



REPUBLIC OF KENYA



**Luthra & 5 others v Laly & 11 others (Environment & Land Case
133 of 2019) [2024] KEELC 13754 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13754 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 133 OF 2019**

JA MOGENI, J

NOVEMBER 20, 2024

BETWEEN

**SITARANI H.S LUTHRA 1ST PLAINTIFF
JOSEPH KARIUKI 2ND PLAINTIFF
SEMA HEALTH PRODUCTS LIMITED 3RD PLAINTIFF
AZTECH BUSINESS SYSTEMS LTD 4TH PLAINTIFF
WESTON KAMAU 5TH PLAINTIFF
ESTHER MURUNGI MATHENGE 6TH PLAINTIFF**

AND

**SUKHDEV SINGH LALY 1ST DEFENDANT
P. NGANGA T/PETRIEND AUCTIONEERS 2ND DEFENDANT
MEGH SINGH KENTH 3RD DEFENDANT
JASWANTRAI KIBALAL SHAH 4TH DEFENDANT
NARENDRA KIBALAL SHAH 5TH DEFENDANT
HEMANT KIBALAL SHAH 6TH DEFENDANT
SILAS KIBALAL SHAH 7TH DEFENDANT
KEDE ENTERPRISES LIMITED 8TH DEFENDANT
KENYA NATIONAL HIGHWAYS AUTHORITY 9TH DEFENDANT
CHIEF LAND REGISTRAR 10TH DEFENDANT
NAIROBI CITY COUNTY 11TH DEFENDANT
HON ATTORNEY GENERAL 12TH DEFENDANT**



RULING

1. Before me is a Notice of Motion application dated 4/06/2024 filed by the 1st defendant/applicant and brought under Order 45 Rules 1, of the Civil Procedure Rules, Sections 3A, of the [Civil Procedure Act](#) and all the other enabling provisions of the law. The Application seeks the following orders;
 - a. Spent.
 - b. That this Honorable Court be pleased to review, set aside its decision and judgment issued and dated 24th April 2024.
 - c. That this court be pleased to review the court's record and proceedings and issue a new judgment.
2. The application is premised on the grounds on its face together with the affidavit of Sukhdev Singh Laly, the 1st defendant/applicant in this matter, sworn on 4th June 2024. The Applicant avers that being the proprietor of LR 93/1429 Mombasa Road the judgment delivered had an error apparent on the face of the record since the property referred to herein was not gazetted as an illegal parcel. That the gazette notice Vol. CXIII-72 did not, in any way, publish LR Nairobi Block 93/1429 as an illegal parcel to be restituted back to the public property.
3. The applicant avers that the gazette notice was not presented to court by the deponent of the Replying Affidavit as per the understanding of the applicant as pleaded and therefore from the face of the record there was an error. This was because the court was misdirected and this led to the error on the face of the record.
4. The Application is opposed by the 11th defendant who filed a replying affidavit dated 3/07/2024 and stated that the application for review has no merit and is null and void, bad in law and incompetent. The 11th respondent averred the applicant has not met the threshold to warrant the orders sought for review of the judgment entered on 24/04/2024.
5. The 11th respondent avers that the judgment by this court was arrived at judiciously without any mistakes errors and/or omissions warranting the orders of review of judgment. That the court did not make an error since the court in making its decision relied on all documents rightly before it. As such the court considered all issues raised through oral evidence and the documents presented before it.
6. It is the contention of the 11th respondent that the applicant already preferred an appeal in this matter against the decision of the court vide the Notice of Appeal dated 25/04/2024. This being the case it is the respondent's contention that the applicant cannot therefore be heard to prefer both an appeal and a review. Further that this suit having been pending for 5 years the 11th respondent has stated that all issues were fully addressed in the judgment and that litigation must come to an end.
7. The applicant filed a further affidavit sworn on 8/07/2024 alleging that this court's ruling in ELC No. 682 of 2014 seems to have been upholding the right to the suit property by the applicant herein.
8. The parties agreed to canvass their application by way of written submissions. The applicant filed submissions dated 16/07/2024. I have considered all documents filed and at the time of writing this ruling the 11th defendant had not filed their submissions yet.



Analysis and Determination

9. I have diligently read through the pleadings filed and submissions and I find that there are two issues for determination which is whether there is error apparent on the face of the record warranting review of the judgment dated 24/04/2024 and whether this court can deal with a matter which is pending before the Court of Appeal
10. To start with, the applicant referred to this court's judgment in ELC No. 682 of 2014 and stated that this court had found the applicant herein to be the owner of LR Nairobi Block 93/1429. I had to read through the attached copy which however is not a copy of the judgment but a copy of the Ruling in ELC No. 682 of 2014. Now, my reading of the ruling does not point to a decision having been made in the ruling touching on ownership of the suit property. Far from it. The ruling was addressing the issue of extension of time to allow the applicant to file their appeal. The applicant was seeking an extension of a stay order which had been issued and which had lapsed. Infact, the decision is a ruling for an application and not a judgment as the applicant infer.
11. I did however search the records for the judgment delivered in ELC 682 of 2014 on 23/05/2022 and noted that the gist of the judgment was about trespass to the suit property LR Nairobi Block 93/1429 not ownership. The issue of ownership was not in contestation and is not an issue that arose at trial. Since the issue of ownership was not in dispute and the defendant claimed that the suit property was on a road reserve but did not produce any documents to prove their claim, the court focused on the dispute that was before it which was the fact that the defendant had trespassed on the suit property which the plaintiff who is the applicant herein had laid claim to and produced documents to support the claim. The court therefore found in favour of the plaintiff who is the applicant herein on the issue of trespass but did not make any pronouncement on ownership since this was not an issue before the court. The court's judgment in ELC 682 of 2014 decisions is captured herebelow :

“Judgment is hereby entered in favour of the plaintiff against the defendant in the following terms:

- a. Declaration be and is hereby issued that the Defendant has trespassed and is continuing to trespass onto the Plaintiff's property.
- b. General damages be and is hereby awarded in favor of the Plaintiff for the sum of Kenya Shilling 5,000, 000/= only for trespass on land.
- c. The Defendant herein having since erected a billboard on the suit property, namely L.R No. Nairobi/Block 93/1429, same be and is hereby directed to remove and/or otherwise, pull down the said bill board within the next 60 days from the date hereof and in default, the Plaintiff shall be at liberty to proceed and demolish the said bill board without further notice to the Defendant.
- d. In the event that the Plaintiff is disposed to carry out the demolition subject to the preceding paragraph, same shall be at liberty to apply to the Deputy Registrar for an order for provision of security, to be provided by the nearest police station and/or sub-county Police Commandant, for purposes of enforcement of and/ or Compliance with, the court orders
- e. The award of General damages in line with order [c] hereof shall attract interests at court rates from the date of judgment



- f. Costs of the suit are awarded to the Plaintiff.”
12. The issue of ownership of the suit property was brought before the court for determination in the current suit and the court delivered its judgment which is the subject of this application. Thus, it is in the current suit that the court has been asked to determine the dispute on ownership and not in ELC 682 of 2014 and the court therefore I am still persuaded that the court did not commit any error in arriving at the decision made. Beside the applicant herein was seized of the decision in ELC 682 of 2014 if he was persuaded that it was a good decision he should have raised it in support of his claim to the suit property in the instant suit it is therefore not new evidence that he has suddenly chanced on.
13. Therefore, for the application for review of the judgment issued on 24/04/2024, the statutory provisions in respect of review are enshrined in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. 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.”
14. 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
- (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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”
15. From the statutory provisions, a court has discretion to grant review orders where the applicant demonstrates having discovered new and important evidence which he could not have obtained even after exercising due diligence, or where there is an obvious mistake or error on record or where there is a sufficient cause. In all these instances the application for review must be made without unreasonable delay.



16. Principles for grant of review have been settled in a long line of decided judicial pronouncements. In the case of Francis Njoroge vs. Stephen Maina Kamore [2018] eKLR the court stated as follows;

“therefore Order 45 of the Civil Procedure Rules 2010 is very explicit that a court can only review its orders if the following grounds exist;

- a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- b. There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.”

17. In the case of Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] EA 243 the Court of Appeal described an error apparent on the face of the record as follows;

“In Nyamogo & Nyamogo vs. Kogo [2001] EA 174, this court said that 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 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 be 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 long drawn process or 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

18. This essentially means that for a party to plead an error on the face of the record, they must demonstrate that the error, mistake, fault or lapse is so obvious and plainly clear that it does not take any amount of effort to spot it. The mistake should be glaring. But if it takes convoluted arguments to find the error, then that cannot be said to be an error apparent on the face of the record worthy of an order for review.

19. In the case of Shanzu Investments Limited vs. Commissioner for Lands Civil Appeal No. 100 of 1993 the Court of Appeal stated as follows;

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the *Civil Procedure Act*and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

20. Similarly, in Registered Trustees of the Archdiocese of Dares Salaam vs. The Chairman Bunju Village Government & Others, the court held that;

“It is difficult to attempt to define the meaning of the words sufficient cause; it is generally accepted however, that the words should receive a liberal construction in order to advance



substantive justice, when no negligence, or inaction, or want of bonafides is imputed to the appellant.”

21. On the question of discovery of new and important matter or evidence, the applicant must show that he could not obtain the new evidence even upon exercise of due diligence and that the matter was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.
22. In this case the Applicant has argued that at the court made an error by stating that the suit property which was in contention was part of the parcels listed for cancellation of title. To the applicant the court having stated so made an error apparent and that the applicant seeks to have the court issue another judgment correcting the alleged error. The issue that this court ought to address is whether, the applicant’s reason has met the threshold of Order 45 Rule 1.
23. The wording of Order 45 Rule 1 is unambiguous in respect of discovery of new evidence as a ground for review. The applicant must show that at the time of the decision sought to be reviewed, the new matter or evidence was not within his knowledge or could not be produced by him after the exercise of due diligence. The fact that the application sought to set aside and or review the said judgment clearly demonstrates that the said judgment was at the core of the applicant’s application and therefore the applicant cannot be heard to plead lack of knowledge of the said judgment as such proposition is simply irreconcilable with the facts in this matter.
24. In the case of *Kaiza vs. Angelo Mpanju Kaiza* [2009] eKLR, the Court of Appeal held that not every new fact will qualify for interference of the judgment. Similarly, in the case of *Stephen Wanyoike Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) vs. Kariuki Marega & Another* [2018] eKLR, the Court of Appeal stated as follows;

“we emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”
25. I note that in the judgment delivered on 24/04/2024 the court found that the applicant herein was not entitled to the suit property having failed to establish the root of title. The applicant was not able to prove how he came into ownership of the said suit property which was considered to be in the road reserve and to be in the buffer zone. Therefore, the contestation that the suit property was not part of the parcels of land gazetted vide Gazette Notice No. 9229 of 29th July, 2011 (Vol. CX111-No.72) does not change the fact that the court found that the applicant was not deserving of the suit property since the claim of ownership could not be supported by documentation.
26. The court at paragraph 29 of the judgment delivered on 24/04/2024 noted thus:

“Further the report that was attached to the replying affidavit for Nairobi Town Planning Liaison Committee of May 1995 noted that the buffer zone had been created by the Physical Planning Department in the 1970s in keeping with good planning principles and international standards of a major highway serving an international airport. The report recommended revocation of allocations in the Plainsview Buffer Zone/strip where the suit property for the plaintiff/1st defendant lie which is Nairobi Block 1429. Thus the creation and registration of the said title is fraudulent and consequently null and void and cannot confer good title.”
27. It therefore follows that the title the applicant lays claim to was one that lay in an area was already demarcated as public way back in the 1970s. I will not say much since the judgment is there.



28. The other issue that is pertinent to this Application is whether or not this Court can review its judgment while an appeal has been preferred therefrom. The starting point is consideration of the provisions of law that form the basis for review. As stated above, the relevant provisions are Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Rules. Order 45 Rule 1(a) of the Civil Procedure Rules provides in the relevant part 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; may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.” Section 80 of the Act has similar wording. Thus, review is one avenue available to any person, in regard to a decision of the Court that he feels aggrieved by. Appeal is another, if the law permits it. But the question is, are the two available to a party at the same time?
29. The provision is clear that a review is not available where an appeal has been preferred from the decree or order. The relevant part of the phrase is, “from which no appeal has been preferred.” In my view, it is immaterial who has preferred the Appeal. Once that is done, and another party or person still feels aggrieved by the same issue, he or she is barred by law from applying for review, until the higher Court to which the Appeal was preferred pronounces itself on the issue.
30. An Applicant has a recourse for review only where “no appeal has been preferred” or “no appeal is allowed...” (Refer again to Sec. 80 of the Act and Order 45 Rule 1 (1) (a) and (b) of the Rules respectively). It was submitted by Counsel for the Applicant that the filing of a Notice of Appeal cannot deprive a party of his right for and order of review under Order 45(2). He relied on the Court of Appeal case of *Kisya Investments Limited vs A.G and Another Civil Appeal No. 31 of 1995* and *Yani Haryanto vs E.D.&F Man (Sugar) Ltd Civil Appeal No. 122 of 1992*. In the latter decision the Court of Appeal argued that a Notice of Appeal is not an appeal but just a formal notification of an intended appeal.
31. In my respectful view, I would depart from that decision cited, given that there are subsequent authorities from the same Court that have held that the filing of a Notice of Appeal is itself equated to filing an Appeal. I know I am bound by the doctrine of judicial precedent and stare decisis for that matter. But where it commends to me that the higher Court arrived at a wrong interpretation of the law, I am duty bound to point out the error by distinguishing the authority from my conclusion.
32. Regarding the above view, I believe, respectfully, that the learned Judge was in error. On this, I rely on the more recent Court of Appeal case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR*, where their Lordships held, “The appellant submitted that though no substantive appeal had been filed, a notice of appeal had been lodged... Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time when the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling.”
33. In any event, a grammatical reading of Rule 2(2) of the Court of Appeal Rules yields the idea that an appeal to include an intended appeal. It reads, ““appeal”, in relation to appeals to the Court, includes an intended appeal;...” Intent does not exist in a vacuum, it is shown by a filing of a Notice. This was the holding by their Lordships in the above-cited case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited [2020] eKLR* where they held: “It is immaterial whether the substantive Appeal has been filed or not. Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal...There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal.” Thus, an intended Appeal to the Court of Appeal occurs when a party lodges a Notice of Appeal in the right Registry.



34. The law put in place these provisions barring a person from seeking review when there is pending an appeal from the decision in order to avoid occurrence of two things: one, running of parallel proceedings and hence having the possibility of having two separate different outcomes or decisions and, two, leaving the subject matter to subsist in the Court that has jurisdiction over it at that moment. An explanation of these two reasons is apt. The latter one is discussed.
35. The Applicant wants this Court to review its judgment delivered on 20/04/2024. At the same time the applicant has filed a Notice of Appeal which he shall certainly prosecute or is already prosecuting since an intended appeal is an appeal so filed. Now supposing this Court agrees with the Applicant and reviews the judgment while the Court of Appeal confirms it, or vice versa? How shall the situation be resolved? What an absurd situation that would be! Common Law came into existence for good order and certainty. Supposing this Court agrees with the Applicant and reviews the Judgment before the Court of Appeal determines it, will that not be a way of destroying the substratum of the Appeal? The above loud thoughts must have been the wisdom behind the requirement of Order 4 Rules 1(2) and 1(5) of the Civil Procedure Rules about disclosure by parties of the fact that there is no suit pending or previous proceedings between the same parties over the same subject.
36. At the same time this application has also brought to the fore the issue of jurisdiction. This court has noted that there is a pending appeal before the Court of Appeal. The Applicant submits that the fact that an appeal has been preferred does not disentitle the Applicant his right to apply for review. This application has been brought when the subject matter has been moved to the Court of Appeal. It is the one now seized of jurisdiction it. As such, any application after the delivery of the judgment and where an appeal has been preferred could at best have been filed before the Court of Appeal where the subject matter is pending hearing and determination. This court is of the considered view that the application before it is improperly filed.
37. It is trite that the claim naturally follows the subject, and jurisdiction does likewise. In essence, once a court is seized of jurisdiction over a certain subject, that divests all others of jurisdiction over the same. This is what this court may refer to as momentary suspension of all other jurisdictions until that subject moves legally to any such other judicial body as provided by law. And once the subject moves to that other judicial body properly authorized to handle it, the next body legally assumes jurisdiction over that subject thereby causing the previous forum to experience momentary suspension of its jurisdiction. It is momentary in the sense that there is a possibility that once done with the subject, the second forum, for instance, the Court of Appeal, may refer the subject back to the former. In that case the former forum once more assumes jurisdiction over the subject. This means that as long as the matter is legally before one forum for adjudication, other forums can only watch and wait for the decision of the forum with currency in the subject. In this case, the subject is in the hands of the Court of Appeal at the moment.
38. In the circumstance, the court is of the considered view that any issue that a party wishes to raise in relation to the subject of this suit ought to raise the same in the Court of Appeal where the matter now rests awaiting determination.
39. The upshot is that the Applicant's application dated 4/06/2024 lacks merit and the same is dismissed with costs to the 11th respondent.

It is so ordered

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS DAY 20TH DAY OF NOVEMBER, 2024.

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MOGENI J

JUDGE

In the virtual presence of: -

Mr. Odhiambo for 1st Defendant/applicant

No appearance for Plaintiffs, 2nd - 12th Defendants

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

