



**Makiba v Mwangi (Environment and Land Appeal 7 of 2017)
[2024] KEELC 13792 (KLR) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 7 OF 2017
LN GACHERU, J
DECEMBER 11, 2024**

BETWEEN

JAMES KIOI MAKIBA APPELLANT

AND

JASON KIIRU MWANGI RESPONDENT

RULING

1. In this Notice of Motion Application dated 23rd May 2024, which is brought under Order 45, Rules 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B and 80 of the [Civil Procedure Act](#), the Appellant/Applicant has sought for the following Orders: -
 1. That this Honourable Court be pleased to review the judgment of Hon. Justice A. Ombwayo issued on 3rd October, 2013.
 2. That this Honourable Court be pleased to Order the Land Registrar Murang'a and District Surveyor Murang'a to Ascertain And Fix the boundaries between land parcels LOC.2/Gacharage/2792, and LOC.2/Gacharage/944, as they are clear on sheet No.22.
 3. That the Respondent should bear the costs of Survey and fixing [of] the boundary.
 4. That the costs of this Application be provided for.”
2. The Application herein is supported by the grounds stated thereon, and by the Supporting Affidavit sworn by James Kioi Makiba (the Applicant herein) on 23rd May, 2024, wherein he averred that although the time when he ought to have sought for review of the judgment of Hon. Justice A. Ombwayo dated 3rd October 2013, has since lapsed, it is necessary for the ends of justice that the instant Application be allowed.
3. The Applicant averred that as per the Order No. 1 in the said Judgement, the Land Registrar Murang'a and District Surveyor Murang'a, were required to only ascertain and not to fix the boundaries between



land parcels LOC.2/Gacharage/2792, and LOC.2/Gacharage/944. Therefore, the Applicant claimed that the Respondent is illegally occupying part of his land.

4. He further averred that the boundaries between land parcels LOC.2/Gacharage/2792 and LOC.2/Gacharage/944, as indicated in the aforementioned Report do not correspond with the boundaries as they appear on the Registry Index Map (R.I.M).
5. Further, the Applicant further contended that it is in the interests of justice that the Land Registrar Murang'a and District Surveyor Murang'a be ordered by this Court to ascertain and fix the boundaries between land parcels Nos. LOC.2/Gacharage/2792 and LOC.2/Gacharage/944.
6. The Applicant attached the decision of the Court dated 3rd October 2013, marked as annexure JKM 2, and a Report dated 20th December 2022, signed by G.M. SAYA, in the capacity of Land Registrar, Murang'a, marked as the Applicant's annexure JKM 3.
7. It was the Applicant's further contention that upon making a request to the Land Registrar and the District Surveyor to fix the boundary, he was informed that the Land Registrar could not fix the boundary because the Judgment of the Court dated 3rd October 2013, only required that the boundary be ascertained.
8. Further, the Applicant blamed his previous Advocates for omitting to include the requirement to "fix" the boundaries between the two land parcels in his prayers in the suit culminating in the holding of the Court dated 3rd October, 2013, hence the wording of the final Orders of the Court.
9. Further, the Applicant averred that this Court has the requisite jurisdiction to entertain the instant application being of equal status to High Court of Kenya sitting at Nyeri which transferred the file in question to this Court.
10. On the basis of the Return of Service filed before the Court, the Court was satisfied that the Respondent was served with the relevant Hearing Notices and did not enter appearance in respect of the instant Application. Therefore, the Application was canvassed in the absence of the Respondent.
11. The Court directed that the Application be canvassed by way of written submissions.

The Appellant/applicant's Submissions

12. The Appellant/Applicant filed written submissions dated 23rd September 2024, through the Law Firm of Anne Nyambura & Co. Advocates, and submitted that as a result of a typing error attributable to the Applicant's previous Advocates on record, the Court issued orders for only the ascertainment of boundaries between land parcels Nos. LOC.2/Gacharage/2792 and LOC.2/Gacharage/944, whereas the Orders ought to have read "ascertain and fix", in relation to the boundaries in question.
13. It was further submitted that pursuant to the provisions of Section 80 of the *Civil Procedure Act*, as read together with Order 45 Rule 1 of the Civil Procedure Rules, the following are the grounds for review of a Judgment of the Court:
 - a. Where there is discovery of a new and important matter of evidence which could not be produced at the time the decree or order was passed.
 - b. Where there is an apparent error on the face of the record.
 - c. Where there is sufficient reason to allow the review."



14. The Appellant/Applicant argued that from the wording of the final Order of the Court, it is evident that there was an error apparent on the face of record because the word “fix” was inadvertently left out, which omission is self-evident and not requiring elaborate arguments.
15. For this submission, reliance was sought in the reasoning of the Court in the cases of Omote & Another Vs Oguttu [2022] KEHC 16441 (KLR); and, Paul Mwaniki V National Hospital Insurance Fund board of Management {2020} eKLR, regarding the meaning and import of the term “error apparent on the face of the record.”
16. With regard to the question whether there exists sufficient reason to allow the Applicant’s prayer for review, it was submitted that the word “fix” having been omitted, the hands of the Lands Registrar and District Surveyor Murang’a, are tied because they cannot fix the boundary without authorization by the Court.
17. The Appellant/Applicant relied on the case of Republic Vs Cabinet Secretary for Interior and Co-ordination of National Government exparte Abdullahi Said Salad [2019] eKLR, as to what amounts to “sufficient reason” for purposes of review of a Judgment of the Court.
18. With regard to the issue whether the instant Application was brought after unreasonable delay, the Applicant submitted that although the Court directed the Land Registrar and District Surveyor Murang’a to file a Report within 60 days from 3rd October 2013, being the date of delivery of said Judgment, the referred Report was never filed as directed;
19. Further, the said report is dated 20th December 2022, and was issued to the Appellant/Applicant only in February 2024. Reliance was placed in the holding of the Court in the case of Stephen Gathua Kimani Vs Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR for the definition of “unreasonable delay.”
20. The court has now considered the instant Application, the grounds in support of the same, the written submissions, the cited authorities and the relevant provisions of law, and finds the issues for determination are;-
 - I. Whether the instant Application was brought after unreasonable delay?
 - II. Whether the Applicant is entitled to the Orders sought?
 - III. Who shall bear the costs of the Application?

i. Whether the instant Application was brought after unreasonable delay?

21. The Application before the court is brought primarily under the provisions of Order 45 Rule 1 and 2 of the Civil Procedure Rules as read together with Section 80 of the [Civil Procedure Act](#).
22. Order 45 Rule 1 (a) and (b) of the Civil Procedure Rules 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.”

23. Further, Section 80 of the *Civil Procedure Act* stipulates 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.”

24. The court will rely on the case of *Jaber Mohsen Ali & another vs Priscillah Boit & another* [2014]eKLR, where the Court reasoned as follows;

“the question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter...”

25. The Applicant herein has contended that although the Order No. 2, as per the Judgment dated 3rd October 2013, directed the Land Registrar Murang’a to file a report within 60 days, the said report was never filed as directed; Further, the said report is dated 20th December, 2022; and, he was issued with a copy of the foregoing report at the Land Registry, Murang’a only in February 2024, upon the Applicant following up on the matter himself by visiting the Lands Registry.

26. The instant Application is dated 23rd May 2024, and it is the Applicant’s contention and submission that the instant application was therefore filed without unreasonable delay.

27. Having considered the explanation given by the Applicant as regards the timing of the filing of the instant application, the Court is persuaded that the same was brought without unreasonable delay. In any event, the delay in question was not occasioned by the Applicant, but by the Land Registrar and the Land Surveyor, in terms of the delayed preparation of the report dated 20th December, 2022.

ii. Whether the Applicant is entitled to the Orders sought?

28. The Applicant argued and submitted that the omission of the word “fix” was due to a typographical error attributable to his previous Advocates on record during the drafting of the prayers, and which error was reproduced in the final Order of the Court issued on 3rd October 2013.

29. Therefore, the Applicant urged the Court to review the Judgment dated 3rd October 2013, by adding the phrase “and fix” immediately following the word “ascertain” and before the word “boundaries” in the relevant section of the Order as set out below:

“Land Registrar Murang’a and District Surveyor Murang’a to ascertain boundaries between LOC.2/Gacharage/2792 and LOC.2/Gacharage/944 as they are clear on sheet No.22.”



30. The Applicant also averred and submitted that the Respondent's land parcel LOC.2/Gacharage/944, encroaches upon his land parcel No. LOC.2/Gacharage/2792, and that land parcel LOC.2/Gacharage/944, occupies more space on the ground than what is provided in the Registry Index Map. Further, that the District Surveyor's Report dated 19th September 2022, and signed by PETER NJERU (Surveyor, Ministry of Lands and Physical Planning) and which referred to the site visit conducted on the suit land on 8th September, 2022, recommended that the Land Registrar to "REVISIT" the boundary in contention and "FIX" the same.
31. That however, the Land Registrar cannot fix the boundary in dispute because the Judgment dated 3rd October 2013, required the Land Registrar, Murang'a and District Surveyor, Murang'a to only ascertain and not to fix the said boundary, and/or not to fix the boundaries, and thus this review.
32. In the case of *Zablon Mokuia Vs Solomon M. Choti & 3 others* [2016] eKLR, the Court held as follows:
- "[T]he statutory grounds upon which orders for review can be obtained are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in 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. Thirdly, that there is sufficient reason to occasion the review."
33. Further, in the case of *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record in the following terms:
- "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 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 long drawn process of 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."
34. Again in the case of *Chandrakant Joshibhai Patel -v- R* [2004] TLR, 218, the court held on what amount to an error apparent on the face of the record as follows:
- "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions."
35. Pursuant to the provisions of Section 18 and 19 of the *Land Registration Act* No.3 of 2012, the Land Registrar and the Surveyor who are the custodians of the land records are empowered to handle issues relating to boundary disputes.
36. Section 19 of the *Land Registration Act* provides follows:
- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an



application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.

- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
 - (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”
37. Section 19 of the *Land Registration Act* provides the procedure and process through which the precise boundaries of parcels of land are fixed. It is to be noted that the process is carried out by the Land Registrar and it is for the said Land Registrar to cause to be defined by survey, the precise position of the boundaries in question, file Plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel. See the holding of the Court in the case of *Munyali v Musyoka* [2022] KEELC 3247 (KLR).
38. The Court herein has perused the Murang’a Land Registrar’s Report dated 20th December 2022, signed by one G.M. SAYA, and noted that at the final paragraph of the said report, under the heading Conclusion, the following observations were entered:

“The boundary between parcel Number 2792 and 944 as being used on the ground, has been determined to NOT be in its corrects position, using survey measurements.

Parcel Lo.2/Gacharage/944 seems to have encroached into parcel Lo.2/Gacharage/2792 as shown in the surveyor’s report.”

39. From the above findings of the Lands Registrar, it is clear that the land parcel number Loc.2/Gacharage/944, encroaches on land parcel number Loc.2/Gacharage/2792. Further, the said Report noted that while the Respondent’s land parcel No. Loc.2/Gacharage/944, occupies more space on the ground as compared to the RIM, the Applicant’s land parcel No. Lo.2/Gacharage/2792, occupies less space on the ground in comparison to the RIM.
40. Further, the Land Registrar, in his Report, stated that he visited both properties on 8th September 2022, during which site-visit the son to the deceased registered owner of land parcel No. Lo.2/Gacharage/944, (John Mwangi Nyoro), and occupant of the said parcel declined to participate in the boundary demarcation exercise on grounds that he was not the registered proprietor of the said parcel of land.
41. The next issue for consideration is whether the encroachment noted in the Land Registrar’s Report dated 20th December 2022, should subsist merely because the Land Registrar and the Land Surveyor were only required to ascertain but not to fix the boundaries between the two parcels of land, as per the Judgment delivered by Court (differently constituted) on 3rd October, 2013.
42. It is trite that Court Orders are not issued in vain, and the court in the case of *B vs. Attorney General* [2004] 1 KLR 431, held that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”



43. Having analyzed the available evidence as above, this Court is satisfied that the omission of term “and fix” immediately after the term “ascertain” as per the Judgment of the Court dated 3rd October 2013, amounts to an error apparent on the face of the record.
44. It is noteworthy that Courts do not issue directions for boundaries to be ascertained for the sake of it; but rather, it is in order for such boundaries to be fixed upon ascertainment; thereby, securing the proprietary rights of the litigants.
45. Having carefully considered the instant Application, and the Judgement sought to be reviewed, the Court finds and holds that the Applicant herein has established sufficient reasons to warrant review of the said Judgement, and thus the instant application is found to be merited.
46. Accordingly, this Court allows the Appellant/Applicant’s Application dated 23rd May 2024, in terms of the prayers Nos. 1 and 2, with no orders to costs as the Application was not opposed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 11TH DAY OF DECEMBER 2024.

L. GACHERU

JUDGE

11/12/2024.

Delivered online in the presence of

Joel Njonjo – Court Assistant

M/s Irungu for the Appellant/Applicant

N/A for the Respondent

L. GACHERU

JUDGE

11/12/2024.

