Jemimah Nyambura Njuguna v Kiaraho & 7 others; Chalbi Gardens Limited (Intended Interested Party) (Environment & Land Case 1058 of 2016) [2024] KEELC 14063 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14063 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1058 OF 2016

AA OMOLLO, J

DECEMBER 9, 2024

BETWEEN

JEMIMAH NYAMBURA NJUGUNA ..... PLAINTIFF

AND

JOSPEH MWANIKI KIARAHO ..... 1ST RESPONDENT

PAULINE NJERI KAMAU ..... 2ND RESPONDENT

KIMANI KAIRU & COMPANY ADVOCATES ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

JONHSON MWANIKI NYAGA ..... 5TH RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 6TH RESPONDENT

THE ATTORNEY GENERAL ..... 7TH RESPONDENT

JEDIDAH WAMBUI & WILLIAM THIGANI MUNGA ..... 8TH RESPONDENT

AND

CHALBI GARDENS LIMITED ..... INTENDED INTERESTED PARTY

RULING

1. Through an application dated 28th June 2024, the applicant sought the following orders for this court:
   a. Spent.
   b. Pending the hearing and determination of this application, there be stay of execution of judgment and decree of this Honourable Court issued on 18th April 2024.

c. Chalbi Gardens Limited be joined as an interested party to these proceedings.

d. That this Honourable Court be pleased to review and set aside the judgment delivered on 18th April 2024 and the resultant decree issued, and all other further and/or consequential orders arising therefrom and make an order to that effect.

e. Costs of this application be in the cause.

2. The application was supported by the following grounds inter alia;

i. Chalbi Gardens Limited, the applicant herein, is the current registered owner of the property known as L.R. No. 3734/457.

ii. That through a well-reasoned judgment delivered on 18th April 2024, the Honourable Court cancelled the applicant's title and ordered that it should revert to the plaintiff/1st respondent.

iii. The cancellation was despite the fact that the applicant herein was not a party to the suit which led to cancellation.

iv. That there is an error apparent on face of record on the judgment delivered in this matter on 18th April 2024, particularly paragraphs 96 and 97 of the judgment which specifically cancelled the applicant's title to the suit property.

v. The judgment and decree therefrom is against the applicant and materially affects its proprietary rights without giving it a right of hearing.

vi. An order issued against a third party is a clear case of error apparent on the face of record which error is reviewable by the Honourable Court.

vii. There is also an error apparent on the face of record as the court validated the plaintiff/1st applicant as the owner despite lack of existence a transfer instrument executed in favour of the applicant herein by the original owners as the transferors.

viii. That the applicant having not been a party to the proceedings cannot appeal against the judgment and can only apply for review.

ix. The two errors are self-evident and do not require any elaborate arguments to be established.

3. The plaintiff/1st respondent filed their Replying Affidavit dated 17th July 2023. She stated that the company listed belongs to her as they formed the same with her husband now deceased therefore the application is mischievously brought to this suit to delay the expeditious dispensation of justice in the subject matter herein. She stated they had filed their Notice of Appeal and was waiting for proceedings from the court which the interested party herein was never involved into the sale agreement to buy any property as alleged therefore not true. She objected to the application which seems to reopen the suit where the Honourable Court. She claimed that the application is an afterthought as it has been brought without any formal appointment to represent the so called intended interested party/applicant. There is nothing to prove that she is a director nor any minutes to give her power to swear the affidavit and file the application.

4. She stated that the applicant knows that the company has an ongoing case being HCC No. 168 of 2017 coming up for hearing on the main suit on 14th October 2024. She denied that the said company held any meeting known to her as the sole director of the company after the death of her husband. She said that the application seeks to reopen the suit for hearing without seeking any orders to set aside the judgment is wrong.

Applicant's submissions

5. The Applicant filed their written submissions dated 21st August 2024 and outlined four issues for determination. On whether the court has jurisdiction to entertain this application, they stated that as far the court records and they are concerned, they have not filed a Notice of Appeal. However, the 1st-9th Respondent have filed a Notice of Appeal. They stated that a Notice of Appeal is not an appeal but an intention to appeal and thereby not a bar to an application for review. They continued that where a party is affected by judgment but was not a party to the said judgment, the court has jurisdiction to hear and determine the application for review.

6. In JMK v MWM & another (2015) eKLR, where it was affirmed that the court has jurisdiction to review and join a party even after the judgment particularly where such a party ought to have been a party to the proceedings and where the judgment has negative impacts on the party seeking to be joined.

7. On the effects of setting aside of judgment of 12th July 2018 in HCCC NO. 168 of 2017, they submitted that it is not disputed that the judgment in HCCC No. 168 of 2017 Jemimah Nyambura Njuguna v Joseph Mwaniki Kiaraho & 6 others issued on 12th July 2018 was set aside in its entirety on 17th November 2020. They claimed that this judgment was not brought to the attention of the court by any of the parties herein. Therefore, the conclusion by the court that the judgment had settled the issue of directors was made because of non-disclosure by the plaintiff in her attempt to obtain a judgment against the applicant. The judgment having been set aside meant that the transfer instrument executed by other directors of Chalbi Gardens Ltd other than the applicant was valid.

8. On whether the applicant should be joined in these proceedings as an interested party, they said it is now settled that a party is considered an interested party and will be joined as such where such a party has an identifiable stake in the matter. They submitted they are the registered owner of the property known as L.R. No. 3734/457 which the court directed be registered in the name of the plaintiff and her deceased husband. It is their humble submission that they have demonstrated a clear case that it should be joined in the proceedings.

9. On whether the applicant has made a case for review of the judgment issued on 18th April 2024, they submitted that there are two errors apparent on the face of the record. They stated it is trite that a court can only determine a matter as between the parties before it. To the extent the court determined the matter as between some parties not before the court, there is an error apparent on face of record. They stated throughout the proceedings, there is no record of Dickson Abner Wanyama Musinde and Peter Cleophas Masinde executing a transfer in favour of plaintiff and her late husband over L.R. No. 3734/457.

10. It was therefore not open to court to find that the land registrar should be rectified to reflect them as the owner. They stated that a court of law cannot affirm an illegality. By ordering the rectification of register as it did, the court by implication affirmed an illegality which amounts to an error apparent on face of record.

Plaintiff/1st Respondent's submissions

11. The Plaintiff/1st Respondent filed their written submissions dated 29th August 2024. It was their submission that this matter has gone to the Court of Appeal as the only time the Honourable Court can reopen the suit is when it is approached by review with any new evidence. She stated the applicant has only requested for stay and enjoinment of the third party and not setting aside of the judgment. According to the Civil Procedure Rules, Order 1 Rule 15(c) which in mandatory terms states shall only

be made before the close of pleadings list to evoke the matter which judgment has been pronounced and parties expressed themselves to go to the Court of Appeal.

12. She stated they have not been shown any sale agreement nor any transfer form to the effect that the said applicant third party intended ever had any documents to the relation of the property subject in the suit herein. She said this court has no jurisdiction to open the suit nor to bring new parties after the closer of pleadings and therefore the application is premature, null and void. The authority of the High Court for any application for review the order sought to accompany the application and further the applicant has not demonstrated that indeed the applicant has any evidence to prove ownership of the subject land which the court has heard and determined on merit.

13. She said the allegation that the applicant company owned the subject property yet nothing has been put before the court to consider as proof of ownership nor purchase of the subject property. She claimed the entry in the title was a fraud as no documents were introduced to confirm who transferred the title to the applicant.

14. She stated the ingredient for review has not been established at all by the applicant since they have not in any manner set out any new evidence to be determined by this court. She contended that if the court will allow this application, it will render the suit before the commercial court nugatory and therefore occasioning great injustice to the parties. The issues of ownership and directorship in the suit HCCC No. 168 of 2017 is yet to be determined and that will cause unnecessary confusion as the commercial court has not yet determined the issues raises in the suit. She concluded by submitting that the said application lacks any merit and should be dismissed with costs and the applicant will not suffer any loss as the suit is yet to determine their issues.

Analysis and Determination

15. I posit that the following issues come up for determination of this application;

    a. Whether the applicant should be joined as an interested party to these proceedings;

    b. Whether this Honourable Court should review and set aside the judgment;

    c. Who should pay costs?

16. The Applicants have stated that the judgment issued by this court on 18th April 2024 seeks to cancel their title of LR.3734/457 affects them even though they were not a party to the suit. The substitution and addition of parties to a suit is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides;

> " The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

17. The Supreme Court in the case of Communications Commission of Kenya and 4 Others vs Royal Media Services Limited & 7 Others Petition No. 15 of 2014 [2014] eKLR defined an interested party as follows:

> " An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the one who will be affected by the decision of the

Court when it is made either way. Such a person feels that his or her interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;

i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

ii. Joinder to provide protection of the rights of a party who would otherwise the adversely affected in law;

iii. Joinder to prevent a likely course of proliferated litigation."

18. The 2nd defendant/3rd respondent has sworn that she is one of the directors of the applicant company which is the current registered owner of the suit property. While the joining of the applicant as an interested party would make it easy for the court to determine all the issues raised therein, the application seems to be late in the day. From the Board Resolution annexed to the supporting affidavit, it appears that the 1st and 2nd defendants are allegedly the directors of the applicant company.

19. It therefore seems mischievous that they are seeking for the company to be included as an interested party after judgment has been issued. The pleadings and orders sought by the plaintiff/1st respondent showed that they were seeking to cancel the applicant's current registration. As directors, they ought to have been aware that any decision of the court would have affected their title and should have taken appropriate steps before the conclusion of the matter.

20. In declining an application for joinder as an interested party, the Supreme Court in Attorney General v David Ndii & 73 others (Petition 12 (EO16) of 2020) [2021] KESC 17 (KLR) (9 November 2021) (Ruling) held that an applicant seeking to be enjoined as an interested party to a suit had to establish that there were sufficient grounds for the grant of the application. The applicant would have to show the personal interest or stake it had in the matter, the prejudice that would be suffered if they were not joined as an interested party in the matter and the submissions that the applicant would make. The submissions should not be a mere replication of what the other parties were making.

21. The submissions that the applicant is making to be included as an interested party were already raised during the hearing of the suit. This court found that the 1st, 2nd, 5th and 8th Defendants had contributed towards the acquisition of the suit property and should be registered as legal owners as per the ratio of their contributions. Be that as it may, the applicant has met the threshold to be joined as an interested party.

22. Review is provided for under Section 80 of the *Civil Procedure Act* and Order 45 rule 1 of the Civil Procedure Rules. The applicant is seeking a review of the judgment on the ground that there is an apparent error on the face of the record as the court determined a matter between some parties not before the court.

23. In Nyamogo & Nyamogo v Kogo (2020) eKLR discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

" An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un 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 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

24. In Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR, the court discussed as follows:

> " 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 of the Civil Procedure Rules 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."

25. The applicant has highlighted paragraph 96 and 97 of the judgment. Paragraph 96 stated:

> '..... 96. Further, the issue of who are the directors have been resolved by the High Court in Commercial case no 168 of 2017 which held that there were only two directors; the Plaintiff and her late husband. Consequently, any transfers effected by Chalbi Gardens Ltd without the signatures of the Plaintiff as a director were null and void.'

26. The applicant has faulted this court for finding that the issue of directorship of the applicant company had been resolved when the said ex parte judgment in High Court in Commercial case no 168 of 2017 had been set aside and the matter was still active in court. From the decisions of other courts on review on the ground of an error apparent on the face of the record, it would appear that the said error goes to the root of the judgment. Correcting the said 'error' would amount to this court sitting on an appeal of its own decision. I am not persuaded if the judgement is set aside through the review order sought, I would reach a different conclusion as regards the interests of these Respondents. There is no new evidence other than the registration of the suit title in the name of the Applicant and no explanation has been made why such evidence was not presented by the directors of the Applicants.

27. In Abasi Belinda v Frederick Kagwamu and Another [1963] EA p.557, cited with approval by the Court of Appeal in Solacher v Romantic Hotels Limited & another (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR) it was held that; -

> " A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal."

28. The applicant is seeking review hoping that this court will set aside its judgment issued on 18th April 2024 and write a new judgment in light of the said error apparent on the record. Courts have held that just because a different judge would conclude differently does not make it a ground for review.

29. Consequently, I find that the application is not merited and proceed to dismiss it with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT NAIROBI ONLINE THIS 9TH DAY OF DEC., 2024

A. OMOLLO

JUDGE