



**Republic v National Land Commission & another; Wanja & 2 others (Exparte Applicants);
Kiambu Dandora Farmers Co Limited & another (Interested Parties) (Environment and Land
Judicial Review Case 35 of 2018) [2023] KEELC 15896 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 35 OF 2018
AA OMOLLO, J
FEBRUARY 16, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

AND

SAMUEL WACHIRA WANJA EXPARTE APPLICANT

DAVIS MALOMBE EXPARTE APPLICANT

JOSEPH THIGA WAWERU EXPARTE APPLICANT

AND

KIAMBU DANDORA FARMERS CO LIMITED INTERESTED PARTY

AMBOSELI COURT LIMITED INTERESTED PARTY

RULING

1. The 1st interested party and the 1st respondent herein each filed separate notices of motion dated August 11, 2021 dated September 17, 2021 which sought similar orders of review. The following reliefs were sought in the application dated August 11, 2021;
 - a. The court be pleased to review its judgment and decree issued on June 10, 2021 and July 2021 and specifically to review and set aside or expunge its orders relating and or referring to making determination on the validity or otherwise of title number 11379/3; and the order on payment of costs.



2. The application was supported by grounds listed on its face and the affidavit of Joseph Mwangi Karanja. The grounds included
 - i. That the circumstances and issues in this case read simultaneously with the issues in trial ELC Pet 47/2011 in which all parties herein are involved including the exparte applicants directly though the 2nd interested party require review of the orders/decrees of this court as it directly touches on issues directly and live in Pet 47/2011.
 - ii. That other factors including the pendency of ELC Pet 47/2011 awaiting to determine the question of title to LR 11379/3 would require rectification of the order or decree to obviate the creation of sense and impression that the court has already made a determination or inclination on the determination of Pet 47/2011.
 - iii. On costs, the 2nd Interested party stated the court failed to take cognizance of the fact that the 1st I Party was not strictly a party to the suit as they had been joined.
3. The applicant deposed that the applicants were joined to the proceedings as interested parties and not defendants meaning there was no specific order directed at them. That the decision that was being challenged was the decision of the National Land Commission which is an independent body whose mandate was clearly defined in the Constitution and there was no evidence that the 1st Interested party had influenced the NLC. That the court has always pronounced that not more than one suit should be entertained in respect of LR 11379/3 pending the determination of Pet 47 of 2011. The Interested party avers that they are surprised by the court's decision which went as far as challenging NLC's upholding of the legality of LR 11379/3 which actions were the powers of the 1st Respondent.
4. The 1st Interested party argued that paragraph 4 of the decree relating to the 1st respondent purporting to uphold the title to 11379/3 is a holding which went beyond the scope of the issues before the court. That in making the pronouncement, the court erroneously went outside the dispute which was being litigated and made an order and pronouncement prejudicial to ELC Pet 47/2011.
5. In the motion dated September 17, 2021, the orders sought were,
 - a. That the judgement made by Hon S Okongo dated June 10, 2021 be reviewed and set aside.
 - b. Such other orders as this court deems just to grant. motions sought for setting aside and review of the said entered judgement and decree issued on July 16, 2021.
6. The latter application was premised on several grounds inter alia;
 - i. That the court in gross violation of the provisions of order 53 rule 7 of Cap 21 rendered a decision based on what was not before the court and proceeded to quash the same.
 - ii. That the court proceeded to erroneously make a finding that the impugned decision was made on May 10, 2018 when its mandate to review dispositions in land had lapsed
 - iii. That a recent survey has established the non-existence of the suit properties whose validity the court upheld in the impugned judgement.
 - iv. That despite noting the existence of many suits in regard to the suit properties including ELC Petition no 47 of 2011, the court proceeded to make a judgement that is likely to pre-empt the outcome of other cases.
7. In the affidavit sworn in support of the application by Mr Brian Ikol, the 1st respondent stated that they were aggrieved by the judgment of June 10, 2021 on account of mistakes and or errors apparent



on the face of the record. He also deposed that the 1st respondent/applicant has also discovered new and important evidence which was not within his knowledge and thus could not be produced before the court. The applicant deposed that its letter of May 10, 2018 did not amount to a determination capable of being quashed. Mr Brian asserted that despite filing a replying affidavit, the 1st respondent was not notified of the subsequent proceedings thus missing out on a chance to highlight pertinent issues at hand. He added that the respondent will not suffer any prejudice if the orders sought are not granted. I noted that there was no report annexed by the 1st respondent/applicant.

8. The ex parte applicants opposed the two applications dated vide replying affidavit sworn by Samuel Wachira Wanja on October 26, 2021 and the application dated September 17, 2022 vide Grounds of opposition dated January 17, 2022. Mr Wachira deposed that on June 24, 2021, the 1st Interested party filed and served them with a notice of appeal and a letter addressed to the Deputy Registrar requesting for proceedings for purposes of filing an appeal against the impugned judgement. That the law precludes the applicant from simultaneously filing an application for review and appeal on the same judgement.
9. The 1st ex parte applicant stated that the decision that was subject to challenge in the judicial review proceedings resulted in the judgement in subject originated from a complaint instigated by the 1st interested party to the 1st respondent hence the actions of the 1st interested party precipitated the process that resulted in these judicial review proceedings and their advocates were served with all the pleadings, documents and relevant materials.
10. The 1st ex parte applicant also stated that no new matter or evidence has been produced which could not be produced at the time when the judgement was delivered and no mistake or error apparent on the face of the record that has been proved by the 1st Interested party and that the court delivered a judgement relating to the determination published by the 1st Respondent on May 10, 2018 and issues in dispute in Milimani Pet No 47 of 2011 were determined and that in that Petition, they are not directly represented in those proceedings by the 2nd Interested party as alleged by the 1st Interested party.
11. The ex parte applicants contended that the 1st respondent's claim of the non-existence of the aforementioned properties does not constitute a valid ground for review as the said properties have been identified and marked in a Survey Plan from the Survey of Kenya registered in the Register and Certificates of Title issued to their respective proprietors.
12. The 1st Interested party filed submissions dated September 27, 2022 in support of their application. They stated that section 80 of the *Civil Procedure Act* gives the court power to review while order 45 provides the sets out the rules. The rules include 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.
13. The 1st interested party stated that their application is premised on the grounds of mistake or error apparent in the judgement. They submit that they have not preferred an appeal. They submit also that the order/decreed issued by this court touches on the issues in dispute in ELC Pet 47/2011 which is yet to be determined as regards the question of title LR 11379/3. It is their contention that the power to review is only available only when there is apparent error or omission on the part of the court which does not require elaborate argument to be established.



14. In explaining what constitutes an error apparent on record, the 1st I Party cited the case of *Nyamogo & Nyamogo v Kogo* [2001]EA 170 as quoted in the case of *Zablon Mokuva v Solomon M Choti & 3 Others* [2016]Eklr among others where the court held thus; 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”
15. The 1st Interested party listed the factors that the court should consider in awarding costs and invited the court to look at paragraph 11 of the supporting affidavit. They submit that the court erred in failing to consider crucial facts which could have swayed it to rule otherwise in awarding cost including the fact that they did not have a cause of action neither did they actively participate in the proceedings that ensued. In conclusion, the 1st Interested Party submitted that the court failed to consider crucial facts which could have swayed the court to rule otherwise.
16. The 1st Ex parte Applicant filed submissions dated October 3, 2022 in oppositions of the two applications stating that the applicants have not demonstrated the error on the face of the record as alleged that meets the definition and criteria established in law citing the case *Nyamogo & Nyamogo* quoted supra
17. The ex parte applicant/respondent submitted that the applicants in both applications before the Court actively participated at the hearing of the Judicial review application and were granted ample and sufficient time to tender their evidence. The Respondent argued that the Applicants have not met the threshold for review referring this court to several cases that defined what constitutes an error on the face of the record. For instance, the case of *Pancras T Swai vs Kenya Breweries* (2014)eKLR where the court of Appeal held thus;
- “We think Bennett J was correct in *Abasi Belinda v Frederick Kangwamu and another* [1963] EA 557 when he 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”
18. I did not find on record any submissions filed by the 1st Respondent/Applicant.
19. The issue for determination is whether the applications have met the threshold for review of the judgement dated June 10, 2021 and decree issued on July 16, 2021. As both parties have submitted, the law on review of judgements is well set out in Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules 2010* as follows:-
- “Section 80.
- 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

”Order 45 Rule 1 (1): Any person considering himself aggrieved-

- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or
- c) 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

20. From the analysis of the arguments presented by the 1st Interested Party, they were specific that the review was on the basis of error in the judgement. They pointed to this court that what constituted the error was twofold; first that the judgement made a determination on issues that were not raised before him and secondly, that the decision made by this court has a direct bearing on the case pending in ELC Pet 47 of 2011. By the age of this file, it is without a doubt it was filed much later after the Pet 47 of 2011 being referred to by the parties herein. Judicial Review proceedings are of a special nature as provided for under order 53 of the Civil Procedure Rules. It limits the court to look at the process followed in reaching the impugned decision of a statutory body. Judicial review proceedings do not go into merits of a case.
21. In the matter before the court, the ex-parte applicant and who is the respondent in the current applications had moved the Court to quash the decision of the National Land Commission made on May 10, 2016. That application was allowed as prayed i.e. an order of certiorari and prohibition was issued quashing the impugned decision of the NLC and prohibiting its implementation. In my view, if any of the parties were aggrieved by the judgement rendered allowing the application, they ought to appeal the same and not apply for review. All the grounds raised by the 1st Respondent/Applicant in support of their application are questioning the merit of the judgement and this court cannot sit on appeal on its own decision.
22. For instance, the grounds that the court in gross violation of the provisions of order 53 rule 7 of Cap 21 rendered a decision based on what was not before the court and proceeded to quash the same or that the court proceeded to erroneously make a finding that the impugned decision was made on May 10, 2018 when its mandate to review dispositions in land had lapsed were purely issues that deals with merit of the decision.
23. The 1st Respondent/Applicant pleaded that there was discovery of new and important matter which was not available to them when the judicial review application was argued. In the affidavit in support of their motion, there is no report of the Director of survey annexed. In their affidavit filed in response to the original application, the same was sworn by the Director of surveys such that if in their view the trial judge did not consider the facts raised by the director in the impugned judgement, that forms an error on merit of the decision and not an error apparent on the face of the record. Thirdly, the question



whether or not their letter of 10th August 2018 constituted a decision capable of being quashed is a matter beyond this court's consideration under review.

24. The 1st Interested Party quoted the provisions of section 27 of the *Civil Procedure Act* on matters exercise of the Court's discretion in awarding party and party costs. This applicant argued that the judge did not take into account certain factors such as, the conduct of parties, the subject of litigation, the circumstances which led to institution of the proceedings etc. This line of argument is clearly questioning the merit of the decision in the manner in which the judge exercised his discretion to assess costs. The same cannot be stated to be error or mistake on the face of the record.
25. The totality of the grounds put forth in support of both applications go beyond the threshold of review. For the reasons stated herein above, I make a finding that the two applications dated August 11, 2021 dated September 17, 2021 are without and is hereby dismissed. There shall be an order that each party meets their respective costs.

DATED AND DELIVERED AT NAIROBI VIRTUALLY THIS 16TH DAY OF FEBRUARY 2023

A. OMOLLO

JUDGE

Ruling delivered virtually in the presence of:

Nderitu for exparte Applicant/Respondent

Nyakowa for 1st Interested Party

Muchiri for 2nd Interested Party

Kamau for Attorney General

No appearance for 1st Respondent

