



Theuri & 6 others v Theuri & another (Environment & Land Case E046 of 2022) [2025] KEELC 594 (KLR) (14 February 2025) (Ruling)

Neutral citation: [2025] KEELC 594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E046 OF 2022
A OMBWAYO, J
FEBRUARY 14, 2025**

BETWEEN

GEORGE THEURI 1ST PLAINTIFF

HANNAH WANGUI KAMAU & 5 OTHERS & 5 OTHERS & 5 OTHERS & 5 OTHERS & 5 OTHERS 2ND PLAINTIFF

AND

NESTER WANJA THEURI 1ST DEFENDANT

RUKENYA COMMERCIAL AGENCIES 2ND DEFENDANT

RULING

Brief Facts

1. The Plaintiffs/Applicants filed the instant application dated 25th November, 2024 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That the Honourable court be pleased to review its order delivered on 23rd May, 2024 requiring the Plaintiffs to vacate the property known as Shawa/Gicheha Block 12/18 (Kamwango farmers, Njoro Nakuru)
 4. That the Honourable court be pleased to exempt plot number 20 from the order requiring Plaintiffs to vacate the property known as Shawa/Gicheha Block 12/18 (Kamwango farmers, Njoro, Nakuru) which suit is made up of plots 1-20.
 5. That the costs of this Application be provided for.



2. The Application was based on grounds set out and supported by the Affidavit of Sheila Midachi the 15th Plaintiff/Applicant herein sworn on 25th November, 2024. She stated that judgment was delivered on 23rd May, 2024 in favour of the Defendants/Respondents as against the Plaintiffs/Applicants. That the court found that the plots in dispute were plots number 1 and 4-19 but failed to exempt plots number 2,3 and 20 from the rest of the plots forming part of Shawa/Gicheha Block 12/12 (Kamwango Farm). She stated that the 14th and 15th Plaintiffs/Applicants only came to be aware of the inadvertent mistake in the definitive orders of the judgment when they were issued with notice to vacate the premises. She further stated that execution will render them homeless yet their land has no dispute.

Response

3. The 1st Defendant/Respondent filed her Replying Affidavit sworn on 13th December, 2024 where she averred that there was no confirmation that the purchase of plots 2,3 and 20 had no sale agreement and there was no proof of payment. She further averred that the court did not make any error since the purchase of the said plots was not done by Anthony Karimi since he lacked the capacity to transact. She also averred that the 14th and 15th Plaintiffs/Applicants were duly represented in court and were also aware of the judgment. She added that the 14th and 15th Plaintiffs/Applicants ought to avail proof of their respective purchases noting that the sale did not occur with the 1st Defendant's knowledge. She urged the court to dismiss the application with costs. The 15th Plaintiff/Applicant filed a further affidavit in response sworn on 17th December, 2024 where she stated that the Plaintiffs/Applicants availed sale agreements and receipts for payments during hearing. She stated that the issue was on the admission of the sale and not proof of payment. She further stated that the plots in dispute were only 1 and 4-19 and thus plot 20 did not form part of the dispute. She stated that the court issued orders against a plot whose ownership was not disputed in trial. She stated that the dispute was only that the definitive part of the judgment failed to exclude plot 20. She urged the court to review its judgment and exclude plot 20 from the definitive part of the judgment as the same is a clear error on the face of record given that the 1st Defendant admitted that plot 20 was not in dispute.

Submissions

4. Counsel for the Applicants filed his submissions dated 16th January, 2025 where the sole issue for determination was whether the application has satisfied grounds for review. He relied on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. It was counsel's submission that the 1st Defendant admitted that the dispute was only over plots 1 and 14-19 and not over plot 20. He further submits that plot 20 ought to be exempted from any determination. He added that the court issued orders against a property which did not form part of the dispute. Counsel relied on the case of *National Bank of Kenya Ltd V Ndungu Njau* [1996] KLR 469 which quoted the case of *John Ngimor & 554 others V Northern Rangelands Trust & 3 Others* [2021] eKLR and the case of *Republic V Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. He submits that it was clear under paragraph 2 page 17 of the judgment that disputed ownership was on plots 1 and 14-19 and not on plots 2,3 and 20. He submits that the court inadvertently failed to exclude plot 2,3 and 20 and issued orders against the whole Shawa/Gicheha Block 12/12 (Kamwango Farm).
5. Counsel for the 1st Defendant filed his submissions dated 25th January where he identified that main issue as whether the Plaintiffs claim for review is merited. He relied on the case of *Josiah V Nyaga* (Civil Appeal 34 of 2021) [2023] KEHC 2054 (KLR) and submits that an error apparent on the face of the record is one that is self-evident and clear requiring no extraneous material or elaborate reasoning to establish its incorrectness. Counsel argues that the 1st Defendant at the time of filing the counterclaim did not exclude any plots as uncontested. It was his submission that during hearing, all the plots were



sold by the 2nd Defendant through its Director who received consideration. He argues that the while the 1st Defendant confirmed that the deceased sold three plots, the Plaintiffs/Applicants attempt to rely on this argument to justify their alleged purchase of the plot 20 so as to evade the eviction order. Counsel submits that the owner of plot 20 did not testify or was there any evidence to substantiate the alleged sale and purchase thus the claim on the said plot remained unproven. He submits that the Plaintiffs/Applicants disagreement with the court's findings does not amount to an error apparent on the face of the record to warrant review. He argues that the issue of the said plot was a matter of fact and evidence and any disagreement with the court's findings remains a matter of appeal rather than review. He cited the case of *Abasi Belinda V Fredrick Kagwamu and Another* [1963] EA which cited with approval the case in *Solacher V Romantic Hotels Limited & Another* (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR)

Analysis and Determination

6. This court has carefully considered the application and the main issue for determination is whether the application is merited.
7. The jurisdiction of this court for review of orders is provided for under Order 45 Rule 1 (1) of the *Civil Procedure Rules* which provides as follows:
 - “1. Application for review of decree or order
 - (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.” It is this court's view that the basis of an application for review of an order is on the recovery of new and important matters or evidence which after due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the order was made. Further an application for review may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.
8. The Plaintiff/Applicant contends that plots number 2,3 and 20 were not in dispute and that the trial court in its judgment found the same. She contends that this was an error apparent on the face of record and the same ought to be reviewed. The 1st Defendant on the other hand contends that the disagreement by the Plaintiffs/Applicants with the court's judgment does not amount to an error apparent on the face of the record. She contends that the disagreement was factual to the court's findings which ought to be appealed.
9. This court has considered its judgment and it is not in dispute that from the evidence that the 1st Defendant confirmed that her late husband had completed the sale of plot numbers 2,3 and 20. I also note that the court in its finding appreciated the fact that the sale of the said plots were never challenged and that the only plots in dispute were plots 1 and 14-19.



10. I find that the error was clearly apparent on the face of record since the court confirmed that the said plots were never in dispute. I am of the view that in as much as the Defendant's counter claim factored all the plots, it would be unfair to have the owners of plots 2,3 and 20 be evicted yet the sale was proper to begin with and this was a fact that the 1st Defendant never disputed. In addition, there will be no prejudice suffered upon the 1st Defendant if the court reviews the orders to reflect the correct and just position.
11. In view of the above, I find that the orders for review is merited to the effect that this court's orders requiring the Plaintiffs to vacate the property known as Shawa/Gicheha Block 12/18 (Kamwango farmers, Njoro, Nakuru) shall not apply to plot Nos 2, 3 and 20. There shall be no orders as to costs. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA.

NAKURU ENVIRONMENT AND LAND COURT

ENVIRONMENT AND LAND COURT

DATE: 2025-02-14 13:03:44

