Mwandori & 7 others v Weda & 7 others (Environment & Land Petition 19 of 2021) [2024] KEELC 1686 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1686 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND PETITION 19 OF 2021

FM NJOROGE, J

MARCH 19, 2024

BETWEEN

KILLIAN MWAJANJI MWANDORI .... 1ST PETITIONER

FARES KAZUNGU MWAFUNGO .... 2ND PETITIONER

KAINGU JAPHET KUFUJA .... 3RD PETITIONER

WILSON KAI DECHE .... 4TH PETITIONER

NYEVU MAZIHA MUKONGO .... 5TH PETITIONER

RAJAB NYALE MWANYAE .... 6TH PETITIONER

JUMA MWASEMU MWANYARE .... 7TH PETITIONER

ALFEIT MUMBO ABIO GUNDA .... 8TH PETITIONER

AND

ALI NDORO WEDA .... 1ST RESPONDENT

HENRY MWANGOME TSUMA .... 2ND RESPONDENT

EVANS MPATE MBARU .... 3RD RESPONDENT

EMMANUEL NDORO DIDA .... 4TH RESPONDENT

FARAJ MWANGOME .... 5TH RESPONDENT

KILIFI COUNTY LAND ADJUDICATION OFFICER .... 6TH RESPONDENT

COUNTY GOVERNMENT OF KILIFI .... 7TH RESPONDENT

NATIONAL LAND COMMISSION .... 8TH RESPONDENT

RULING

1. By a notice of motion application dated 12th February 2024, the 1st -5th Respondents sought the following orders: -

    a. Spent;

    b. Spent;

    c. That this Honourable Court be pleased to review, set aside the ruling issued by this court on the 15th day of January 2024 allowing the Petitioners' application dated 23rd August 2021;

    d. That this Honourable Court be pleased to strike out the application and the suit with costs for being frivolous, vexatious, scandalous, not disclosing a reasonable cause of action against the defendants, {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;a cause of action may not be relitigated once it has been judged on the merits; finality} res judicata}} and/or {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title; Under judgment.} sub judice}} and or otherwise an abuse of the court process.

    e. That costs of this application be provided for.

2. The application, which was brought under Order 45 rule 1,2, and 3, Order 2 rule 15, Order 51 rules 1 and 3 of the *Civil Procedure Rules* and Section 1A and 3A of the *Civil Procedure Act*, was premised upon the grounds outlined on the face of the motion and supported by the affidavit sworn by Ali Ndoro Weda on 9th February 2024.

    3. According to Ali Ndoro, the 1st Respondent herein, this petition was filed in relation to a parcel of land identified as G.L 15A Kidutani Settlement Scheme (the suit property), of which the Petitioners are said to be the occupants; the Respondents herein are in occupation and committee members of a different parcel of land identified as Nyika Reserve and therefore there can be no cause of action against them in relation to the suit property. He annexed letters from the Ministry of Lands and Physical Planning and the Kilifi County Department of Lands, Housing, Physical Planning and Urban Development dated 23rd September 2020 and 16th October 2020 respectively to support his claims.

    4. The 1st Respondent added that the Petitioners have previously filed other suits in relation to the suit property raising similar issues as those in this petition, suits which have since been dismissed with no pending appeal.

    5. The Petitioners did not file any response. Notably, when the matter was placed for mention on 4th March 2024, Mr. Mangaro, counsel for the 1st- 5th Respondents only sought for a ruling date. As much as the application is not opposed, it does not mean that the it must automatically succeed. The Respondents have a duty to substantiate their case. The Supreme Court in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018]* eKLR stated as follows on unopposed applications:

        > " [10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed

application, the Court will as a matter of cause grant the sought orders. It behoves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court."

6. The Respondents want this court to review and set aside its ruling delivered on 15th January 2024. This kind of remedy finds its footing in section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules.

7. Section 80 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."

8. Order 45 rule 1 provides as follows:

"(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 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."

9. In this case, the Respondents aver and seem to rely on the ground that there is an error apparent on the face of the record. The question that follows therefore is whether there is an error apparent on the face of the record to warrant a review of the impugned ruling.

10. 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. In Nyamogo and Nyamogo Advocates v Kogo [2001] EA 173, the Court of Appeal explained: -

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of an error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the Court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

11. The ruling containing the orders in question was delivered on 15th January 2024. The orders sought by the Petitioners and eventually granted were that pending the determination of this petition, there be a conservatory order staying the appointments of the 1st to 5th Respondents as members of the Mtwapa-Kidutani Settlement Committee and that they be restrained from identifying or selecting beneficiaries, sitting or hearing of disputes relating to the settlement of persons on the suit property.

12. Looking at the grounds relied upon by the Respondents, and the reasoning given in the impugned ruling, I am of the view that the grounds raised herein are substantive in nature which would require a long process of reasoning and cannot therefore be said to be a mere mistake or error apparent on the face of the record. For this reason, I decline to grant prayer no. 3 in the motion.

13. The Respondents also contested that the petition is res judicata and or sub judice Kilifi CMCC Land Case E52 of 2020 and E76 of 2020. The doctrines of res judicata and res sub judice are set out in Section 7 of the *Civil Procedure Act*. The doctrine of {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;a cause of action may not be relitigated once it has been judged on the merits; finality} res judicata}} ousts the jurisdiction of a court to try any suit or issue which had been finally determined in a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title; the doctrine of res {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;Under judgment.} sub judice}} bars the trial of a suit where there is another suit involving the same parties or parties litigating under the same title pending determination in a court of competent jurisdiction. The common elements in the two doctrines are that the issues must be directly and substantially in issue in the former suit and between the same parties litigating under the same title.

14. A cursory perusal of the proceedings before the subordinate courts, reveals that the parties are not entirely the same as those in this Petition. The only common names appearing in both instances are the 6th -8th Petitioners and 5th Respondent. Similarly, the cause of action is not the same. While the cause of action in the suits before the subordinate court is premised on trespass to individual plots

within the suit property herein, the present petition challenges the constitutionality and legality of the alleged appointment of the 1st -5th Respondents as members of Mtwapa-Kidutani Land Settlement Committee.

15. Whether or not there exists a reasonable cause of action against the 1st- 5th Respondents, all I need do is refer to the ruling the Hon Lady Justice Odeny where she states as follows while granting the orders in the application dated 23/8/2021:

> " In this case if the appointment of the 1st -5th respondents is upheld, the allocation exercise shall be carried out to the detriment of the petitioners. The respondents are also a party to the dispute, which is still pending hearing and determination."

16. I therefore believe that in the light of the finding in that ruling this suit and application can not be struck out out on the ground that they do not disclose a reasonable cause of action

17. The conclusion of this court is that there is no merit in the application dated 12th February 2024 and the same is hereby dismissed with no orders to costs.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 19TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI