from the provisions of the [Civil Procedure Act](#) on how suits should be heard and disposed of. Further, it was submitted that the earlier ruling striking out the suit was wrong, for the trial court misunderstood and misapplied the law applicable to the matter. Reliance was placed on *Peter Kimandui v Land Adjudication Officer & others* Nyeri Court of appeal no. 28 of 2015 that [Land Consolidation Act](#) & [Land Adjudication Act](#) 283 & 284 do not apply simultaneously and that in Tigania East District only Cap 283 applied yet the trial court applied Cap 284, which mixed up of the law as an error.
9. The appellant submitted that he was not challenging the merits of the land adjudication officer's decision and had obtained consent thereof. Reliance was placed on [Stephen Kungutia and others v Severina Nculubi](#) Nyeri Court of Appeal No 221 of 2010), [Maingi Peter Stanley & another v Juda K.M](#)



- Benedict Imunya & others* (2022) eKLR, and *Benedict Kilemi M'Thinya v Joseph Ngituyu & another* (2021) eKLR.
10. The appellant submitted that the trial court adopted a procedure alien to the *Civil Procedure Act* on how a civil suit should be heard and determined and that to strike out a suit ought to be exercised sparingly and cautiously, especially where full merits of the case have not been met through discovery and oral evidence. Reliance was placed on *Yaya Towers Ltd v Trade Bank Ltd* Civil Appeal No. 35 of 2000.
  11. The appellant submitted that a right to hear was a fundamental right and that substantive justice dictated it was only provident that disputes between parties be resolved and determined through a full hearing on merits. Reliance was placed on *Richard Ncharpi Leiyagu v IEBC and others* Nyeri C.A No. 18 of 2013.
  12. The role of a first appellate court is to look at the record of the court below with an open mind, with a fresh perspective, and come up with independent findings on the facts and the law. See *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates, Gitobu Imanyara & others v Attorney General* (2016) eKLR.
  13. In this appeal, what was before the trial court was an application for review based on errors apparent on the face of the record. The record shows this matter started before this court on 9.10.2017 before it was transferred to the lower court. At the time, there was a pending application dated 9.10.2017. I have yet to come across any disposal of that application. The appellant in that application had averred on oath that the land adjudication section had become closed and registration of titles made in favor of the 1<sup>st</sup> respondent. So obviously, the land had become titled, and that is why the appellant was seeking inhibition orders. Instead of determining that application first, the trial court proceeded to direct the parties to address it on the question of jurisdiction, which none of the parties had pleaded to or raised.
  14. Whereas there is nothing wrong with a court of law raising sua sponte, the issue of jurisdiction, parties must be given an opportunity to ventilate issues. See *Nur Olow Farah v Muda Arale Farah & another* (2021) eKLR, *in Re-state of JKM (deceased)* (2020) eKLR, *Political Parties Dispute Tribunal & another v Musalia Mudavadi & others exparte Petronila Were* (2014) eKLR, *KBC v Municipal Council of Mombasa & another* (2021) eKLR.
  15. In the record, it appears that the parties filed written submissions to the directions given by the trial court and appeared in court on 23.11.2019 to fix a ruling date. So, a ruling date of 30.1.2020 was given. The ruling as read was dated 23.1.2020. The appellant sought for review since there was an error on the face of the record and for the matter to start denovo. The grounds were that the procedure adopted by the trial court was offensive to the *Civil Procedure Act*, there was a mix-up, and unless the review was allowed, the appellant would be gravely prejudiced. Counsel for the appellant swore on oath that there was a mix-up on the date due process was not followed, his clients were condemned unheard and were risking losing a prime property.
  16. The law allows a court to review, set aside, and vacate its earlier decree or on order under Order 45 of the Civil Procedure Rules as read together with Section 80 of the *Civil Procedure Act*. In this instance, the appellant had singled out the ground of mistake or error apparent on the face of the record. In *NBK v Ndungu Njau* (1997) eKLR, cited with approval in *Otieno Ragot & Co. Advocates v NBK* (2020) eKLR, the error or omission must be self-evidence should not require an elaborate argument and further that it will not be sufficient grounds that another judgement could have taken a different view of the matter. In *KBC v Municipal Council of Mombasa* (*supra*), the court observed that a review cannot be a substitute for an appeal.



17. In *Muyondi v ICDC & another* (2006) 1. EA 243, the court observed that as per *Nyamogo & Nyamogo Advocates v Kogo* (2001) E. A 174, an error on the face of the record, cannot be exhaustively defined but must be left to be determined judicially on the facts of each case. The court said that where an error is on a substantial point of law and stares one in the face, and there are no two opinions about it, a clear case of an error appearing on the face of the record is made. The court said a mere error or wrong view was no ground for review, though it may be a ground for appeal.
18. In the application before the trial court, there was already an identified error by the applicant, which the trial court conceded to but said it was a mere technicality that did not prejudice anybody. Order 21 Rule (3) of the Civil Procedure Rules provides that a judgment must be dated and signed. In *Refrigeration Contractors Ltd v James O Lieta* (2005) 1 KLR, the court said a judgment that is not dated was a nullity. Pronouncement of a decision is given legal effect by dating and signing it at the time of such dating and pronouncement. A judgment must speak for itself. Section 99 of the *Civil Procedure Act* allows the court to correct it either suo moto or on an application of a party. Under Order 42 13 (4) (f) Civil Procedure Rules, a judgment is one of the critical documents in an appeal. So, its date and signature are not mere formalities or technical errors. The period within which the appeal against a judgment ought to be appealed against is computed from the date of delivery. In this appeal, I find the trial court was proper to correct the error.
19. That is not all. The appellant had asked for more than the correction of the date of the delivery of the ruling. The trial court was being asked to relook at the entire ruling, for there was a complete departure of due process and the right to a fair hearing. As indicated above, there was a pending application dated 9.10.2017 where the land was said to be registered. The land had been described as L.R 5369 Akaiga Adjudication Section. An inhibition order under Sections 68 and 70 of the *Land Registration Act* was being sought to preserve the suit property.
20. Jurisdiction means the authority and the power to decide matters that are litigated before a court in a formal way for its decision. It flows from *the Constitution* statute or both. See *Owners of Motor Vessel Lillian S v Caltex Oil (K) Ltd* (1989) KLR. A court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined by looking at the pleadings and not to the substance merits of the case. In the instant appeal, the jurisdiction had not been challenged (in limine).
21. The appellant's and the 2<sup>nd</sup> respondent's pleadings were the determining factors. They contained the legal basis of the claim. The appellant had pleaded that consent had been obtained from the land adjudication officer. The claim was based on fraud. The appellant had also pleaded that the land had become titled after the completion of the adjudication register for the section. All these, in my view, were indicators of the jurisdiction of the court.
22. In *Republic v Magistrates Court Mombasa Absin Energy Ltd* (I.P.) J.R E033 of 2021 (2021) KEHC 101 (KLR) 24<sup>th</sup> January 2022 (Judgment), the court said pleadings are not for cosmetic purposes, and a trial court must hoist its antennae high anytime it read averments in the pleadings. The court said jurisdiction has three categories, subject matter, territorial and pecuniary, and from which the court has to discern if it has a right to hear the case.
23. In this appeal, the appellant has submitted his right to a fair hearing, and to have his suit determined on merits was curtailed when the trial court fell in error, misapplied the law, and held the suit improperly before it. Reliance was placed on *Peter Kimandiu v Land Adjudication Officer* (*supra*), *Maingi Peter Stanley & another v Juda Imunya* (*supra*), *Stephen Kungutia 2 others v Severina Nchulubi* (*supra*), *Benedict Kilemi M'Ithinyai v Joseph Ngituyu & another* (*supra*) and *Richard Ncharpi Leiyagu v IEBC* (*supra*).



24. Guided by the case law cited by the appellant, I think the trial court was wrong to decline jurisdiction based on the pleadings before the court. The trial court ignored the pending application and the pleadings and revisited the same when called upon to exercise the review jurisdiction. It should have become evident that the appellant and the parties in general were properly before the court.

25. The upshot is that I find the appeal with merits. It is hereby allowed with costs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON  
THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024**

In presence of

C.A Kananu

Miss Kendi for Mbaikyatta for 2<sup>nd</sup> respondent

Miss Mbumbuya for the Appellant

**HON. CK NZILI**

**JUDGE**

