



**Midega v Akudo (Environment & Land Case 11 of 2021)
[2024] KEELC 3386 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 11 OF 2021
AY KOROSS, J
APRIL 25, 2024
[FORMERLY KISUMU ELC CASE NO.35 2015]**

BETWEEN

BENARD J. MIDEGA PLAINTIFF

AND

CHARLES OTIENO AKUDO DEFENDANT

RULING

1. The notice of motion dated 5/10/2023 that is the subject of this ruling is filed by the plaintiff and he has sought several reliefs from this court. Some of the reliefs are spent and the residual reliefs are: -
 - a. That the honourable court be pleased to review the orders issued on 10/05/2023 to reflect the correct position that the surveyor do visit land parcel nos. Uyoma/Kokwiri/3052 and Uyoma/Kokwiri/3053.
 - b. The Deputy Registrar of this Hon. Court do execute the relevant forms limited for purposes of complying with the consent dated 24/4/2023 on behalf of one Akudo Waka (deceased) who is the registered owner of Uyoma/Kokwiri/3052 to enable the plaintiff comply with the terms of the consent dated 24/4/2023.
 - c. That costs of the application be provided for.
2. The motion is based on the grounds set out on its face and on the supporting affidavit of the plaintiff which he deposed on 5/10/2023.
3. In summary, it is the plaintiff's case that parties filed a consent dated 24/4/2023 and during its adoption as an order of the court, the court erroneously indicated the parcel nos. for purposes of establishing new boundaries as land parcel nos. Uyoma/Kokwiri/3052 and Uyoma/Kokwiri/3055 as opposed to Uyoma/Kokwiri/3052 and Uyoma/Kokwiri/3053.



4. Further, the plaintiff contends such rectification would enable parties to comply with the consent. The plaintiff candidly states the registered owner of Uyoma/Kokwiri/3052 one Akudo Waka (Waka) is deceased and his estate has not been administered.
5. Accordingly, the plaintiff contends the execution of the consent by the deputy registrar of the court will not prejudice any party and that he will bear expenses towards implementing the consent order.
6. Counsel for the defendant Mr. Odongo appeared before this court on 7/02/2024 and confirmed that he did not have instructions to oppose the motion. The motion is canvassed by the plaintiff's written submissions dated 8/12/2023.
7. Turning to the submissions, in giving a history of the dispute upto the time of recording the consent, counsel Miss Onyango submits this court erroneously failed to include land parcel no. Uyoma/Kokwiri/3052 as one of the disputed parcels of land and implores this court to include it as one of the parcels of land in contention.
8. Counsel submits the order for the deputy registrar (DR) to execute documents for purposes of adding the estate of Waka will not amount to intermeddling with the estate of a deceased person and relies on the authorities of *re Estate of M'Ngarithi M'Miriti* [2017] eKLR and the Supreme Court of Kenya's decision of *Geoffrey M. Asanyo & 3 others v Attorney General* [2018] eKLR. Unfortunately, counsel did not avail these authorities and on that premise, this court will not consider them.
9. Having carefully considered the motion, affidavit and plaintiff's submissions, the issue that falls for determination is whether there is an error on the face of the record to warrant a review of the consent order.
10. The applicable provisions that govern review of court orders are encapsulated by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. Section 80 states that;

“ 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.”
11. The salient conditions brought out in Order 45 Rule 1 (1) of the *Civil Procedure Rules* such as discovery of new and important matter, mistake and sufficient cause have to be proved by an applicant and in this case, the plaintiff.
12. In the persuasive decision of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, the court on analysis of law and jurisprudence on review of court decisions, summarized the guiding principles for review of a court decision thus: -
 - 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.”

13. Having outlined the law and jurisprudence on the grounds for revision, I will juxtapose the plaintiff’s singular ground for review which is in the following verbatim words: -

“That on 10/5/2023 when the matter came up for purposes of adopting the consent the court erroneously indicated the parcels to be surveyed for purposes of establishing new boundaries as being parcel nos. Uyoma/Kokwiri/3052 and Uyoma/Kokwiri/3055 as opposed to parcel numbers Uyoma/Kokwiri/3052 and Uyoma/Kokwiri/3053.”

14. Turning to the record, this matter has been in the court corridors for 9 years whereby the plaintiff sued the defendant for trespassing onto land parcel nos. Uyoma/Kokwiri/3053, 3055 and 3056 and amongst other orders, sought for fixation of boundaries.

15. From the record Mr. Odongo filed a preliminary objection (PO) dated 2/03/2015 contending this court did not have jurisdiction. In a ruling rendered on 28/04/2016, this court stated that since the prayer for fixing the boundary was an alternate prayer and the essence of the plaintiff’s case was trespass, it reserved the issue of the boundary dispute and stated it shall be determined at the conclusion of the case.



16. On 22/05/2019 and by consent of the parties, the land registrar was directed to visit land parcels no. Uyoma/Kokwiri/3052, 3053 and 3055. The registrar's report which ensued from this visit shows all these parcels of land had encroached upon each other.
17. During trial, this court referred the case to court annexed mediation and upon collapse of negotiations, the matter proceeded for hearing. Upon hearing parties and after closing the plaintiff and defence cases, counsels submitted there was a possibility of settlement.
18. True to their word, counsels filed a consent dated 24/4/2023 in the following terms: -
- “ 1. The status quo currently subsisting to be maintained.
 2. The county surveyor to visit the parcels in dispute, survey the same and create new boundaries in line with the current status quo and thereafter parties to be issued with title deeds reflecting the new acreages created.
 3. Costs of the survey to be shared between the parties.
 4. Mention in 90 days.”
19. On the date of adoption of the consent which was on 10/05/2023, this court considered two factors; firstly, the properties in dispute were Uyoma/Kokwiri/3052, 3053 and 3055 and secondly, the court could not adopt a consent that was contrary to the policy of the court. This court omitted Uyoma/Kokwiri/3052 and adopted the consent as an order of the court in following terms: -
- “ 1. The status quo currently subsisting to be maintained.
 2. The county surveyor to visit land parcels no. Siaya/Kokwiri/3053 and Siaya/Kokwiri/3055, survey the same and create new boundaries in line with the current status quo and thereafter parties to be issued with title documents reflecting the new acreages and or hectares that have been created.
 3. Costs of the survey to be shared equally by the plaintiff and defendant.
 4. Mention to confirm settlement and mark the matter as settled within 90 days.
 5. Mention on 18/9/2023.”
20. Having so confirmed the terms of the consent in counsels presence, it was binding on the parties. It is noted consents are not blanketly adopted by the court but in exercise of its judicial function, the court has to evaluate it, domesticate it and approve it by its adoption.
21. Nevertheless, from the adoption, it is evident that there is a typographical error which is rectifiable under Section 99 of the *Civil Procedure Act* this is because the parcels were referred as “Siaya/Kokwiri/3053” and “Siaya/Kokwiri/3055” instead of “Uyoma/Kokwiri/3053” and “Uyoma/Kokwiri/3055”.
22. The omission of Uyoma/Kokwiri/3052 in the consent adoption was not an error but a deliberate non-inclusion of this property. The registered owner- Waka is deceased and his estate is not a party to these proceedings. This court bore in mind Article 50 of the *Constitution* which states that a party must be accorded a right to fair hearing.
23. This is in tandem with the audi alteram partem cardinal principle of law which provides that parties must be given an opportunity to be heard before adverse orders are made against them. The Court



of Appeal had an opportunity to elucidate this principle in the case of *Pashito Holdings Limited & Another v Paul Nderitu Ndungu & 2 Others* [1197] eKLR when it stated: -

“The rule of “audi alteram partem”, which literally means hear the other side, is a rule of natural justice. According to *Jowitts Dictionary of English Law* (2nd Edition)

“It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him”.

There is an unpronounceable Latin maxim which in simple English means: “He who shall decide anything without the other side having been heard, although he may have said what is right, will not have done what is right.”

24. It is appreciated that a consent order can never be adopted as an order of the court if there is collusion or fraud or if it is contrary to the policy of the court and the Apex Court appreciated this in *Housing Finance Company of Kenya Limited & another v Sharok Kber Mohamed Ali Hirji & another* [2021] eKLR when it stated: -

“(17) We are persuaded the High Court’s decision in in *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, where Harris, J held, inter alia, that -

- “1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.”

25. It is not lost to this court if parties are of the view the consent as adopted does not serve the parties’ purpose, they can by consent, set aside the adopted consent. This court adopts the position of *Hobson Nyangau Onchuru v Tom O. Mogoi & Another* [2012] eKLR which cited with approval the decision of Harris J. in *Kenya Commercial Bank Ltd. -v- Specialized Engineering Co. Ltd.* [1982] KLR 485 at p. 493 which stated:-

“The marking by the court of a consent is not an exercise to be done otherwise than on the basis that the parties fully understand the meaning of the order either personally or through their advocates and when made such an order is not lightly to be set aside or varied save by consent or on one or other of the recognized grounds.”

26. Ultimately, I find there was a typographical error in the consent order that was adopted by the court when it referred to the properties as Siaya/Kokwiri/3053 and Siaya/Kokwiri/3055 instead of Uyoma/Kokwiri/3053 and Uyoma/Kokwiri/3055. I also find there was no error on the face of the record when the court precluded Uyoma/Kokwiri/3052 from the consent order. Having made my findings, the second relief in the motion is otiose.



27. Before I issue my final disposal orders, from the consent terms, it is evident the predominant issue in conflict is a boundary dispute and because of alleged obliteration by the plaintiff's parcels of land and Uyoma/Kokwiri/3052, parties are seeking rectification of boundary lines and issuance of new parcel nos.
28. This rectification process is envisaged by Section 16 of the Land Registration Act and the jurisdiction thereof lies with the department of surveying, mapping and land registration.
29. It appears notwithstanding the absence of Uyoma/Kokwiri/3052 from the consent, parties attempted to pursue this procedure but the land registrar declined to proceed further. Indeed, since Uyoma/Kokwiri/3052 is registered in Waka's name, the land registrar or surveyor could not move one step further unless and until Waka's estate was included in the process.
30. It also noted the plaintiff has lamented the defendant's family is reluctant to administer Waka's estate. I sympathize with the plaintiff that he is aged and Waka's children who are his nephews including the defendant have failed to administer Waka's estate.
31. However, he is not tied to Waka's heirs inaction since by the provisions of part VI of the Probate and Administration Rules in particular Rule 21 and 22 (1-7), he could take citation proceeding against any person who could by himself, be entitled to take a grant on Waka's estate.
32. In conclusion, this case has been in court for a very long time and since parties have closed their respective cases, let them address me on the issue of submissions or otherwise.
33. For the foregoing reasons and findings, I am accordingly inclined to amend the typographical error in paragraph 2 of the adopted consent order. The motion is dismissed and the plaintiff shall bear his own costs. Ultimately, I issue the following final disposal orders: -
- a. The consent order adopted by this court on 10/5/2023 is amended at paragraph 2 to read: -
- “The county surveyor to visit land parcels no. Uyoma/Kokwiri/3053 and Uyoma/Kokwiri/3055, survey the same and create new boundaries in line with the current status quo and thereafter parties to be issued with title documents reflecting the new acreages and or hectares that have been created.”
- b. The notice of motion dated 5/10/2023 is hereby dismissed with the plaintiff bearing his own costs.
- c. Mention for further directions on 29/05/2024.
- It is so ordered.

DELIVERED AND DATED AT SIAYA THIS 25TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

25/4/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

In the presence of:

Miss Anyango for the Plaintiff

N/A for the defendant



Court assistant: Ishmael Orwa

