



REPUBLIC OF KENYA



KENYA LAW
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Chege & 2 others v Chege alias Chege “B” (Environment & Land Case 424 of 2013) [2024] KEELC 906 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 906 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 424 OF 2013
MD MWANGI, J
FEBRUARY 15, 2024

BETWEEN

JANE WANJIRU CHEGE 1ST PLAINTIFF

JAMES WAINAINA CHEGE 2ND PLAINTIFF

GEORGE MBUGUA CHEGE 3RD PLAINTIFF

AND

JOHN NDWARU CHEGE ALIAS CHEGE “B” DEFENDANT

RULING

1. This Ruling is in respect of the Plaintiffs’ application dated 26th June, 2023. The application is expressed to have been brought under the provision of Order 45 Rule 1 (b) of the *Civil Procedure Rules* and Article 159 (d) of the *Constitution*. The Applicants pray for orders that;
 - a. The Honourable Court do review its order of closing the Court file and reopen the same.
 - b. The Honourable Court be pleased to review its order issued on 10th July, 2019 by including the terms of the Consent order dated 22nd June, 2018 and filed in Court on the 18th July, 2018 which he Court inadvertently over looked.
 - c. That costs of the application be in the cause.
2. The application is premised on the grounds that the parties herein filed two consents dated 18th July, 2018 and 20th May, 2019. However, when the Court adopted the consent it only recorded the second Consent leaving out the first consent.
3. It is averred that in order to correct the situation and ensure all the parties concerned get their fair share of the disputed land, it is necessary to review the order. That the omission of one consent is an apparent error on the face of the record.



4. The application is supported by the Affidavit of Jane Wanjiru Chege, the 1st Plaintiff/Applicant herein, deponed on the 26th June, 2023, sworn on her own behalf and on behalf of her co-Plaintiffs. She avers that parties herein recorded two consents dated 22nd June, 2018 and 20th May, 2018 respectively.
5. She states that on 10th July, 2019, they informed the court that they had two consents to be adopted. However, upon issuance of the Decree, they realized that the consent dated 22nd June, 2018 and filed on 18th July, 2018 had been left out. The said omission is an error apparent on record hence the need for a review. She averred that the Surveyor is unable to sub divide the parcel of land known as Dagoretti/ Riruta/ 731 as it is not quoted in the Decree.
6. The Defendant/ Respondent was served with the application but he opted not to file any response thereto. The application is therefore unopposed. However, although the application is unopposed, the court is mandated to determine the application on its merit in line with the law.

Issues for determination

7. I have keenly perused the application and guided by the enabling laws, the sole issue for determination is whether the court should grant the reliefs as sought by the Applicants.

Analysis and determination

8. Section 80 of the *Civil Procedure Act* Cap 21 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

9. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows: -

“ 1. Any person considering himself aggrieved—

- (1) 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.”

10. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

“ Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to



the following grounds; (a) 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; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

11. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
12. From the record, it is evident that the court only adopted the consent dated 20th May, 2019 and left out the consent dated 22nd June, 2018. Evidently, that would amount to an error apparent on the record to warrant a review of the Decree issued therein.



13. It is a settled principle of law that the Court has power to inquire into the propriety of a proposed consent order before adopting it. In the case of *Onesmus Munio Ndumbi vs. Joseph Njogu Paulo & Anoter* [2017] eKLR, Sila Munayo, J stated that,
- “Generally, Parties are free to enter into consents. However, the Court is not bound to adopt, as orders of the Court all consents of the parties, and may in some instances reject them. The Court always bears oversight over a matter that is before it and may reject a consent, if for example, it is aimed at stealing a march on one of the parties, if it is a clear fraud apparent on the face of it, if it is out rightly illegal, or if it is against public policy. A consent is therefore always subject to scrutiny by the presiding judicial officer.”
14. The Consent dated 22nd June, 2018 states that;
- “By Consent: -
- a. That Land Parcel No. Dagoretti/Riruta/731 be shared out among all the children of the late James Chege Ndwaru.
 - b. That the Defendant to sign the necessary mutation and transfer forms to facilitate the said subdivision and transfer and in default the Deputy Registrar of this Honourable Court do execute the necessary subdivision and transfer documents to effect the above transfer.”
15. Having keenly perused the above consent the issue of jurisdiction prominently glares at me. I must determine whether I have the jurisdiction to adopt the Consent as framed. A court can only exercise jurisdiction as conferred on it by the *Constitution* or other written law. See *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. Consequently, every court must ascertain for itself whether or not it has jurisdiction in any particular matter placed before it before embarking on determining the matter. In the now famous case of, ‘The *Owners of Motor Vessel Lilian S Vs Caltex Kenya Ltd* (1989) KLR where the court held that:-
- “It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
16. The Consent as framed invites the Court to distribute the Land Parcel No. Dagoretti/Riruta/731 among all the Children of the late James Chege Ndwaru. The assumption then must be that the said property forms part of the Estate of the deceased James Chege Ndwaru. The Law relating to testate and intestate Succession and due administration of estates of deceased persons and for purposes connected therewith and incidental thereto is the *Law of Succession Act*, Cap 160, Laws of Kenya.
17. The *Law of Succession Act* at section 47 confers jurisdiction to deal with such matters upon the High Court and Magistrates specifically appointed for that purpose by the Chief Justice. This Court is one of the special Courts established under the Provisions of Article 162(2)(b) to specifically hear and determine disputes relating to the environment and the use and occupation of, and title to, Land. The jurisdiction does not extend to testate and intestate succession and administration of estates of deceased



persons. That is the preserve of the High Court and Magistrates appointed for that purpose under Section 47. What the parties seek by their consent of 22nd June, 2018 is beyond this Court's jurisdiction.

18. The Court adopted the consent dated 20th May, 2019 that settled the issues within its jurisdiction. The application before the Court is an invitation to the Court to confer jurisdiction on itself that it does not have. I need to restate what the Supreme Court stated in the case of *Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 others* [2012] eKLR, that:

“A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of Law can only exercise jurisdiction as conferred by the *Constitution* or other written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by Law.”

19. It is worthy adding as aptly stated by the Court of Appeal in *Equity Bank Ltd -versus- Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR, that,

“It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists.”

20. I need not say more. The Plaintiff's application dated 26th June, 2023 is disallowed but with no orders as to costs.

21. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

M.D. MWANGI

JUDGE

In the presence of:

No appearance by the parties.

Court Assistant, Yvette.

M.D. MWANGI

JUDGE

