



**Mumo v Nduke (Environment & Land Case 67B of 2018)
[2024] KEELC 13313 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 67B OF 2018
TW MURIGI, J
NOVEMBER 20, 2024**

BETWEEN

JACKSON MUTISO MUMO PLAINTIFF

AND

MATHITU NDUKE DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 20th February 2024 brought under Sections 1A, 1B and 3A, 63(h), 80, 95, 100 of the Civil Procedure Act, Order 8, Order 45 Rule 6(2), (3), Order 50 Rules 1,2,3,4,5,6 and 7 and Order 51 Rule 1 of the Civil Procedure Rules in which the Applicant seeks the following orders:-
 1. Spent.
 2. That pending the hearing and determination of this application the Honourable Court be pleased to stay the proceedings in the matter.
 3. That the Honourable Court be pleased to set aside, vary and/or review the order granted on 15th November 2022 dismissing the Defendant's application dated 3rd February more particularly with regard to the prayer seeking to amend their defence and counter claim.
 4. That the Honourable court be pleased to grant the Defendant/Applicant leave to amend their statement of defence.
 5. That the cost of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Faith Mutio Mutuku Advocate sworn on even date.



The Applicant's Case

3. The deponent averred that the ruling delivered on 15th November 2023 in respect of the application dated 03/07/2023 contains an error as the court inadvertently overlooked the Applicant's prayer to amend his defence. The deponent argued that the Applicant will be locked out from ventilating the issues related to the subject matter herein if the orders sought are not granted. She further argued that it is necessary for the Applicant to amend the defence and counter claim so as to enable the court to determine the matter conclusively.

The Respondent's Case

4. The Plaintiff/Respondent filed a replying affidavit in opposition to the application. The Respondent contended that the court considered the prayers sought in the application dated 3/7/2023 before rendering its decision.
5. He argued that the application is bad in law as the Applicant is seeking to introduce a new cause of action namely adverse possession as opposed to the previous cause of action.
6. He argued that the grounds raised in the application are grounds of appeal and not grounds for review. He further averred that the Applicant has not met the conditions set out in Order 45 Rule 1 of the Civil Procedure Rules and added that the application is res judicata since the court has rendered itself on prayer No. 3 of the application.
7. In conclusion, the Respondent contended that the application has been brought with inordinate delay and that no sufficient reasons have been advanced for the grant of the orders sought.
8. The application was canvassed by way of written submission.

The Applicant's Submissions

9. The Applicant filed his submissions dated 24th May 2024.
10. On his behalf, Counsel outlined the following issues for the court's determination:-
 1. Whether the Applicant has met the threshold for review
 2. Whether the ruling should be reviewed so as to grant the Defendant leave to amend their statement of defence.
 3. Whether the Defendant will suffer any prejudice
 4. Whether there is delay in bringing the- present application
11. On the first issue, Counsel relied on the provisions of Order 45 Rule 1 of the Civil Procedure Rules to submit on the law that governs applications for review. Counsel submitted that there is an error apparent on the face of the record as the court addressed itself on the issue of joinder of parties and overlooked the prayer for amendment of the defence. Counsel further submitted that the amendment is necessary for the purpose of determining the issues in controversy between the parties herein.
12. With regards to the second issue, Counsel submitted that the Defendant is not seeking leave to amend his defence so as to introduce a new cause of action and added that even if that were the case, it would not be a ground to refuse a party leave to amend his Defence since the court will have an opportunity to interrogate the suit on merits.



13. Concluding her submissions, Counsel submitted that the Plaintiff will not suffer any prejudice if the orders sought are granted as the matter has not been heard. In addition, Counsel submitted that the Plaintiff will have an opportunity to file a reply to the defence.
14. As at the time of writing this ruling the Defendant had not filed his submissions as directed.

Analysis and Determination

15. Having considered the application and the submissions by the Applicant, the only issue that arises for determination is whether the ruling delivered on the 15th November, 2023 should be reviewed
16. 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.
17. Section 80 of the [Civil Procedure Act](#) provides 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.
18. 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.
19. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjoh 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.”



20. 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.”

21. In the matter at hand, the Applicant has not shown that there is discovery of new or important matter of evidence that the Applicant could not have discovered even after exercising due diligence.

22. As regards 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 as follows;

“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.”

23. 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.”

24. The Applicant is seeking to review the ruling delivered on 15/11/2023 on the grounds that the court overlooked the Applicant’s prayer to amend his defence. In the application dated 3rd February 2023, the Applicant had sought the following orders:-

1. That this Honourable Court be pleased to enjoin Joice Nthambi Kyalaani and Anne Kaumbi Mutuku as Defendants in the Defendant’s Counter claim.
2. That the Honourable court be pleased to enjoin the personal representative and/or administrators of the Estate of Jacob Wambua Kivindio as Defendants in the Defendant’s counterclaim.
3. That the Honourable court be pleased to grant the Defendant leave to amend their statement of defence and counter claim.
4. That the costs of the suit be in the cause.

25. In the ruling delivered on 15th November 2023, the court found that the only issue for determination was whether the orders for amendment and joinder were merited. At paragraph 24 to 30 of the ruling, the court analysed the law on amendment of pleadings. As rightly submitted by the Applicant, the issue of whether the Defendant should be granted leave to amend his statement of defence and counter



claim was not determined. The court declined to grant orders for joinder of Joice Nthambi Kyalaani and Anne Kaumbi Mutuku as well as the personal representative and/or administrators of the Estate of Jacob Wambua Kivindio as Defendants in the Defendant’s Counterclaim. The grounds laid by the Applicant disclose an error apparent on the face of the record. The Applicant has pin pointed the errors that are apparent on the face of the record to the satisfaction of this court.

26. The Court is also mandated to consider if there are sufficient reasons to review the Court’s judgment. 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 with out 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.”

27. Arising from the error apparent on the face of the ruling, the Applicant has in my view demonstrated sufficient reason to warrant a review of the Court’s ruling.

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

29. The ruling sought to be reviewed was delivered on 15th November 2023. The instant application was filed on 21st February 2024. Though the said duration is far from reasonable and the same has not been explained, the Applicant has demonstrated sufficient reasons to warrant a review of the court’s ruling.

30. In the ruling delivered on 15th November 2023, the court found that it is trite law that an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied by costs. The Respondent argued that the Applicant is seeking leave to amend his defence so as to introduce a new cause of action. Indeed, this matter has not taken off for hearing. The Plaintiff will not suffer prejudice as he will have an opportunity to file and serve a reply to the defence and additional documents if need be.

31. In the end, I find that the application dated 20th February, 2024 is merited and the same is hereby allowed in the following terms:-

32. The ruling delivered on 15th November 2023 is reviewed in the following terms:-

1. Prayer Nos. 1 and 2 of the application is dismissed.
2. The Defendant is granted leave 14 days leave to file and serve an amended defence and counter claim.
3. The Plaintiff will have corresponding leave to file and serve a reply to the defence and additional documents/statements.
4. The Plaintiff is awarded the costs of the application.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH NOVEMBER OF 2024.



IN THE PRESENCE OF:

Gateru holding brief for Ms Mutuku for the Defendant/Applicant

Munyasya for the Plaintiff/Respondent

Court Assistant-Alfred

