



**Onguso v Nyachoti (Environment and Land Appeal E003 of 2024)
[2024] KEELC 13466 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E003 OF 2024**

**JM KAMAU, J
NOVEMBER 21, 2024**

BETWEEN

SHEM ONAMI ONGUSO APPELLANT

AND

CHRISTOPHER MAKORI NYACHOTI RESPONDENT

JUDGMENT

1. By a copy of Plaintiff filed in the Principal Magistrate’s Court at Keroka in ELC Case No.16 of 2019, the Respondent, Christopher Nyachoti Makori sued Shem Onami Onguso for an eviction order from the Respondent’s land parcel No.East Kitutu/Mwamangera/4370, General Damages for trespass and costs. He claimed that the said parcel of land was at all material times registered in his name while the Appellant owned the bordering East Kitutu/Mmwamangera / 4385. The Respondent got the land from his grandfather one Peter Misoi Minyenga as a gift and that he obtained the Title documents on 7/9/2016. He further averred that the Appellant encroached onto his parcel of land in March 2019, started tilling a portion thereof, planted maize and beans and also commenced plucking reea without the Respondent’s consent and/or authority. In spite of the fruitless efforts of arbitration by the area chief, the District officer and District commissioner, the Appellant has been harassing the Respondent and even confiscated the former’s title documents with the help of criminal investigation officers from Keroka Police Station.
2. In his statement of Defence dated 9/9/2019 and filed in court the following day, the Appellant denied all the contents of the Plaintiff in toto.
3. In the meantime, and simultaneously the Respondent filed an Application of even date i.e. 5/9/2019 for a temporary injunction against trespass by the Appellant pending the hearing and determination of the suit property.



4. The same was opposed by the Appellant. On 23/10/2019 both parties consented that the County Surveyor and Land Registrar, Nyamira do visit the suit land and align the boundary and also place beacons thereon and file the Surveyor's Report within 30 days from that date. On 15/7/2020 the Land Registrar's Report dated 2/12/2020 was adopted by the Court:
5. It is apparent from the court records that the Appellant never adduced evidence before Judgment was delivered. Judgment was entered and delivered in court on 20/4/2023 as follows: -The defendant herein by himself, agents, servants or any other persons acting on his behalf is restrained from trespassing and/or occupying land parcel no. East Kitutu/Mwamangera/4370 which rightfully belongs to the plaintiff. If in the process by a petitioner the defendant is directed to quit the said occupation and give room for the plaintiff to develop and enjoy quiet possession of the said parcel of land No. East Kitutu/Mwamangera/4370 The said title East Kitutu/Mwamangera/4385 to be recalled by the Land Registrar and rectified to indicate the right position on the ground for the benefit of the defendant for as it is, it is erred and invalid. The plaintiff herein is allowed to re-apply for replacement of title East Kitutu/Mwamangera/4370 through the laid down procedures for a lost title deed since the original is considered misplaced and/or lost.
6. On 2/10/2023 the Appellant filed an Application dated 15/10/2023 seeking the Court's stay and review of its Judgment dated 20/9/2023 and all the consequential orders thereon on the ground that there was a glaring error apparent on the face of the record which occasioned the Appellant injustice because Judgment was delivered without the Appellant being heard. The said Judgment was a product of the evidence of the Respondent and the Land Registrar in exclusion of the Appellant. He pleaded that should the court find in his favour, the Respondent would suffer no prejudice or at all. The Application was not certified urgent and was heard on and the same dismissed on 31/1/2024 on the ground that the apparent mistake the Appellant relied on was that of his Advocate and not that of the Court. The Court did not err at all and therefore this ground did not meet the threshold for review. The Honourable trial Magistrate advised that the Appellant ought to have preferred an appeal and not go back to the trial Court for Review.
7. As a result, and being dissatisfied with the said Decision, the Appellant filed this appeal asking the Court to set aside the Court's orders of 31/1/2024 and also set aside and review the Judgment/Decree dated 20/9/2023 and order the Principal Magistrate's Court at Keroka to set down for a fresh Hearing before another Magistrate other than Honourable C. Ombija, SRM Keroka PM's ELC Case no. 16 of 2023. He also sought the costs of this Appeal. He gave the following as his grounds of Appeal.
 1. The Learned Trial Magistrate erred in law in not directing his mind in exercise of his discretion under Order 45 of Civil Procedure Rules in that court has a wide and unfettered discretion to the extent that the ends of justice be reached which he failed to do in this case.
 2. The learned Trial Magistrate erred in law is not considering that there was not only an apparent error on record but there was also sufficient cause shown why the court was being urged to review its judgment.
 3. The learned Trial Magistrate failed to exercise his discretion judiciously in deciding this application.
 4. The learned trial magistrate acted in error as he failed to properly evaluate all the pleadings, evidence on record and the application plus all the submissions and thereby reached at an erroneous decision.
8. I allowed both Counsel to file written submissions which I have considered before retiring to write this Decision.



9. Section 80 of the *Civil Procedure Act* Cap 21 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.”
10. Order 45 Rule 1 of the Civil Procedure Rules, 2010 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
 - 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.”
11. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held: -
- Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
12. In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held:-
- Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.....”
13. I would also wish to draw the Appellant’s attention to *Sarder Mohamed v. Charan Singh Nand Sing and Another* (1959) EA 793 where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion to the Court to make such order as it thinks fit on Review and that the omission of any qualifying words in the Section was deliberate.
14. Discussing the scope of Review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. had this to say:-
- the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilising it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

15. In *Tokesi Mambili and others vs Simion Litsanga* the Court held as follows:-

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

16. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018* Judge John M. Mativo culled out the following principles from a number of authorities: -

- 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.
16. According to the Appellant herein none of the Grounds for the Application have absolutely anything to do with
- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - (b) on account of some mistake or error apparent on the face of the record, Applicant's knowledge.
17. The main grounds hinged upon by the Appellant was mistake of his Advocate and his ignorance of the law none of which meets the threshold.
18. The Application could also not pass the Test of:
-or for any other sufficient reason.....”
- which reasons leading authorities hold must be analogous to the other grounds mentioned under the Act and Rules, a reason sufficiently analogous to those specified in the Rule”
19. In the case of *Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006* cited fin the case of *Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR* the Court of Appeal held as follows:
- An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”
20. The Application before the lower Court fails the test as shown in the above category. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end. Parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Judgment. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal. What is demonstrated by the Application is a case of poor pleading which is not what was envisaged by Section 80 of the *Civil Procedure Act* nor the Rules under Order 45.
21. Finally, the Application was irregularly in Court since an Applicant in an Application for Review ought to have annexed a formal extracted Decree or order in respect of which the review is sought.
22. In the case of *Suleiman Murunga V Nilestar Holdings Limited & Another (2015) eKLR* the court held as follows:

The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the



order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's application was fatally defective. I agree that a formal decree or order is a prerequisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order”

23. No such an Order was attached to the offending Application which makes the Application fatally defective.
24. Having said so, the remaining duty is to dismiss the Appellant's Appeal dated 20/2/2024 with costs. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 21ST DAY OF NOVEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff's Counsel: Mr. Soire

Defendants' Counsel: Ms. Bochaberi

