



**Monyenche v Nyamboga & 2 others; Momanyi & another (Intended Interested Party)
(Environment & Land Case 35 of 2021) [2024] KEELC 14097 (KLR) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14097 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 35 OF 2021
JM KAMAU, J
DECEMBER 18, 2024**

BETWEEN

JOHN NYANGAU MONYENCHE PLAINTIFF

AND

NYAMUSI NYAMBOGA 1ST DEFENDANT

JACKSON ONYANCHA MOMANYI 2ND DEFENDANT

PERIS KEMUNTO MONYENYE 3RD DEFENDANT

AND

NICHOLAS ONDWANI MOMANYI INTENDED INTERESTED PARTY

ANDREW GUTO MOMANYI INTENDED INTERESTED PARTY

RULING

1. There is an Appeal in the Court of Appeal at Kisumu being Civil Appeal No. 2 of 2023 against my Judgment dated and delivered on 22/4/2022 in which I delivered a Decree in the following terms:
 1. Eviction of the Defendants from the piece of land parcel number West Mugirango/Bomanono/1135.
 2. That the Defendants do pay the sum of kshs.400,000/= jointly and severally to the Plaintiff as General Damages for illegal occupation.
2. On 20/6/2024 I declined to allow one Nicholas Ondwani Momanyi and Andrew Guto Momanyi to be joined in the suit as parties to the suit in their Application dated 21/2/2024 after Judgment had already been delivered. This Court was then urged to review the orders of 20/6/2024 in an Application dated 2/9/2024 under certificate of urgency. By then eviction orders had been made on 18/7/2024. The grounds upon which the Application for Review was made were that:



- a. The intended interested parties are the court appointed administrators of the estate of Peris Kemunto Monyenye where estate the execution of the decree would affect.
- b. The Intended interested parties/applicants seek to be enjoined to raise issues pertinent to the land parcel WEST MUGIRANGO/BOMANONO/1134 as representatives of the estate.
- c. The Land parcel WEST MUGIRANGO/BOMANONO/1134 is threatened with encroachment or interference with boundaries' or trespass by the plaintiff/respondents in abuse and or overstretching of the orders/judgment of this court.
- d. That the applicants' interests on the 3rd defendant's property are to protect the legal and equitable rights associated with the estate.
- e. That the administrators have a legitimate and vested interest in the land, which goes beyond a mere incidental or peripheral impact. The rights of the beneficiaries are intrinsic to the management, distribution, and use of the property.
- f. That the principal of judicial fairness requires all parties with a legitimate interest in a case to be given an opportunity to participate in the proceedings.
- g. That the court's classification of the interested parties as "merely being affected" downplays the substantial and direct stake the beneficiaries and by extension the administrators have in the property.
- h. That the interested parties herein should not be made to shoulder the consequences of the negligence of the defendant's advocates previously on matters substantive and procedural with regard to the late Peris Momanyi's estate.
- i. That the plaintiff/respondent is on course to enter into land parcel WEST MUGIRANGO/BOMANONO/1134 which belongs to the 3rd defendant who is deceased and was deceased at the time of hearing and determination of the suit.
- j. That the plaintiff/respondent intends to interfere with the boundaries or cause subdivision in flagrant breach of right to property and on an account of an abated claim against the 3rd defendant in Nyamira ELC NO.35 of 2021 in which the 3rd defendant had ceased being a party by virtue of abatement of claim against her.
- k. The property WEST MUGIRANGO/BOMANONO/1134 belongs to the late Peris Kemunto Monyenye and the same has a boundary dispute with WEST MUGRIANGO/BOMANONO/11345. The same is the subject mater in the suit herein
- l. That the intended interested parties are the beneficiaries of the estate of the late Peris Kemunto Monyenye and are directly affected by the proceedings of this honourable court.
- m. The boundary dispute affects them directly, being the children of the 3rd defendant who is deceased.
- n. The property WEST MUGIRANGO/BOMANONO/1134 belonging to the 3rd defendant is part of the estate of the 3rd defendant and any activities dealing with the piece of land will affect the beneficiaries of the estate of the late Peris Kemunto Monyenye.
- o. That pursuant to Order 45 Rule 1 & 2 of the Civil Procedure Rules, the honourable court is seized of jurisdiction and powers to review the ruling herein for the interest of justice.



- p. No prejudice whatsoever or at all shall be visited upon the plaintiff/respondent if the application herein is allowed.
3. The Plaintiff opposed the Application vide Grounds of Opposition dated 17/9/2024 as follows:
1. That the Application herein is merely speculative and not supported by evidence.
 2. The Application at hand does meet the threshold for review as no grounds for review have been fronted.
 3. The Application has delayed inordinately without any justification from the Applicants since the judgment was rendered.
 4. The application herein challenges the courts and analysis of evidence and issues raised before it and its is calling on his court assume an appellate jurisdiction over its own decisions.
 5. The application is overtaken by events since the eviction has already been done and the applicants are well alive to this since they were present when the said eviction was done.
 6. The Defendant/Applicant is approaching court with unclean hands after blatantly disregarding corrupt order's to vacate the suit land and to pay a sum of kshs 400,000 as per this court's judgment as is in contempt of this court's orders.
 7. The applicants were represented when the matter was in court and they were given time to prosecute their application but failed to prove their case and are merely delaying the matter.
 8. There is no dispute before this court regarding any boundary since the Land Registrar was ordered to resolve the issue and the same was concluded buy the land registrar's report that was adopted by this court.
 9. It is clear from the proceedings that the case against the estate that the applicants seeks to purportedly protect abated and the court declared it so and the applicants have no locus standi as they represent a party that is not in the matter anymore and the application herein has no legs to stand on.
 10. The Defendant/Applicant fully participated in the matter preferred an appeal but has never filed any record of appeal and the present application is clearly an abuse of court process.

PARA 4.

I then allowed parties to file written submissions upon which I make my Ruling. 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.”

5. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -
- 1.



- (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.”

6. 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.”

7. 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.....”

8. In *Sarder Mohamed v. Charan Singh Nand Sing and Another* (1959) EA 793 the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in 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.

9. 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 stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

10. 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.
11. 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* John M. Mativo Judge 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.



12. In Republic.v Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR Justice Mativo had this to say on the subject:

.....There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.....The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.....The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.....”

13. In the present case, the Court made a conscious Decision on the matters in controversy and exercised its discretion and delivered a Ruling from the material on record.

14. 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.....”

15. The current Application falls under the category mentioned above. That of re-opening the application or case afresh. 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 Decision on any matter before it. 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 preparation of the Application whose Decision is sought to be reviewed. This is not what was envisaged under Section 80 of the [Civil Procedure Act](#) nor the Rules under Order 45.



16. Finally, the Application is irregularly in Court since in an Application for Review the Applicant ought to have annexed a formal extracted Order in respect of which the review is sought.
17. 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"

18. No such an Order was attached to the present Application. This makes the Application fatally defective.
19. The applicant has not demonstrated that there is an error/omission apparent on the face of the record which would necessitate a review of the Ruling.
20. I need say no more. The remaining duty is to dismiss the Applicants' Application dated 2/9/2024 with costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 18TH DAY OF DECEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff's Counsel: Mr. Masolo

Defendants' Counsel: Ms. Kwamboka

