Mwangi & 3 others v Karanja & another (Environment & Land Case 386 of 2011) [2023] KEELC 929 (KLR) (20 February 2023) (Ruling)

Neutral citation: [2023] KEELC 929 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 386 OF 2011

JA MOGENI, J

FEBRUARY 20, 2023

BETWEEN

PETER KAMAU MWANGI ..... 1ST PLAINTIFF

JOSPHAT NYAKWARA ..... 2ND PLAINTIFF

MAUREEN ONDIEKI ..... 3RD PLAINTIFF

MICHEAL OKEYO CURTIS AND 104 OTHERS ..... 4TH PLAINTIFF

AND

ESTHER MUMBI KARANJA ..... 1ST DEFENDANT

MARGARET WAIRIMU WANGUYU T/A RUAI PROPERTY DEVELOPERS ..... 2ND DEFENDANT

RULING

1. Pending before this Court for determination is the 1st Plaintiff's Application dated August 30, 2022. It is brought under Order 9, Order 45 and Order 51 Rule 1 (1) of the *Civil Procedure Rules* and Section 3 and 3A of the *Civil Procedure Act*, Article 159 of the *Constitution* of Kenya 2010 and all other enabling provisions of the law. In it the Applicant seeks the following orders;

    1. Spent
    2. THAT the 1st Plaintiff/Applicant Peter Kamau Mwangi be granted leave to appear in person as representing himself and the other Plaintiffs/Applicants in place of Lumumba Onchuru Advocates LLP.
    3. THAT this Honourable court be pleased to review, set aside or modify its ruling in this suit delivered on 30th Day of June 2022.

4. THAT upon grant of prayer (1) herein above, a mandatory order do issue compelling the defendants to execute transfer forms, effect registration process and issue title deeds in respect of plots owned by the following plaintiffs and carved out of LR No 7340/104 namely: Naomi Wangare Ndua ID No 12944XXXX Plot No 92/324, Agnes Wanjiku Kimani ID No 957XXXX Plot No 92/377, Patrick Muchai Mugwanja ID No 303XXXXX Plot No 92/323 and Plot 92/322, John Rua Nyambura ID No 2060XXXX Plot No 206XXXX Plot No 92/283, Peter Kamau Mwangi ID No 551XXXXX Plot No 92/366 and Plot No 92/367, Wambui Kihunyu ID No 1205XXXX Plot No 92/294, Stephen Gathiaka ID No 520XXXX Plot No 92/329, Kamurio Kinuthia ID No 2260XXXXX Plot No 92/326, Rose Wanjiru ID No 876XXXX Plot No 92/284, and Teresia Wamaitha ID No 1022XXXX Plot No 92/363. And for which the plaintiffs have already paid transfer, registration ad issuance of Title Deed fees to the defendants.

5. THAT this Honourable court be pleased to give any further or additional orders as the circumstances of this case any deem fit and in order to avoid a miscarriage of justice.

6. THAT the costs of this application be provided for.

2. The Application is premised on the grounds that:-

a. There was an error apparent on the face of ruling dated June 30, 2022 since the plaintiff herein had executed a hand written authority in the year 2011 under the *Civil Procedure Rules* donating the power to the 1st plaintiff namely Peter Kamau Mwangi to plead, swear affidavits and appear in court on behalf of them.

b. This matter is set for pre-trial directions under Order 11 of the *Civil Procedure Rules* on September 22, 2022 and yet the main suit was compromised by the consent letter dated December 5, 2012 and which was adopted as a judgment of the court before Hon Barasa Deputy Registrar.

c. The consent letter dated December 5, 2012 having been adopted as a judgment of the court before Honourable Barasa Deputy Registrar over rides the second consent dated August 31, 2021 which includes issues not agreed in the earlier consent.

d. The orders dated June 30, 2022 did not put into consideration that the plaintiffs had fulfilled their part of the consent letter dated December 5, 2012 by paying money to the defendants who had refused, ignored or neglected to process the title deeds in favor of the plaintiffs.

e. This honourable court having found that the 2nd defendant had in law and by virtue of the doctrine of jus accrescendi having inherited the liability of the co-tenant namely the 1st defendant, this honourable court ought to have ordered for a mandatory order as prayed for by the plaintiffs.

f. The ruling of 30th did not consider the effect in law of the second consent which was entered into long after the consent of December 5, 2012 was

adopted as a judgment of the court before Honourable Barasa, Deputy Registrar.

g. The ruling of June 30, 2022 reveals an error apparent on the face of the record.

3. The Application further supported by the Affidavit of Peter Kamau Mwangi sworn on August 30, 2022 in which he reiterates the averments made in the Notice of Motion Application.

4. In response to the Application dated August 30, 2022, Margaret Wairimu Wangunyu, the 2nd Defendant/Respondent in the Application, through BM Musyoki & Co Advocates filed a Replying Affidavit on October 3, 2022 in which she avers that: -

a. It is not disputed that there is a ruling in this matter that was delivered by this Honourable court on June 30, 2022.

b. She also concedes that the suit was compromised by a consent order and to that extent there is nothing to go for trial. In the circumstances the process of pre-trial and other proceedings should be abandoned.

c. She also concedes that the order that parties should not deal with parcel number 7340/104 should be reviewed as the said parcel no longer exists as it had been subdivided to 104 parcels as at the time of the filing application dated November 17, 2021. It is not possible to adhere to the said order.

d. Save for what is deponed in paragraph 4 and 5 above, there is nothing to warrant reintroduction of the application dated November 17, 2021.

e. The rest of the prayers in the application dated August 30, 2021 are an attempt to litigate application dated 17/11/2021 again and should be dismissed. In that regard she reiterated the contents of her supplementary affidavit dated May 20, 2022 and the late 1st defendant's replying affidavit dated December 2, 2021 (same are annexed hereto and marked "MMI").

f. To be specific prayer 4 of the application dated August 30, 2022 is *Res Judicata* application dated November 17, 2022 and that she shall raise a preliminary objection.

g. There is no discovery of new and compelling evidence that has been produced by the applicant to warrant for review of the court orders in the ruling delivered June 30, 2022.

h. In view of the above, the application should be dismissed with costs.

5. The Application was canvassed by way of written submissions. Parties submitted and a Ruling date was reserved.

6. Having considered the motion, supporting affidavit, replying affidavit and the rival submissions, this court is of the considered view that the issued falling for determination are whether the 1st Plaintiff/Applicant has met the grounds for an order of review and whether the 1st Plaintiff can be granted leave to appear in person as representing himself and the other Plaintiffs/Applicants in place of Lumumba

Onchuru Advocates LLP. I will proceed to analyze the legal and jurisprudential framework on the issues.

Whether the 1st Plaintiff/Applicant has met the grounds for an order of review.

7. On the issue of whether the grounds and facts presented make the Application merited thus calling for a review or setting aside of the impugned ruling, it is common ground that the High Court has a power of review, but such power must be exercised within the framework of Section 80 of the *Civil Procedure Act* and Order 45 Rule (1) of the *Civil Procedure Rules*. It is now well settled law that for a party to succeed in an application for review and setting aside of a judgment, decree, ruling or order of a Court, the applicant must prove that:

   i. There is discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicants' knowledge and which could not therefore produce at the time the order was made or,

   ii. Some mistake or error apparent on the face of the record or,

   iii. Any other sufficient reason.Further that the application has been brought without undue delay."

8. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review.

9. The starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

10. The impugned ruling was issued on June 30, 2022 and the instant application was brought on August 31, 2022. That is 62 days. A period of that kind is not unreasonable delay. That said, I turn to the issue that is the crux of the instant application.

11. The next issue was that firstly, there was an error apparent on the face of ruling dated June 30, 2022 since the plaintiff herein had executed a hand written authority in the year 2011 donating power to the 1st Plaintiff to plead for the other Plaintiffs, that the matter is set for pre-trial directions on September 22, 2022 and yet the main suit was compromised by the consent letter dated December 5, 2012 and was adopted as a judgment of the court before Hon. Barasa Deputy Registrar, that the consent letter dated December 5, 2012 having been adopted as a judgment of the court before Honourable Barasa Deputy Registrar over rides the second consent dated August 31, 2021 which includes issues not agreed in the earlier consent, that the orders of June 30, 2022 did not put into consideration that the Plaintiffs had fulfilled their part of the consent letter dated December 5, 2012, that this court having found that the 2nd defendant had in law and by virtue of the doctrine of *jus accrescendi* having inherited the liability of the co-tenant ought to have ordered for a mandatory order as prayed for by the plaintiffs, the ruling of 30th did not consider the effect in law of the second consent which was entered into long after the consent of December 5, 2012 and largely, the ruling of June 30, 2022 reveals an error apparent on the face of the record.

12. On the other hand, the 2nd Defendant mainly concedes that the suit was compromised by a consent order and to that extent there is nothing to go to for, she also concedes that the order that parties should not deal with parcel number 7340/104 should be reviewed as the said parcel no longer exists as it had been subdivided to 104 parcels as at the time of the filing application dated November 17, 2021, that the rest of the prayers in the application dated August 30, 2021 are an attempt to litigate application dated November 17, 2021 again and that prayer 4 is res judicata and finally that there is no discovery of new and compelling evidence that has been produced by the applicant to warrant for review of the court orders in the ruling delivered June 30, 2022. All in all, it is the 2nd defendant's case that there is nothing to warrant reintroduction of the application dated November 17, 2021 and the application dated August 30, 2022 should be dismissed with costs.

13. From a perusal of the Court record, both parties concede that they entered into a consent and wrote a consent letter which they adopted before Deputy Registrar, Hon. Barasa on December 5, 2012. In the consent letter, the defendants after receiving Kshs 33,000 from the plaintiffs she was to execute transfer forms, effect transfer process and issue individual Title Deeds. Both parties also concede that the suit was compromised by the consent order dated December 5, 2012 to the extent that there is nothing to go on trial.

14. The Consent letter dated December 5, 2012 provided that:

    1. Each plot owner to pay Kshs 33,000.00 to BM Musyoki & Co Advocates for registration and other outgoings.

    2. All matters civil or criminal in nature between the plaintiffs and other members and defendants are hereby withdrawn and terminated.

    3. There be no order as to costs.

15. The 1st Plaintiff avers that the defendants have failed to execute transfer forms, effect registration and issue individual title deeds to the plaintiffs.

16. I note that the consent dated August 31, 2021 being referred to by the Plaintiff was never adopted as an order of this court. The file had been closed on November 9, 2017 as per the request of the Defendant's counsel and forwarded to archives. The defendant counsel confirmed that the suit was settled by the consent order dated December 5, 2012. The file was only revived on December 2, 2021 pursuant to the 1st Plaintiff's Application dated November 17, 2021.

17. Further to the above, from a perusal of the record, I found that the Authority to Plead was not attached/adduced together with the Plaint in 2011. The Plaintiffs' list of documents only listed title deed, deed plan & subdivision map and share certificate. This court notes that the authority was only filed on June 19, 2012 together with a Reply to Defendant's Submissions and before the suit was set down for hearing. I find and hold that the Authority was properly on record because to hold otherwise would be to elevate procedural technicalities to a point where they would be an impediment to the administration of justice. Article 159 (2) (d) of the *constitution* which Section 19(1) of the *Environment and Land Court Act*, 2011 echoes, enjoins the court to administer justice expeditiously and without undue regard to technicalities of procedure.

18. 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 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."

19. 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.

20. The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. 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.

21. In *Attorney General & O'rs v Boniface Byanyima* HCMA No 1789 of 2000, the court citing *Levi Outa v Uganda Transport Company* [1995] HCB 340, held that:

> " the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."

22. 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.

23. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the 1st Plaintiff/ Applicant do qualify to be grounds prescribed in Order 45 Rule 1 of the *Civil Procedure Rules*.

24. In view of my above conclusions, I find that the grounds cited in relation to impugned ruling qualify to be grounds for review to bring the applicant's application within the ambit of the grounds specified in Order 45 Rule 1. It is my finding that this is a proper case for the court to grant the review sought or even to exercise its discretion in favour of the applicant's application dated August 30, 2022 and the Ruling dated June 30, 2022 be and is hereby reviewed and set aside.

25. The Defendant claims that prayer No 4 is *res judicata*. I believe the same is true however since the Court set aside the Ruling delivered on June 30, 2022, I am inclined to mention the issue of the mandatory order as prayed in this present application.

26. On whether the 1st Plaintiff has met the criteria for grant of a mandatory order, in the Ruling delivered on June 30, 2022, this Court found that the prayer sought by the 1st plaintiff for mandatory injunction should not be granted as the granting of such mandatory injunction should only be on the clearest of cases. The Applicants' case is not as clear and the explanations given cannot in any way be done through affidavit evidence but rather the same should be canvassed during the main hearing. Both parties have gone to great length to bring evidence on the issue of consent but there are other material facts that may need elaboration at the trial.

27. Looking at the consent dated December 5, 2012, it speaks of "each plot owner to pay Kshs 33,000 to BM Musyoki & Co Advocates for registration and other outgoings." To me, I understand this to mean that this was the amount to be paid for the sale transaction to be completed.

28. The 1st Plaintiff's case is that the Court's ruling did not put into consideration that the plaintiffs had fulfilled their part of the consent letter dated December 5, 2012 by paying money to the defendants

who had refused, ignored or neglected to process the title deeds in favor of the plaintiffs. That this honourable court having found that the 2nd defendant had in law and by virtue of the doctrine of jus accrescendi having inherited the liability of the co-tenant namely the 1st defendant, this honourable court ought to have ordered for a mandatory order as prayed for by the plaintiffs. The 2nd Defendant on the other hand conceded that there is nothing to go for trial. She further concedes that the order that parties should not deal with parcel number 7340/104 should be reviewed as the said parcel no longer exists as it had been subdivided to 104 parcels as at the time of the filing application dated November 17, 2021. It is not possible to adhere to the said order. She reiterated the contents of her supplementary affidavit dated May 20, 2022 and the 1st Defendant's replying affidavit dated December 2, 2021.

29. The effect of a consent order is that all the parties agree to the terms therein. The 2nd Defendant contesting the allegations that the 1st Plaintiff only are not valid as the consent order of December 5, 2012 has not been varied or set aside. No evidence has been adduced to demonstrate that. This court had held that there were other material facts that may need elaboration at trial. However, the effect of the consent order of December 5, 2012 was that all matters civil or criminal in nature between the plaintiffs and other members and the defendants are hereby withdrawn and terminated. That means that there would be no trial to elaborate the allegations made by the defendants.

30. I shall conclude as follows; the threshold scope on consent Judgments as expounded in the persuasive decision in *Vulcan Gases Ltd v Okunota* {1993} 2 NWLR 274 P 142 wherein the Court held:

> " That a consent Judgment presupposes out of Court settlement reached by the parties, and that the terms of the said settlement or agreement are furnished to the Court and forms the basis of the Courts Judgment in the suit. Such Judgment is intended to put an end to further litigation between the parties just as much as if the Judgment was the result of a decision of the Court after the matter had been fought to the end."

31. It is not in dispute that the parties herein entered into a consent on December 5, 2012. Both parties concede that the suit was compromised by a consent order. The consent order withdrew the present suit. The file was closed on November 9, 2019. Parties are therefore bound by the terms of the consent order of December 5, 2012.

32. In the *Kenya Commercial Bank Ltd v Specialized Engineering Co Ltd* {1982} KLR 485, the Court of Appeal laid down the following principles which connotes that:

> " A consent order entered into by Counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts the general for a reason which would enable the Court to set aside an agreement. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side." (See also *Contractors Ltd v Margret Oparanya* {2004} eKLR)."

33. The import of the above is that I find that the 1st Plaintiff has met the criteria for the grant of a mandatory order and I shall proceed to grant prayer No 4 as prayed.

34. In the case of *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, the court of appeal said:

> "It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases."

35. In this instant case, the parties entered into a consent and the same was adopted as an order of the Court on December 5, 2012. The grounds of the consent have been reproduced somewhere in this ruling. The 1st Plaintiff contended that the Defendant was to execute transfer forms and effect transfer process and issue individual title deeds. The 2nd Defendant contended that said parcel no longer exists as it had been subdivided to 104 parcels as at the time of filing of the application dated November 17, 2021.

> Whether the 1st Plaintiff can be granted leave to appear in person as representing himself and the other Plaintiffs/Applicants in place of Lumumba Onchuru Advocates LLP.

36. The Court has already found that the 1st Plaintiff had properly filed the Authority to plead. I also note that the 1st Plaintiff has already filed a notice of intention to act in person. He filed the same on September 28, 2022 and proceeded to serve it upon the Defendants on the same day.

37. Order 9 Rule 5, 6 and 8 of the *Civil Procedure Rules* provides that:

> "5. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.
>
> 6. Service of notice of change of advocate [Order 9, rule 6.]
>
> The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).
>
> 8. Notice of intention to act in person [Order 9, rule 8.]
>
> i. Where a party, after having sued or defended by an advocate, intends to act in person in the cause or matter, he shall give a notice stating his intention to act in person and giving an address for service within the jurisdiction of the court in which the cause or matter is proceeding, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of intention to act in person, with the necessary modifications.
>
> ii. The address for service given under subrule (1) shall comply with Order 6, rule 3."

38. In the circumstances, this Court hereby grants prayer (2) of the Application dated August 30, 2022. However, I order that the 1st Plaintiff/Applicant serves the said notice of intention to act in person dated September 28, 2022 upon his former advocate, Lumumba Onchuru Advocates LLP.

39. On the issue of costs, both parties in this suit signed a consent letter dated December 5, 2012 agreeing that the suit is withdrawn with no order as to costs. I believe this is a special circumstance that warrants departure from the general principle that costs follow the event. Therefore, there shall be no orders as to costs.

Disposal Orders

40. In light of the foregoing, the 1st Plaintiff's Application dated August 30, 2022 succeeds and is hereby allowed in the following terms:-

    a. The 1st Plaintiff/Applicant Peter Kamau Mwangi is hereby granted leave to appear in person as representing himself and the other Plaintiffs/Applicants in place of Lumumba Onchuru Advocates LLP.

    b. The 1st Plaintiff is hereby ordered to serve the notice of intention to act in person dated September 28, 2022 upon his former advocate, Lumumba Onchuru Advocates LLP.

    c. The Ruling delivered on June 30, 2022 be and is hereby reviewed and set aside.

    d. A mandatory order be and is hereby issued compelling the defendants to execute transfer forms, effect registration process and issue title deeds in respect of plots owned by the following plaintiffs and carved out of LR No 7340/104 namely: Naomi Wangare Ndua ID No 1294XXXX Plot No 92/324, Agnes Wanjiku Kimani ID No 957XXXX Plot No 92/377, Patrick Muchai Mugwanja ID No 303XXXX Plot No 92/323 and Plot 92/322, John Rua Nyambura ID No 206XXXX Plot No 206XXXX Plot No 92/283, Peter Kamau Mwangi ID No 551XXXX Plot No 92/366 and Plot No 92/367, Wambui Kihunyu ID No 120XXXX Plot No 92/294, Stephen Gathiaka ID No 520XXXX Plot No 92/329, Kamurio Kinuthia ID No 226XXXXX Plot No 92/326, Rose Wanjiru ID No 876XXXX Plot No 92/284, and Teresia Wamaitha ID No 1022XXXX Plot No 92/363. And for which the plaintiffs have already paid transfer, registration ad issuance of Title Deed fees to the defendants.

    e. No orders as to costs.

    f. File closed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI ON THIS 20TH DAY OF FEBRUARY, 2023.

MOGENI J

JUDGE

In The Virtual Presence of: -

Mr Mwangi for the Plaintiffs

Mr Kasimu for the Defendants

Ms. Caroline Sagina: Court Assistant

MOGENI J

JUDGE