Warui & 5548 others v Mbeere Elders Advisory Welfare Group (NGOME) & 14 others (Civil Appeal 141 of 2020) [2025] KECA 960 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 960 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 141 OF 2020

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

MAY 23, 2025

BETWEEN

BENSON MUTHIKE WARUI & 5548 OTHERS & 5548 OTHERS & 5548 OTHERS & 5548 OTHERS & 5548 OTHERS ..... APPELLANT

AND

MBEERE ELDERS ADVISORY WELFARE GROUP (NGOME) .... 1ST RESPONDENT

DAVID NJUKI ..... 2ND RESPONDENT

NJERU MBANDA ..... 3RD RESPONDENT

ESTON NYAGA NTHIGA ..... 4TH RESPONDENT

SERAPHINO NGARI ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

COMMISSIONER OF LANDS ..... 7TH RESPONDENT

DIRECTOR OF LANDS ADJUDICATION ..... 8TH RESPONDENT

CHIEF LAND REGISTRAR ..... 9TH RESPONDENT

DISTRICT LAND REGISTRAR MBEERE ..... 10TH RESPONDENT

COUNTY COUNCIL OF MBEERE ..... 11TH RESPONDENT

NATIONAL LAND COMMISSION ..... 12TH RESPONDENT

COUNTY SECRETARY LAND AND PHYSICAL PLANNING, EMBU COUNTY ..... 13TH RESPONDENT

AMBROSE KITHAKA KARIUKI AND 233 OTHERS ..... 14TH RESPONDENT

JUSTIN NYAKI NGURE AND 249 INTERESTED PARTIES .... 15TH RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court at Embu (Y.M. Angima. J.) dated 28th May 2020 in ELC Case No. 14 of 2014)

JUDGMENT

1. The appellants have brought to this Court this appeal from the ruling and order of the Environment and Land Court [ELC] at Embu (Angima, J.) delivered on 28th May 2020 in ELC Case No. 14 of 2014, in which the ELC dismissed the appellants' application in which they sought, inter alia, that the ELC do review, vacate, vary and/or set aside the consent of 12th January 2016.

2. A brief background of the matter is that on 12th January 2016, a partial consent was entered before the Deputy Registrar of the Environment and Land Court at Embu, Hon. V.O Nyakundi, by the counsel for the petitioners, counsel for the 1st to 7th respondents and counsel for the Embu County Government, to the effect that:

    1. All that parcel of land known as LA No. 26461 FR No. 317/30 of approximately 17,830.6 Ha as per the Kenya Gazette Notice No. 577 under Cap. 288 of 30th January, 2004 popularly known as Mwea Settlement Scheme be and is hereby withdrawn from this petition.

    2. That the demarcation, alienation and or allocation and registration of Titles of the Mwea Settlement Scheme be done by the National Land Commission and the Chief Land Registrar.

    3. That the demarcation, alienation and or allocation and registration of Titles be as per:

        a. The Spatial and Survey plan;

        b. The list of beneficiaries as generated and agreed by the community and handed over to the National Land Commission, the 7th respondent herein.

    4. That there be no order as to costs on the partial consent."

3. The appellants contended that the partial consent was irregularly entered into. Thus vide a Notice of Motion dated 28th October 2019, the appellants herein sought to have the consent reviewed, vacated, varied, and/or set aside, to have the titles that had been issued following the consent cancelled, to have the entire process start all over again, and upon verification of the beneficiaries as per the law.

4. In the supporting affidavit of even date, sworn by Benson Muthike Warui on behalf of the appellants, he contends that the consent was irregularly recorded since the Mwea Settlement Scheme had already been gazetted as a Settlement Scheme vide the Gazette Notice No. 577 of 2004 dated 30th January, 2004 in line with the provisions of Section 117(1) of the repealed Constitution and Section 13 of the Trust *Land Act* [repealed]. It is contended that the suit land had ceased to be community land and became public land for all intents and purposes.

5. He averred further that as a result of setting apart the Mwea Community or any other community for that matter, the mandate to identify and prepare a list of beneficiaries of the suit land was the preserve of the sub-county selection committee as stipulated under Section 134 of the *Land Act*. That therefore due to failure to follow the laid down legal process, land grabbing was inevitable; that several individuals were allocated large tracks of land while residents were left landless; the suit land was irregularly allocated to Mbeere community to the detriment of other communities; and, that the correct procedure to identify, verify and determine the rightful beneficiaries was through establishment of a sub- county selection committee in conformity with Section 134 of the *Land Act* and Sections 33, 35, 37, 38 and 39 of the Land Regulations 2017.

6. The application was opposed. Replying affidavits were filed by Peter Nyaga Elisha Mitaru, Josphat Kithumbi, Ambros Kithaka Njeru, and Justin Nyaki Ngure. The main contentions as derived from these replying affidavits being that the application had been overtaken by events due to the court's ruling dated 6th February 2020. Further the appellants were part of the Mwea community and were involved in the exercise of public participation of all interested in the Mwea Settlement Scheme at all material times and were represented in the discussions leading up to the recording of the consent as a result of which a formula of distribution of the suit property was agreed upon as follows:

> Mbeere Community – 40%; Akamba Community – 30%; Embu Community – 20%; Agikuyu Community – 5%; and, Disabled – 5%.

7. It was contended that the appellants could not claim discrimination as they fully participated in the entire process. Further, that the allocation was ongoing, and if there was a challenge, the same should have followed the procedure, laid down in the relevant law.

8. In addition, it was contended that the application was res judicata on account of the judgment in Embu ELC Petition No. 2 of 2016- Nickson Mutinda Musyoki & 9 others vs National Land Commission & 2 Others.

9. The 8th respondent, Josphat Kithumbu, the Embu County Executive Committee Member in charge of Lands Physical Planning and Urban Development, swore a replying affidavit dated 13th March 2020, on his behalf and that of the defunct Mbeere County Council, the 11th respondent. It was averred that the implementation of the Gazette Notice No. 577 of 2004 was carried out with full compliance with the *Constitution* and existing laws and within the meaning of Section 134 of the *Land Act* of 2012, with the formation of the Verification and Selection Committee on 11th December 2015, that worked under the supervision of the 7th respondent, and which conducted public participation through various public forums attended by representatives of the various ethnic groups and clans resident within the area and after due and sufficient notice. He annexed documents to prove that various public consultative forums were held over a period of 3 years. He contended that the appellants had not satisfied fundamental grounds that would warrant the setting aside of the consent order. It is contended further, that the Land Regulations, 2017 were not in existence at the time of the implementation of the consent order and thus could not have been applicable. Further, the 8th respondent raised doubt that the appellants had demonstrated any illegality in the implementation process and any proof that the appellants were residents of the area or that they had been discriminated, or that there had been bloodshed or demonstrations in the region as a result of bad blood, as alleged by the appellants.

10. In addition to the above responses, the 6th Respondent, the Attorney General, filed grounds of opposition dated 10th February 2020 on behalf of the 7th, 8th, 9th, 10th, & 11th respondents, opposing the application on the grounds that it was res judicata; frivolous, mischievous and an abuse of the court process; and that the partial consent was recorded with the full consent of the parties and stakeholders.

11. There were several replying affidavits by interested parties also opposing the application on grounds that, inter alia, all parties with interest in the matter were represented at the time of negotiation leading up to the consent order; that they were party to the public participation forums and cannot cry foul at this late stage of the implementation of the same.

12. The application was canvassed by way of written submissions. By his ruling dated 28th May 2020 Angima, J. found that the appellants had not made out a case for review and/or setting aside of the impugned consent order. He also found that the requirements to declare the application as overtaken by events on account that it was res judicata were not satisfied, noting that the parties in Embu ELC Petition No. 3 of 2016 were different from those in the instant case. He was also unable to agree that the judgment in Embu Petition No. 2 of 2016 could have rendered the application res judicata. The learned judge noted that whereas the court was aware that the appellants were not personally party to the consent, there was sufficient material on record to demonstrate that their interests and that of their community were taken into account by the reservation of a 30% share of the suit land; and therefore found that there was nothing wrong with the leaders of the Mbeere Community participating prominently in the consultative meetings. The Judge, noting the long time it took for the appellants to file the application, found no plausible explanation for the delay in filing the application for a review of the consent order. The application was dismissed in its entirety with each party bearing its own costs of the application. In conclusion therefore the trial court made the following orders: -

    a. The instant application is not res judicata on account of any previous proceedings.

    b. There is no material on record to demonstrate that the application has been overtaken by events.

    c. It has not been demonstrated that the instant application is frivolous or otherwise an abuse of the court process.

    d. The appellant's have not made out a case for review or setting aside of the consent order dated 12th January 2016.

    e. The appellant's are not entitled to the consequential orders for cancellation of titles and fresh allocation of the suit land.

    f. Each party shall bear its own costs of the application."

13. Aggrieved and dissatisfied by the decision of the learned ELC Judge, the appellants lodged a notice of appeal dated 24th June 2020 on 25th June 2020. In their memorandum of appeal dated 16th September 2020, the appellants fault the learned Judge on the following grounds:-

    1. The Learned Judge erred both in law and in fact in failing to find that the appellants had proved their case on a balance of probability and were entitled to the prayers sought, particularly the prayers for review, varying and/or setting aside of the partial consent of 12th January, 2016 cancellation of titles issued pursuant to the said consent and the exercise of issuing titles in Mwea Settlement Scheme upon verification of the beneficiaries do start afresh.

    2. The Learned Judge erred both in law and in fact in his interpretation of the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010 Law of Kenya.

3. The Learned Judge grossly misdirected himself in failing to appreciate that factors vitiating a valid contract are similar to factors vitiating a consent specifically; fraud, misrepresentation, mistake and once any of the elements is proved the consent is invalid.

4. The Learned Magistrate erred in law and in fact for failing to appreciate that the appellants were not parties to the partial consent dated 12th January, 2016 and could not therefore be bound by the contents therein.

5. The Learned Judge erred in law and in fact in dismissing the appellants' application in its entirety and in so doing failed to appreciate sufficiently or at all the following:-

    i. That land known as LA NO.26461FR NO. 317/30 of approximately 17,830.6 Ha had been set apart under Section 117 of the Repealed Constitution and Section 13 of the Trust *Land Act* as settlement Scheme vide Gazette Notice No. 577 of 2004 and as such there could be no valid consent on a non- existing subject.

    ii. The appellants were in occupation of the suit land at the time the purported consent was entered into.

    iii. The partial consent entered into on 12th January, 2016 was based upon misapprehension, ignorance or insufficiency of material facts in that the suit land subject of the consent had already been set apart as a settlement scheme.

    iv. The appellants had proved all elements vitiating a valid consent to wit mistake.

6. The Learned Judge failed to consider the fact that the respondents had failed to disclose to the court before recording of the partial consent that land known as LA No. 26461FR NO 317/30 of approximately 17, 830.6 Ha subject of the consent had been gazetted as a settlement scheme vide Gazette Notice No. 577 of 2004.

7. The Learned Judge erred in law and in fact in his finding that the appellants case did not fall within Order 45 Rule 1 of the Civil Procedure Rules, 2010.

8. The Learned Judge erred in law and in fact in failing to appreciate the fact that mistake vitiates a valid consent.

9. The Learned Judge erred in law and in fact and misdirected himself in his finding that the partial consent was valid regardless of the fact that the suit land subject of the said consent had been gazetted as a settlement scheme vide the gazette notice.

10. The Learned Judge erred in law and in fact for failing to appreciate that in any event the partial consent relied on by the respondents contained the suit land in dispute which had ceased from being a community land to public land reserved for a settlement scheme and as such it could not form part of land available for allocation by the respondents.

11. The Learned Judge erred in law and in fact by failing to properly and exhaustively evaluate the evidence on record, hence arriving at wrong inferences.

12. The Learned Judge misdirected himself by applying wrong principles in relying on a consent that was void ab initio.

13. The Learned Judge erred in law and in fact in failing to appreciate that the appellants had proved their case on a balance of probabilities, having adduced evidence to support their case and in the absence of any contradictory evidence from the respondents.

14. The Learned Judge failed to appreciate the submissions of the Learned Counsel for the appellants by finding in favour of the respondents herein.

14. On the above basis the appellants thus pray for the appeal to be allowed; the ruling and order of the ELC Judge be set aside and substituted with a proper judgment of this Court; and that the appellants be awarded costs of this appeal as well as costs of the case before the ELC.

15. We heard this appeal on the 16th December 2024, through this Court's virtual platform. Present at the hearing was learned counsel Ms. Shimila, holding brief for Dr. Khaminwa for the appellants, learned counsel Mr Kamunda Njue for the 1st to 5th respondents, learned counsel Mr. Ireri for the 11th and 13th respondents, learned counsel Mr Njagi Wanjeru was present for the 234th to 249th interested parties. There was no appearance by the Attorney General, who is on record for the 6th to 10th respondents, and neither was the 12th respondent represented at the hearing. The Court was satisfied that all parties were duly served with the hearing notice on the 25th November 2025. Those who filed their written submissions were the appellants and the 11th and 13th respondents dated 22nd September 2023 and 13th December 2024 respectively, which they relied on with oral highlighting by Ms Shimila and Mr. Ireri. Mr Kamunda Njue, whereas Mr Njagi Wanjeru, for the 1st to 5th respondent and 234th to 249th respondents made oral submissions.

16. Ms. Shimila submitted that the consent entered on the 12th January 2016, over the Mwea Settlement Scheme, was illegal as it was entered when Gazette Notice No. 577 of 2004 dated 30th January 2004 where the suit land was gazette as Trust Land was still in force. She argued that the National Land Commission (NLC) had no right to instruct parties to proceed with the consent while there existed the said Gazette Notice.

17. Ms. Shimila further urged that the appellants' legitimate expectation to be included in the process of preparing the consent was sidelined. Counsel relied on the case of Communications Commissions of Kenya & 5 Others vs. Royal Media Services Ltd & 5 Others Petition No. 14 of 2014, which outlined the principles of legitimate expectation. She also submitted that the action by the NLC overlooked the laws provided under Section 13 of the Trust *Land Act* in approving the negotiations. For that proposition counsel placed reliance on the case of Funzi Island Development Limited & 2 Others vs. County Council of Kwale & 2 Others (2014) KECA 882 (KLR), which held that statutory requirements laid down in the Trust *Land Act* that govern trust land should be considered as mandatory. In addition, it was argued that the NLC was duty bound to follow the criteria provided under Section 134 of the *Land Act* and therefore, the 12 members appointed by the NLC had no authoritative mandate entering into a consent on behalf of the other communities.

18. Ms. Shimila argued that the impugned consent failed to meet the legal threshold for it to be binding upon the parties. She contended that the consent was vitiated by factors such as fraud, as no proper notice was served. Secondly, unilateral mistake as opposed to mutual mistake, as not all parties were informed of the effect of entering into the consent while there was in existence the Gazette Notice. For that proposition, she relied on the South Africa case of Poverty Alleviation Network & Others vs. President of the Republic of South Africa & Others (CCT 86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010).

19. Further, Ms. Shimila claimed that there was no full participation by parties. She contended that the representations of parties in the partial consent majorly came from the Mbeere community vis á vis the other communities who had settled on the subject land through Gazette Notice No. 577 of 2004. Counsel noted that the question posed was how the leaders from other communities could have participated in the hearing without being invited.

20. It was submitted that the emphasis of participation is to ensure openness and accountability. It was contended that the appellants were able to prove during the hearing that they were not heard contrary to their legitimate expectation thus seeking to be enjoined as parties in the current suit. It was contended that there was no plausible explanation given by the 7th respondent why efforts were made to appoint a commission as opposed to a simple approach of inviting participants through a letter. It was argued that this was a ploy to lock out other communities from participation. For that proposition, the appellants cited the case of Samuel Thinguri Waruathe & 2 Others vs. Kiambu County Government & 2 Others [2015] eKLR.

21. Ms. Shimila submitted further that the impugned consent was majorly premised on customary rights as opposed to the rights of individuals who were in occupation of the land, the effect of which led to mass eviction of people who were already residing on the suit land.

22. In conclusion, Ms. Shimila emphasized that the consent of 12th January 2016 was entered without proper consultation of the members of the public and that its implementation would lead to an unjust enrichment and inequity.

23. Ms. Shimila confirmed to the Court that as the Mwea Settlement Scheme was a public land, the NLC, having replaced the Commissioner of Lands, had the mandate to reallocate the land. She further confirmed that the NLC had participated in the consent recording. Moreover, her clients who were from the Kamba community were represented and allocated a 30% share of the Mwea Settlement Scheme. She, however, contended that the appellants' major concern was that the consent took precedent without considering that Mwea Settlement Scheme is a cosmopolitan area and the distribution was to be per household and not per community.

24. Mr. Kamunda for the 1st to 5th respondents associated himself with the written submissions by Mr. Ireri for the 11th and 13th respondents. He emphasized that the Gazette Notice was issued by the Commissioner of Lands whose mandate was taken up by the NLC and that the NLC participated squarely as a major party in the consent in question. He noted that at the time of the hearing of the motion that led to the impugned ruling of the ELC, the authority, capacity and mandate of the NLC were not questioned.

25. Mr. Kamunda submitted that the appellants fell within the communities mentioned in the impugned ruling and noted that Ms. Shimila admitted that her clients came from the Kamba community therefore representing 30% of those allocated the suit land. Further, he submitted that titles were issued to the Kamba community, and that included individuals who were not parties to the application before the ELC and neither parties in the appeal.

26. He emphasized that each community was represented through its leadership and argued that the leadership of any community was an internal issue, not a script that was to be followed in a certain way.

27. Mr. Kamunda, further submitted that the appellants did not meet the threshold to call for the setting aside of the impugned ruling and urged this Court to find that the appeal has no merit and dismiss it with costs. He argued that litigation must come to an end.

28. On the issue raised that Mwea Settlement Scheme was no longer a community land but public land and that consideration should have been based on individual household as opposed to communities, Mr. Kamunda stated that the NLC, the AG and now the County Government of Embu are the government that had the mandate to hold public land and had the capacity to deal with the suit land. He added that there was also Gazette Notice No. 9 of 1971 still in force, indicating that the County Council held the land on behalf of Mbeere community and that that was what Mbeere community

relied on when they petitioned. He urged that the said Gazette Notice has never been questioned even before the ELC and further, that Gazette Notice No. 577 of 2004 did not revoke the earlier Gazette Notice [No. 9 of 1971] and therefore the issue of public land did not arise.

29. Mr. Ireri, for the 11th and 13th respondents, relied on his written submissions dated 13th December 2024. He submitted that the appellants failed to show how the trial Judge erred in his ruling. It was argued that the appellants failed to present a case for review or setting aside of the consent order within a reasonable time. He urged that the court rightly found that no plausible explanation was given to justify the three (3) years delay by the appellants in applying for a joinder and/or review of the consent order and he urged this Court to be guided by the case of Mwangi vs. Wambugu [1984] KLR 453, and not interfere with a finding fact by the trial court unless such finding was based on no evidence or on misapprehension of the evidence or the Judge was shown demonstrably to have acted on wrong principles in reaching the findings, or it appears either that the trial Judge clearly failed on some material point to take into account particular circumstances or probabilities material to the evidence.

30. Mr. Ireri further submitted that the appellants did not prove their case on a balance of probability. He relied on the case of Flora Wasike vs. Destimo Wamboko [1985] eKLR for the proposition the appellants failed to give sufficient reason for review of the consent or to prove mutual mistake capable of invalidating the partial consent of 12th January 2016 and that, hence,, they were not entitled to the orders they sought. He argued that a unilateral mistake would not normally be sufficient to vitiate an otherwise valid contract. In addition, learned counsel submitted that the appellants failed to demonstrate what the fundamental nature and effect the impugned consent had on the appellants and to demonstrate how it affected them in the process of the allocation of the land in question.

31. Mr. Njagi Wanjeru for the 234th to 249th interested parties relied on the replying affidavits sworn on behalf of the 234th to 249th respondents. He urged the Court to note that the application for review by the appellants was also the subject of the ELC Petition No. 2 of 2016; Nickson Mutinda Musyoki & 9 Others vs. National Land Commission & 24 Others (2018) KEELC 2357 (KLR) and that in that decision Angima, J. found that the land in question constituted community land by dint of Article 63(2) (d) & (3) of the *Constitution* and which decision remained unchallenged hence, the argument that the land in question is public land was not correct.

32. On the rest of the issues, the learned counsel associated himself with the submissions by Mr. Kamunda. He emphasized that there was public participation and submitted that even the weak segments of the resident communities were taken care of by the group of disabled. He further submitted that it was never contested by the appellants before the High Court that public participation exercise, as noted by the learned judge, took about three (3) years before recording the parties consent, and the same was never disputed.

33. Mr. Learned counsel further submitted, that there was a delay in the filing of the application for review by the appellants and thus urged this Court to find that no good explanation was given.

34. When asked to clarify on the issue whether Mwea Settlement Scheme was meant to be a public land and not community land vide Gazette Notice No. 577 of 2004, Mr. Njagi stated that the appellants were confusing a settlement scheme under the Agricultural Act and the description of the purpose for which Mbeere County Council was setting aside the land under the Trust *Land Act*. He urged that the two (2) provisions were different. In addition, he stated that nowhere in the Gazette Notice was it declared that the land was being converted into public land.

35. In a rejoinder Ms. Shimila urged that no evidence was placed before this Court to prove the existence of Gazette Notice No. 9 of 1971. She argued that this Court was invited to check on the procedural impropriety, especially when it was not proved that the criteria for appointing the leadership was done

in an honest, transparent, and accountable manner. She maintained that the consent entered on behalf of the appellants could not stand.

36. On the issue of the land in question being a community land as opposed to a trust land, Ms. Shimila submitted that since there was no notice of de-gazetement of Gazette Notice No. 577 of 2004, NLC had no capacity to initiate negotiations between the communities or in the distribution of the land.

37. On the issue of whether public participation took place, Ms. Shimila submitted that it has always been said that the court ought not to sit and watch injustice being done upon people on grounds of procedural technicalities. She maintained that the lower court erred.

38. We have considered this appeal, the rival submissions by counsel, the law relied on and the cases cited. This being a first appeal, our mandate is akin to a retrial. Under Rule 31

(1)

(a) of this Court's Rules, 2022, we are required to re- appraise the evidence and draw our independent inferences and conclusions. This mandate was explained in Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR as follows:

> This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

39. While we appreciate that we may, in appropriate cases, reverse or affirm the findings of the trial court, in Peters vs. Sunday Post Limited [1958] EA 424, the predecessor to this Court, stated that:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide."

40. With respect to findings of fact by the trial court, this Court's position as stated by Hancox, JA. (as he then was), in Mohammed Mahmoud Jabane vs. Highstone Butty Tongoi Olenja [1986] KLR 661; [1986-1989] EA 183 is that:

> " The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

41. The appellants faulted the learned trial Judge on 14 main grounds in their memorandum of appeal. We find that the Issues that present themselves to us for determination are the following:

a. Whether the learned ELC Judge erred when he found that the appellants did not meet the threshold for variation, review, and/or setting aside of the impugned partial consent order of 12th January, 2016;

b. Whether the learned ELC Judge erred to find that there was no breach of procedural requirements in the implementation process and that there was due process in the establishment of the Selection and Verification Committee that was to perform the exercise of identification, verification and determination of beneficiaries to the suit land.

Whether the learned ELC Judge erred when he found that the appellants did not meet the threshold for the variation, review, and/or setting aside of the impugned partial consent order of 12th January 2016;

42. The application was brought before the ELC under Section 80 of the *Civil Procedure Act* [CPA] and Order 45 rule 1 of the Civil Procedure Rules [CPR]. Section 80 of the CPA provides:

> " 80. Review
>
> 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."

43. On the other hand,

44. Order 45 rule 1 stipulates:

> "(1) 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."

45. It follows then that Order 45 provides three circumstances under which an order for review can be made. The applicant must demonstrate to the Court that there has been the discovery of new and important matters or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him when the decree was passed. Secondly, the applicant must demonstrate to the court that there has been some mistake or error apparent on the face of the record. Thirdly, an application for review can be made for any other sufficient reason. The appellants, even though basing their application for review on the ground of mistake or error apparent on the face of the record and secondly on the grounds of other sufficient reason, also submitted that the partial consent

was recorded in misapprehension, ignorance or insufficiency of material facts in that the suit land, the subject of the partial consent had already been set apart as a trust land.

46. What constitutes a mistake or an error apparent was enunciated by this Court in National Bank of Kenya Ltd vs. Ndungu Njau Civil Appeal No. 211 of 1996 (UR) where it held:-

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established."

47. Similarly, in Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR the court stated:

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review."

48. The Court went on to say:-

> " The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

49. Similarly, this Court in the case of Sanitam Services (E.A.) Limited vs. Rentokil (K) Limited & Another [2019] eKLR, it was held that:

> Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 Civil Procedure Rules. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay."

50. There are a plethora of cases of this Court and other Superior Courts that discuss the principles that should guide Courts when considering applications for review under Order 45 of the CPA, the above-quoted cases being but a few. It is also clear what qualifies to be a mistake or error apparent on the face of the record. Such error or mistake ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. In other words, error or omission must be self-evident. It should not require an elaborate argument to be established, as it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the CPR and Section 80 of the CPA.

51. The appellants urge that it was a misapprehension, ignorance or insufficiency of material facts for the parties to have recorded the partial consent, while there was in existence the Gazette Notice No. 577 of 2004. That the consent order ought not to have been recorded; that the entire process was illegal. The appellants urged that the recording of the partial consent was a unilateral mistake, as not all parties were informed of the effect of entering into the consent while there was in existence the Gazette Notice.

52. The learned Judge ruled as follows in regard to what the appellants needed to demonstrate in order to get the variation, review and/or setting aside order sought:

> " There is no evidence of a mistake of fact or error of law apparent on the face of the record to warrant a review. Assuming, but without deciding the point, that the status of the suit land had changed from community to public land, that was a matter which was well known to the Respondents. There is some evidence on record to demonstrate that Gazette Notice No. 577 of 2004 was within the possession and knowledge of the concerned government officials. The gazette notice was published by the Commissioner of Lands whose successor, the National Land Commission (the NLC), was represented in the petition. It must be remembered that in order to be sufficient to vitiate a consent, the mistake in question must be a common mistake by all the concerned parties. A unilateral mistake will not normally be sufficient to vitiate a contract which is otherwise valid.
>
> Accordingly, the court finds no evidence of a mutual mistake capable of invalidating the partial consent dated 12th January 2016."

53. In response to the appellants' argument that there was "other sufficient reason" to warrant a review of the consent order." The learned Judge ruled as follows:

> " 39. The court is not satisfied from the material on record that there is any other sufficient reason to review the consent. Whereas the court is aware that the Applicants were not personally party to the consent, there is sufficient material on record to demonstrate that the interests of their community were taken into account by the reservation of 30% share of the suit land. There was nothing wrong in the leaders of the Mbeere Community participating prominently in the consultative meetings. They were the petitioners in the matter and they were entitled to actively participate in the process of resolution of the land dispute. Conversely, the Applicants and their community leaders were not precluded in participating in the process."

54. As regards to whether the aggrieved party discovered a new and important matter or evidence which after the exercise of due diligence they were not within their knowledge or could not be produced by them, the learned Judge observed that the Gazette Notice No. 577 of 2004 was published by the

Commissioner of Lands whose successor, the National Land Commission (the NLC), was represented in the petition at the time the partial consent was recorded as a major party in the petition. The gazette notice was therefore within its knowledge, was not unknown, and being a gazette notice, could be obtained in exercise of due diligence.

55. Furthermore, we are not satisfied that the appellants demonstrated that there was a mistake and or the party that was to blame for it. The argument that there was unilateral mistake, on the grounds that not all parties were informed of the effect of entering into the partial consent while there was in existence the Gazette Notice, does not satisfy the need for specificity. The appellants used generic terms without establishing who was at fault. Not having demonstrated this, we find that the learned Judge cannot be faulted for his findings on this point.

56. The grounds the appellants urged hardly qualify nor meet the required threshold for an error or mistake on the face of the record that would justify the Court to review the ruling or order of the Court, as it is not self-evident but one that requires an elaborate argument for it to be established. As was put in the case of Paul Mwaniki vs National Hospital Insurance Fund Board of Management, (supra), 'If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act.'

57. The other issue is whether there was any other sufficient reason shown to warrant a review. The appellants argued that the partial consent created rights that did not otherwise exist, and caused disruption on the ground by displacing persons already on the suit land and unfairly enriching others who did not deserve. This is a serious allegation and if true, the appellants should have been able to avail evidence to prove it. No evidence was brought of massive displacements of persons on the ground. There was no evidence adduced of unrest as a result of dispossession of persons in occupation of the suit land. This ground therefore remained bare words that were not substantiated and therefore not proved.

Whether the learned ELC Judge erred to find that there was no breach of procedural requirements in the implementation process and that there was due process in the establishment of the Sub-County Selection and Verification Committee that was to perform the exercise of identification, verification and determination of beneficiaries to the suit land.

58. It was the appellants' contention that there was violation of mandatory provisions of the law. It was urged that that the NLC was duty bound to follow the criteria provided under Section 134 of the *Land Act* and Sections 33, 35, 37, 38 & 39 Land Regulations, 2017. They urged that under Section 35 of the Land Regulations 2017, the mandate was bestowed upon the Sub-County Selection Committee to submit the list of verified beneficiaries to the Board of Trustees established under Section 135 of the *Land Act* 2012. The appellants submitted that the list generated by the 12 members appointed by the NLC violated both the *Land Act*, Section 134 (4) and Section 35 of the Land Regulations.

59. The respondents and interested parties, in their very elaborate replying affidavits and in their submissions, both oral and written contended that the laws alleged to have been violated or not adhered to were not in existence at the time the settlement process was being implemented, and in particular Section 134 of the *Land Act* and the Land Regulations of 2017. Further, the 8th respondent who was in charge of Lands, Physical Planning and Urban Development and therefore responsible for the settlement process averred that he complied with the provisions of the Section 134 of the *Land Act* No. 6 of 2012, then in force, in the implementation of the Gazette Notice No. 577 of 2004. He annexed the communication from the NLC marked 'JK1', dated 11th December 2015 communicating

the appointment of the Sub- County Selection Committee, and which communication states on the body that the appointment was 'in compliance with Section 134 (4) of the *Land Act*.'

60. In that regard, the learned Judge found:

> "35. The Applicants submitted that a sub-county selection committee under Section 134 of the *Land Act*, 2012 was never established. It was further submitted that it was a violation of the law for the Respondents to have allowed the community or clan representatives to agree on the list of beneficiaries.
>
> 36. The Applicants have submitted that under Section 134 (4) of the *Land Act* it was the Cabinet Secretary responsible for lands to appoint the selection committee and not any other authority. The court has noted that the current Section 134 of the Act was introduced by the Land Laws (Amendment) *Act No. 28 of 2016*. The amendment Act was assented to by the President on 31st August 2016 and it came into operation on 21st September 2016. Prior to the amendment Act coming into force the NLC was the entity responsible for settlement programmes and it was the one responsible for appointing the sub-county selection committee. The court has noted that the 8th Respondent exhibited a copy of such letter of appointment from the NLC dated 11th December 2015."

61. As the learned Judge found, Section 134 of the *Land Act* was introduced by the Land Laws (Amendment) *Act No. 28 of 2016*, and it came into operation on 21st September 2016. As for the Land Regulations of 2017, they came into effect after the partial consent had been recorded and, the settlement process was underway. The learned Judge was right about the two pieces of legislation becoming effective after the partial consent was recorded and the process of settlement had begun. Now that it was established that the two pieces of legislation became law after the settlement process was underway, the issue then is whether they could be applied retrospectively. In the case of Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, this Court considered the question of, inter alia, retrospective legislation and had the following to say:

> "Before considering this question, it is necessary to revisit the issue of retrospective or retroactive legislation. Black's Law Dictionary (6th Edition) to which we have been referred, defines retrospective law as:
>
> > A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred.
> >
> > As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:

i. is in the nature of a bill of attainder;

ii. impairs the obligation under contracts;

iii. divests vested rights; or

iv. is constitutionally forbidden."

62. The appellants did not claim that Section 134 of the *Land Act*, and the Land Regulations had retrospective application, or that there were express words in the law to the effect it could be applicable retrospectively, or that by necessary implication it would appear that it was the intention of the legislature for the law to be applied retrospectively. These are serious matters that cannot be assumed, thus the appellants needed to prove either express provision existed in the body of the legislation providing for retrospective application, or show that that was the intention of legislature. We find nothing to lead to such a finding. That means that retrospective application of the two laws is out of question.

63. In regard to compliance with procedural requirements, the appellants' contention was that the leaders from the other communities could not have attended the hearing without being invited. They relied on the case of Funzi Island Development Limited & 2 Others vs. County Council of Kwale & 2 Others [2014] KECA 882 (KLR) for the proposition that 'Statutory procedural safeguards which are imposed for the benefit of the persons affected by the exercise of administrative powers by a statutory body are normally regarded as mandatory. That 'The procedural safeguards in section 13(2) of the Trust *Land Act* which are described as mandatory particularly the requirement for issuing a notice, hearing and recording the residents' representations and ultimately, and more importantly, approval by council by resolution passed by a majority of the members of the council went to the jurisdiction to set apart Trust land.'

64. We note further, that the appellants' complaint in the Petition was that the respondents had engaged in illegal management and/or irregular demarcation, alienation and allocation of the suit land for reason that they did not carry out consultations with the Mbeere people, consequently denying them their right to ownership and management of the land. In their address before this Court, Ms Shimila admitted that the petitioners were from the Kamba tribe, not any other. Secondly, that they had been allocated 39% of the suit land. Compliance with the Trust *Land Act* was not raised in the Petition, the evidence, or in the submissions. The case of Kenya Hotels Limited vs. Oriental Commercial Bank Limited [2018] eKLR, is spot on, where this Court held that an appellant cannot be allowed to argue a completely new ground on appeal. The Court delivered itself thus:

> " ...there are well known strictures that seek to ensure firstly, that an appellate court does not, in disguise, metamorphose into a trial court and make first-instance determinations without the benefit of the input of the court from which the appeal arises...
>
> Due to these fundamental concerns, the Courts have developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (ca 42/1981) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant's case as conducted in the trial court, not changing it into a totally different case; the matter must have been properly pleaded and the facts in support of the new point must have come out in the trial court."

The challenge before the ELC court, which has also been raised here is on the issue of compliance and adherence to Section 134 of the *Land Act* and the various Sections of the Land Regulations of 2017. We have already dealt with these

herein above. The issue of compliance with the Trust *Land Act* is a new issue as it was neither pleaded nor canvassed before the superior court. It has been raised for the first time in the appellants written submissions. It cannot be allowed.

65. The other challenge raised was in regard to public participation, which the appellants argued was their legitimate expectation, and which, they claim they were denied. Ms. Shimila for the appellants contended that the consent was vitiated by factors such as fraud, as no proper notice was served upon the parties interested in the suit land as service was to the leadership rather than the individual members; and that there was no full participation by parties. Counsel urged that due to lack of proper notice and failure to implead all the interested parties in the proceedings, not all parties were involved in the negotiations before the consent was recorded, that the partial consent was passed behind their backs and that there was therefore, violation of the rules of natural justice.

66. The appellants urged that they were not heard and thus denied their legitimate expectation. The appellants submitted that they established beyond reasonable doubt that both the *Land Act* and Trust Act required the affected parties to be fully involved in the negotiation before any consent could be entered. They placed reliance on the case of Communications Commissions of Kenya & 5 Others vs. Royal Media Services Ltd and 5 Others Petition No. 14 of 2014 on the emerging principles on legitimate expectation. They also rely on the case of Samuel Thinguri Waruathe & 2 Others vs. Kiambu County Government & 2 Others [2015] eKLR.

67. Counsel contested that the representations of parties in the partial consent majorly came from the Mbeere community vis á vis the other communities; relying on the case of Samuel Thinguri Waruathe & 2 Others vs. Kiambu County Government & 2 Others [2015] eKLR, Counsel urged that the appellants were not heard contrary to their legitimate expectation, and that the consent was entered without proper consultation of the members of the public. For that proposition, she relied on the South Africa case of Poverty Alleviation Network & Others vs. President of the Republic of South Africa & Others (CCT 86/08) [2010] ZACC 5; 2010 (6) BCLR 520 (CC) (24 February 2010).

68. The cited case of Poverty Alleviation Network & Others, (supra), was a South African constitutional case where the petitioners challenged the respondents, the Parliament and the KwaZulu-Natal Legislature as having failed to properly facilitate public involvement as required by sections 59 (1)(a), 72 (1)(a), and 118 (1)(a) of the *Constitution*, and that the affected residents should have been consulted as a distinct and identifiable group. The Constitutional Court found that both Parliament and the KwaZulu-Natal Legislature had taken reasonable steps to involve the public and had considered the input received. The Court dismissed the application, delivering itself thus on the objective of public participation:

> ...engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision."

69. It is clear, and that is the legal position, that engagement with the public is essential. The same was the proposition in the case of Funzi Island Development Limited & 2 Others vs. County Council of Kwale & 2 Others (supra), cited by the appellants.

70. That said, we note that The Supreme Court has settled the issue of public participation and its objectives and has gone further and given guiding principles on the same in the case of British American Tobacco Kenya, Plc (Formerly British American Tobacco Kenya Limited) vs. Cabinet Secretary For The Ministry Of Health Petition No. 5 of 2017, had this to say regarding public participation:

> " 164. Our analysis of the emerging jurisprudence from the Supreme Court and other superior courts as well as the reading of the express provisions of Section 3 of the *Public Procurement and Asset Disposal Act*, 2015 as read with Articles 10 (2) (b) and 227 of the *Constitution* lead us to find that as a general principle (subject to limited exceptions) public participation is a requirement in all procurement by a public entity. The jurisprudence also reveals that allegation of lack of public participation must be considered in the peculiar circumstances of each case. The mode, degree, scope and extent of public participation is to be determined on a case by case basis.
>
> 165. What is critical is a reasonable notice and reasonable opportunity for public participation. In determining what reasonable notice is, a realistic time frame for public participation should be given ..." [Emphasis added].

71. The Supreme Court further made the following observation and to set out guiding principles for public participation among them as follows:

> "(96) From the foregoing analysis, we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court's mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:
>
> Guiding Principles for public participation
>
> i. As a constitutional principle under Article 10(2) of the *Constitution*, public participation applies to all aspects of governance.
>
> ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
>
> iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
>
> iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional

requirement. There is need for both quantitative and qualitative components in public participation.

v. Public participation is not an abstract notion; it must be purposive and meaningful.

vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.

vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis..."

72. The appellants have not brought any evidence of lack of public participation, except allegations of unrest and displacements of persons on the ground, which they also did not substantiate.

73. We have considered the record and find the responses by the respondents and the interested parties contradicts the appellants' allegations. Starting with the replying affidavit sworn by the 8th respondent, he averred, inter alia that there was full compliance procedural law. He averred that the law was complied with in the selection of the Sub-County Selection Committee, by the body with the legal mandate to do so, the 7th respondent and, that the Committee set out to do its work under the supervision of the 7th respondent. He attached copies of meetings conducted by the committee at the various locations leading up to adoption of the consent order, held over a period of three years. They are marked exhibit JK1a to JK1k. The 8th respondent averred that the meetings were public forums and involved various leaders representing various ethnic groups.

74. The interested parties, as the respondents in their replying affidavits aver that the petitioners were fully involved through their leadership, organized by them in-house. That the same is evident in the resulted agreement on the mode of distribution, in which their members got 30% of the suit land. The agreed distribution was:

> Mbeere Community – 40%; Akamba Community – 30%; Embu Community – 20%; Agikuyu Community – 5%; and, Disabled – 5%.

75. The averments by the respondents and the interested parties have not been controverted. The officer charged with the duty to ensure compliance with engagement with the membership and the public was the 8th respondent. From his affidavit in response to the application before the ELC, we are satisfied that he ensured and facilitated public participation, and kept record of the meetings which he annexed to his affidavit. The public participation conducted was real and not illusory, it was not a cosmetic or a public relations act or a mere formality but was both quantitative and qualitative components. The meetings were purposive and meaningful and were held in various places relevant to issue at hand, and notices issued for each. Actual consultations took place resulting with the impugned partial consent and the eventual mode of distribution, the identification and verification of beneficiaries.

76. We find that the appellants have not controverted these averments, nor have they challenged them in any way. All the appellants decried is that they should have been consulted individually. Considering the numbers involved, we do not think that it could have been reasonable to expect individual based invitations. The various ethnic clans and tribes having chosen their leadership to lead the process for them, there was no problem involving that leadership on their behalf. As held by the Supreme Court in British American Tobacco Kenya, Plc (Formerly British American Tobacco Kenya Limited) vs. Cabinet Secretary for the Ministry of Health, supra, 'the fact that someone was not heard is not enough to annul the process.' It is our view that as representatives of the various clans and tribes were part of the meetings, consultations and communication prior to the recording of the partial consent, this satisfied the requirements of the *Land Act*, 2012 with regard to public participation.

77. We have considered the grounds upon which a Court can set aside a consent order and find that the appellants did not satisfy the principles required for that purpose. We find that the parties have been in Court for a long time. They negotiated the partial consent for a period of three years. Furthermore, the appellants admit that they were part of the Kamba community, one of the groups involved in the negotiations. We are satisfied that they had an opportunity to be heard before the consent was recorded. We are satisfied that the same took care of all the parties, including the appellants. They came up with a mode or formula of distribution. From the record, that consent has been implemented to a large extent and titles to land issued. The appellants took no step to challenge the process until three years later. As the learned Judge observed, there was unreasonable delay in bringing the petition, and the same was not explained. The delay smacks of an action taken as an afterthought.

78. We have come to the conclusion that the appellants appeal lacks in merit and accordingly we dismiss it in its entirety with no order as to costs.

DATED AND DELIVERED AT NYERI THIS 23RD DAY OF MAY, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI – ARONI

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR