Macharia (Suing as the Personal Representative of the Estate of Angelo Kanyuanjohi Macharia) v Land Registrar, Murang'a & another; Maguta & another (Intended Defendant) (Environment & Land Case 47 of 2017) [2023] KEELC 15744 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15744 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 47 OF 2017

LN GACHERU, J

FEBRUARY 23, 2023

BETWEEN

GABRIEL MACHARIA NJOROGE (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF ANGELO KANYUANJOHI MACHARIA) ..... PLAINTIFF

AND

LAND REGISTRAR, MURANG'A ..... 1ST DEFENDANT

TIRUS NYINGI NGAHU ..... 2ND DEFENDANT

AND

LYDIA NJOKI MAGUTA ..... INTENDED DEFENDANT

STACY WAMBUI NYINGI ..... INTENDED DEFENDANT

RULING

1. By an Application dated 14th September 2022, and filed on 16th September 2022, the Plaintiff/ Applicant sought the following orders:

    1. Spent;

    2. That the 2nd Defendant herein Tirus Nyingi Ngahu (deceased) be substituted with Lydiah Njoki Maguta and Stacy Wambui Nyingi, the legal representatives of the estate of Tirus Nyingi Ngahu (deceased);

    3. That this honourable Court deems it fit to review and set aside the judgement of this honourable Court dated 27th February 2020, and all consequential orders;

4. That this honourable Court be pleased to stay the taxation proceedings to the bill of costs dated 1st March 2022, pending the hearing and determination of this application;

5. That this honourable Court does make such orders or alternative orders as the Court may deem it fit;

6. That costs of this application be the cause.

2. The application is supported by the Affidavit of Gabriel Macharia Njoroge, sworn on 14th September 2022, and twelve grounds sets on the face of the application. The Plaintiff/Applicant contends that the 2nd and 3rd Defendants/Respondents moved the Court for the taxation of the bill of costs dated 31st March 2022,necessitating the prayer for stay of proceedings pending the hearing and determination of this application. The Applicant contends that he stands to suffer irreparable damages should the taxing master proceed to tax the bill of costs pending the hearing and determination of this application. The Applicant further contends that the application for review has survived the 2nd Defendant (deceased) hence the need to have him substituted by his legal representatives.

3. It is the Applicant's further contention that there is an error on the face of record as the judgement was anchored on the premise that the entries on the Green Card for land parcel Loc 9/Kiruri/459, was fabricated and forged.That the judge erroneously relied on mutations of the suit property signed by the 2nd Defendant/Respondent and Anthony Kanyuanjohi.

4. It is the Applicant's averment that the judgement erroneously relied on unregistered mutations and forged mutation documents. Lastly, that the Plaintiff/Applicant has since made a discovery of material evidence that was not available during the trial. The Applicant prays that the orders be granted in the interest of justice.

5. In response and in opposition to the application, the Intended 2nd and 3rd Defendants/Respondents, filed a Replying Affidavit sworn on 4th October 2022, through Davies Mulani, the advocate having conduct of this matter. He deponed that the Applicant instituted proceedings against the 1st and 2nd Defendants/Respondents at Kerugoya ELC through a Plaint dated 27th October 2014, which was then transferred to this Court as ELC 47 of 2017. That the 2nd Defendant/Respondent entered appearance and filed a Statement of Defence and Amended Defence on 31st October 2016. The 2nd Defendant/Respondent further deponed that the matter proceeded to full hearing in which the Plaintiff/Applicant fully participated from 2014 to 2020, wherein judgement was delivered on 27th February 2020, and the suit was dismissed with costs to the Defendants.

6. The 2nd Respondent further deponed that the Plaintiff/Applicant being dissatisfied with the Judgement of 27th February 2020, filed a Notice of Appeal dated 3rd March 2020. That despite filing his Notice of appeal, the Defendant/Applicant has not taken any steps to prosecute his appeal and this prompted the 2nd Defendant/Respondent to file his bill of costs over two years after delivery of judgement by this Court. That instead of pursuing his appeal to its logical conclusion, the Applicant filed two more cases raising similar grounds as contained in the instant application against the intended 2nd Respondent at the Senior Principal Magistrates Court at Kangema, culminating in Kangema SPM ELC no E001 of 2022 and Succession Misc. Application no E012 of 2022. The 2nd Respondent further avers that the Plaintiff/Applicant is forum shopping in a bid to obtain favourable orders.

7. It is the intended 3rd and 4th Defendant/Respondents' assertion that the *Civil Procedure Rules* 2010 prohibits joinder of the intended Defendants/Respondents as the same requires the extraction and Service of Summons upon the 3rd and 4th Respondents and amendment to the Statement of Defence

should the 3rd and 4th Respondents wish to do so, which cannot be done post judgement. The intended 3rd and 4th Respondent deponed that the new evidence that the Plaintiff/Applicant alludes to, formed part of the documents filed by the 1st Respondent in support of his Defence. They further denied that there was any error on the face of the record and lastly, that the allegations by the Plaintiff/Applicant do not constitute grounds for review, but grounds for appeal. The intended 3rd and 4th Respondents contended that the Applicant has not displayed any sufficient grounds for review of the judgement. They pray that the application be dismissed.

8. The Applicant filed a further affidavit dated 18th October 2022, and averred that the application dated 15th December 2017, had no nexus with the present application; that there is no pending appeal in this suit as he had abandoned seeking the same, that there was indeed new evidence, that the Applicant had to change his advocates, and that the 2nd Respondent had indeed passed on precipitating the substitution of parties.

9. The Application was canvassed by way of written submissions. The Plaintiff/Applicant through the Law Firm of Triple N.W & Co. Advocates LLP filed their written submissions on 2nd December 2022.

10. The Applicant identified six issues for determination.

11. On the issue of whether to substitute into the suit the Legal Representatives of the Estate of Tirus Nyingi Ngahu (deceased), and 2nd Respondent in the suit, it was the Plaintiff/Applicant's submissions that the cause of action being an application for review which is pending while the 2nd Respondent is deceased. He further submitted that the 3rd and 4th Respondents have obtained Letters of Administration to the Estate of Titus Nyingi Ngahu, and are therefore suitable to be substituted for all intended legal purposes. He relied on the case of *Silas Njeru Njiru & 2 others v Mugo Mukere and 2 Others* (2022) eKLR, where the Court stated as follows:

> " Where a defendant dies and the cause of action survives the defendant, then such deceased person can only be substituted by the legal representative of his estate. In Embu Succession Cause no 6 of 2017, the intended Respondents were issued with letters of administration dated 11thJanuary 2018, to the estate of the defendant. It is therefore not in dispute that they are the legal representatives of the estate of the defendant. It therefore follows that they are the rightful parties to be substituted in place of the defendant. The upshot of the foregoing is that the application for hearing has merit and is allowed."

12. On the issue whether the Applicant's discovery of new evidence is sufficient to support an application for review or setting aside of the judgement of 27thFebruary 2020, the Plaintiff/Applicant submitted that he discovered mutation forms which were not in his possession during the main hearing. He further submitted that he intended to appeal the judgement, but now prefers a review based on errors on the judgement. He relied on Order 45 rule 1(1) of the *Civil Procedure Rules* which provides as follows:

> (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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 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."

13. The Applicant further relied on the Case of *Khalif Sheikh Adan v A.G* (2019) eKLR ,wherein the Court stated as follows:-

> " 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 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 their record or for any other sufficient reasons. A review cannot be claimed or asked for 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 which states in the face without any elaborate argument being needed for tabling it. It may be pointed out that the expression "any have a sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

14. On the final issue of whether there are errors apparent on the face of the record sufficient to review and set aside the judgement of 27th February 2020, the Applicant submitted that there were errors and discrepancies in the judgment as compared to the information on the greencard of the suit property; that the mutations to the suit property were noted to be done in 1992, while the evidence adduced stated that they occurred in 2009, and that there was a cover up of the fraudulent actions. He further submitted that the Mutation Form discovered recently dated is a forgery and lacked the requisite Land Control Board consent. On this issue, the Applicant relied on the case of *Elias Ndwiga Njoka v Land Registrar Kajiado & another* (2019) eKLR ,wherein the Court held while allowing an application to set aside and review.

> In *Nyamogo & Nyamogo v Kogo* (2001) EA, 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 options, 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 they 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 this Court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for review though it may be for an appeal. This laid down principles of law are indeed applicable in the matter before us.

15. In conclusion, the Plaintiff/Applicant submitted that there is apparent new evidence, and the erroneous dates cited in the judgement proves sufficient error on the face of the record upon which correction is likely to change the *ratio decidendi* of the judgement. He urged the Court to allow the instant Application as prayed.

16. The 2nd Respondent and the intended 3rd and 4th Defendants/Respondents through the Law Firm of MJD Associates Advocates filed their written submissions dated 4th December 2022. The Respondents identified three issues for determination by this Court.

17. On the issue of the competency of the application, the Respondents submitted that following the Judgement dated 27*th February 2020, the Applicant filed a Notice of Appeal which is now running concurrent to this application for review. They relied on the Order 45 Rule 1(a) of the *Civil Procedure Rules*, which prohibits filing of an appeal, while at the same time pursuing a review in a similar suit. The Respondents buttressed their submissions by relying on the Court of Appeal case of *John Gakure & 148 Others v Dawa Pharmaceutical Co. Ltd & 7 Others* (2010) eKLR. The Respondents further submitted that there has been no withdrawal of the Notice of Appeal and that it is still valid.

18. On the issue of the principles of review, the Respondents submitted that these are provided for under Order 45 Rule 1 of the *Civil Procedure Rules*. These were echoed in the case of *Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (suing on behalf of 112 Plaintiffs)* (2019) eKLR , where it was held:

> "A Court's power to review a judgement or orders stems from Order 45 of the Civil Procedure Rules and Order XLIV on the previous rules. Under the said Order, a Court can only review its orders if the following grounds exist: there must be discovery of new and important evidence 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 there was a mistake or error apparent on the face of the record; or there were other sufficient reasons; and the application must have been made without undue delay."

19. The Respondents examined the particular elements for review. On whether there is an error on the face of the record, the Respondents submitted that there were no errors as alleged by the Defendant/ Applicant. The Respondents further submitted that the Applicant seeks to challenge the evidence presented which does not fall within the confines of review, but rather appeal. They relied on the case of *ICEA Lion Insurance Co. Ltd v Chris Ndolo Mutuku t/a Crystal Charlotte Beach Resort* (2021) eKLR.

20. On the issue of new and important evidence that has been discovered by the Applicant, the Respondents submitted that the Applicant failed to state when he came across the allegedly new evidence. They further submitted that the alleged new evidence was part of the pleadings filed by the Applicant. The Respondents placed reliance on the case of *Hosea Mosagwe & 2 Others v County Government of Nyamira* (2022) eKLR, wherein the Court held that:

> "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 judgement. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal."

21. On the issue of whether the application was filed without unreasonable delay, the Respondents submitted that the Judgement was entered on 27th February 2020, while the application for review was entered on 14th September 2022 , which is over two years and six months from the date of the Judgement. That no explanation was provided for the delay. The Respondents also relied on the case of *Ruth Kwachimoi & another v Charles Nalika Chelot & another* (2021) eKLR, where the Court held:

> "However, the 2nddefendant was required to file the application for review without unreasonable delay. The order sought to be reviewed was made on 20 th March 2017, and

this application was filed on but 3 rd July 2020, over three years later. No explanation has been made either in the application itself nor the supporting affidavit as to why it took three years to file the application, a delay that is clearly unreasonable. What is or is reasonable delay will of course be determined by the circumstances of each case. However, any delay must be satisfactorily explained."

22. Considering the above, the Applicant failed to sufficiently explain the reason for the delay in pursuing the review of the Judgement.

23. On the final issue of substitution and joinder of the intended Respondents, the Respondents focused on the Applicant insistence that the application for review is subsisting as the same survived the 2nd Defendant. They relied on Order 24 Rule 104(1) which prescribe that:

> " In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon which such interest has come or devolved."

24. To buttress this issue, the Respondents relied on the case of *Antony Francis Wareham t/a Wareham & 2 Others v Kenya Post Office Saving Bank* (2004) eKLR,where the Court held that:

> " Accordingly the issue of whether or not a Court could order an amendment after judgement must be determined without any presumption that there is a power to do so by dint of the express wording of the rule. Be that as it may, even after the rule had such express wording, the exercise of the discretion to order an amendment after judgement in the circumstances of this case could not pass unquestioned even though it is well established that the word at any stage of the proceedings means and includes before, or act, or after the trial, or even after judgement or on appeal."

The Court continued:

> " To our minds, questions in controversy between the parties should only be raised before or in the course of the trial in order to give the affected party an opportunity to adduce evidence there on and make submissions. Such a purpose would not be served if the questions are raised ex po facto after the trial. Accordingly, it is to make nonsense of the rules of procedure to order amendments touching on the issues of attack or defence after the trial."

25. Finally, the Respondents submitted that the instant application is not merited as it is contrary to Order 45 of the *Civil Procedure Rules*,as the Applicant has filed an appeal to the judgement of 27th February 2020. They urged the Court to dismiss the Application with costs.

26. The above being the pleadings and the written submissions, the Court has carefully read and considered the said pleadings by the parties, the rivals written submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;

    1. Whether the application for review is merited?

    2. Whether the 3rd and 4th intended Respondents can be joined in the suit at this stage?

27. Before this Court delves into the aforementioned issues, it will provide a background of the facts as adduced by the pleading and evidence by the parties herein.

28. By a Plaint filed on 27th October 2014, the Plaintiff brought a claim against the Defendants and the impugned Judgment was entered on 27th February 2020. The 2nd Defendant/Respondent herein died on 12th February 2022, and Letters of Administration intestate where issue on 1st September 2022, to the intended 3rd and 4th Defendants/Respondents. The Applicant filed a Notice of Appeal on 3rd March 2020. The present application was filed on 16th September 2022, seeking to join the 3rd & 4th intended Respondents as Defendants in the suit and review the said judgement.

(i) Whether the Application for Review is merited?

29. Review is provided for under Order 45 of the *Civil Procedure Rules*, which states as follows;

> "(1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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."

30. Further, provisions for review are set out under Section 80 of the *Civil Procedure Act* which states as follows:

> Section 80 -Any person who considers himself aggrieved—
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> a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> 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.
>
> c. the order, and the Court may make such order thereon as it thinks fit.

31. In the case of *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."

32. In the present case, the Plaintiff/Applicant has filed a Notice of Appeal and a Review. The impetus of Order 45(2) of the *Civil Procedure Rules*, is to prevent litigating parties from seeking two remedies at the same time, which this Court has noted. The Applicant states that they have withdrawn the Appeal by virtue of lack of interest to pursue that avenue further. No evidence was however presented for formal withdrawal.

33. To allow the review, the Applicant must satisfy the Court that;

    (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.

34. The present application for review was made over 2 years after the delivery of judgement and the delay has not been sufficiently explained by the Applicant and neither has an extension of time been given to file the same. In *John Agina v Abdulswamad Sharif Alwi* C.A Civil Appeal no 83 of 1992, the Court stated as follows: -

> " An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy from any Court."

35. The Applicant further submitted that there was new evidence to present as grounds for review. 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 his/her knowledge and even after the exercise of due diligence, the same could not be produced before the Court/tribunal earlier. (See *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] eKLR). The alleged new mutation forms filed by the Plaintiff/Applicant in the present application were indeed already filed during the hearing of the main suit.

(ii) Whether the 3rd and 4th Intended Respondents can be joined as Defendants at this stage?

36. The final issue for determination is whether to join the intended 3rd and 4th Respondents after the Judgement has already been delivered?

37. On this issue, this Court relies on the Court of Appeal case of *Central Kenya Ltd v Trust Bank & 4 Others*, CA no 222 of 1998, wherein the Court affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

> " All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

38. In the present case, the 2nd Defendant/Respondent is deceased and the 3rd and 4th intended Defendants/ Respondents are the administrators to his estate. The procedure in case of death of one of several Defendants or of sole Defendant is provided for under Order 24 Rule 4 of the *Civil Procedure Rules*. It states:

    (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the Legal Representative of the deceased

39. For a person to be joined as a party to the suit, he/she must be "the Legal Representatives of the deceased defendant". It has long been held as the correct position since the Court of Appeal decision in *Trouistik Union International & anor v Jane Mbeyu & Anor* Civil Appeal no 145 of 1990 [1993] KLR 230,that the Legal Representative of the deceased is the person appointed as such by a Succession Court, in accordance with the *Law of Succession Act*. This Court finds that the intended 3rd & 4th Respondents herein are properly joined to respond to this Application.

40. Having found that the Plaintiff/Applicant failed to meet the grounds for review and setting aside of the Judgement of 27th February 2020, the Court finds and holds that only Prayer no 2 of the Instant Application is merited and the same is allowed.

41. However, Prayers no 3 and 4 are not merited and the said prayers are disallowed entirely with costs to the Respondents herein.

42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF FEBRUARY 2023.

L. GACHERU

JUDGE

In the presence of;

Mr Ndungu for the Plaintiff/Applicant

M/s Kerubo for the 1st Defendant/Respondent

Mr Onyancha for 2nd Defendant/Respondent

Mr Onyancah for Intended 3rd Defendant/Respondent

Mr Onyancha for Intended 4th Defendant/Respondent

Court Assistant - Joel Njonjo

L. GACHERU

JUDGE

23/2/2023