



**Muswii v David & 6 others (Environment & Land Case 76 of 2018)  
[2024] KEELC 5919 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5919 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 76 OF 2018  
TW MURIGI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**SAMMY MUTUA MUSWII ..... PLAINTIFF**

**AND**

**FRANCIS WAITA DAVID & 6 OTHERS ..... DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 3<sup>rd</sup> March 2023 brought under Sections 1A, 1B & 3A of the Civil Procedure Act, Order 45 and 51 Rule 1 of the Civil Procedure Rules, in which the Applicant seeks the following orders:-
  - i. That this Honourable court be pleased to review and set aside its ruling signed, dated and delivered herein on 19/10/2020 and proceed to hear and determine the Plaintiff/Applicant's application dated 19/11/2019.
  - ii. That the cost of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Sammy Mutua Muswii sworn on even date.

**The Applicant's Case**

3. The Applicant averred that vide the ruling delivered on 19/10/2020, the court deferred the hearing of the application dated 19/11/2019 to await the outcome of the Defendants appeal against the dismissal of the preliminary objection.
4. He further averred that the appeal is yet to be heard and determined three years since it was filed. He contended that the Appeal cannot by itself operate as a stay of the proceedings herein. He urged the court to grant the orders as prayed.



## The Respondents Case

5. The Respondents opposed the application through the replying affidavit of Francis Mutisya sworn on 10<sup>th</sup> May 2023. The deponent averred that the application is devoid of merit as directions have been issued with regards to the hearing and determination of the appeal. He urged the court to dismiss the application with costs,
6. The application was canvassed by way of written submissions.
7. The Applicant opted to rely on the submissions filed on 5/2/2020 which I have duly considered.
8. As at the time of writing this ruling, the Respondents had not filed their submissions as directed.

## Analysis And Determination

9. Having considered the application and the submissions filed by the Applicant, the only issue that arises for determination is whether the ruling delivered on the 19<sup>th</sup> October, 2020 should be reviewed.
10. The Applicant is seeking an order to review and set aside the ruling delivered on 19/10/2020 on the grounds that the appeal against the dismissal of the preliminary objection is yet to be determined three years since it was filed. He urged the court to proceed to determine the application dated 19/11/2019 as there was no order staying proceedings herein.
11. The law that governs applications for review is set out in Section 80 of the [Civil Procedure Act](#) and in Order 45 Rule 1 of the Civil Procedure Rules.
12. Section 80 of the [Civil Procedure Act](#) 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.
13. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides that: -  
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 the judgment to the court which passed the decree or made the order without unreasonable delay.



14. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjob Amalgamated Limited & Another Vs Kenya Commercial Bank Limited* (2014) eKLR where the Court held that:-

“In the High Court both the *Civil Procedure Act* in Section 80 and the *Civil Procedure Rules* in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review.”
15. Similarly, in *Republic Vs Public Procurement Administrative Review Board & 2 Others* (2018) eKLR the court held that: -

“Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”
16. As regards the first requirement, the Applicant must show that there is discovery of new or important matter of evidence which after due diligence was not within his knowledge or could not be produced at that time. The record shows that the Applicant filed the application dated 19/11/2019 seeking leave to amend his amended plaint. In its ruling delivered on 19/10/2020, the court deferred the hearing of the application to await the outcome of the Appeal.
17. The Applicant has not shown that there is discovery of new or important matter of evidence that the Applicant could not have placed before the Court during the hearing of the application.
18. With regards to the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of *Nyamogo & Nyamogo Vs Kogo* (2001) EA 170 the court held that:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must 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 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 where there may be 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 possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.”
19. Similarly, in the case of *Timber Manufacturers and Dealers Vs Nairobi Golf Hotels* (K) HCCC No. 5220 of 1992, Emukule J held that;

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”
20. The Applicant has not pin pointed the errors that are apparent on the face of the record. The grounds laid by the Applicant do not disclose an error apparent on the face of the record.
21. The Court is also mandated to consider if there are sufficient reasons to review the Court’s judgment.



22. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR stated that;

“These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

23. The Applicant has not demonstrated any sufficient reason to warrant a review of the Court’s ruling.

24. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.

25. The ruling sought to be reviewed was delivered on 19/10/2020. The instant application was filed on 03/03/2023. That duration is far from reasonable and the same has not been explained.

26. In so finding, I am persuaded by the finding in the case of *John Agina Vs Abdulswamad Sharif Alwi* C.A Civil Appeal No. 83 of 1992, where the court stated as follows;

“An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy of the court.”

27. In the end, I find that the application dated 3<sup>rd</sup> March, 2023 is devoid of merit and the same is hereby dismissed with costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

In The Presence Of:

Kituku for the Plaintiff

Court Assistant Stephen

