



**Republic v Land Disputes Tribunal Magarini (Now Defunct) & another; Ngonyo & 5 others (Exparte); Kalama & another (Interested Parties) (Miscellaneous Civil Application 19 of 2019) [2023] KEELC 869 (KLR) (13 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 869 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**  
**MISCELLANEOUS CIVIL APPLICATION 19 OF 2019**  
**MAO ODENY, J**  
**FEBRUARY 13, 2023**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**LAND DISPUTES TRIBUNAL MAGARINI (NOW DEFUNCT) .... 1<sup>ST</sup>  
RESPONDENT**

**PRINCIPAL MAGISTRATES COURT AT MALINDI ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**JEREMIAH KAZUNGU NGONYO ..... EXPARTE**

**FREDRICK NGUMA ..... EXPARTE**

**CHRISPUS CHARO CHEU ALIAS CHRIPIN CHARO CHEU ..... EXPARTE**

**MORRIS KAKA KITSAO ALIAS KAKA KITSAO NGONA ..... EXPARTE**

**SAMSON RAHISI KASHURU ..... EXPARTE**

**ANTONY SHUKU KAINGU ..... EXPARTE**

**AND**

**KATANA GONA KALAMA ..... INTERESTED PARTY**

**HARRISON KAZUNGU KATANA ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect of a Notice of Motion dated February 14, 2022 by the Applicant seeking the following orders; -



- a. Spent
  - b. That the honourable court do review the ruling and orders of the court dated January 25, 2022 and set aside the same.
  - c. That upon granting prayer (b), the court do set aside the ruling dismissing the plaintiffs' application and set the same for hearing on merit.
  - d. Costs be in the cause.
2. The application is supported by the sworn affidavit of Fredrick Nguma the 2<sup>nd</sup> *ex parte* applicant who deponed that the impugned ruling dated January 25, 2022 has an apparent error on the face of the record in that the court addressed itself on a nonexistent Preliminary Objection.
  3. The applicant further stated that they were not aware of a Preliminary Objection as their advocates were never served and that the directions that were taken on May 17, 2021 were clear that the anticipated submissions were for the application for Judicial Review dated December 16, 2021 and not the alleged Preliminary Objection. Further, the matter is not *res judicata* as the appeal was dismissed for want of prosecution.
  4. The interested parties filed a replying affidavit dated March 4, 2022 sworn by Harrison Kazungu Katana stating that the court determined the matter on merit and the instant application is an abuse of the court process. He added that the Preliminary Objection dated January 30, 2020 was served on the firm of Mwaure and Mwaure advocates. Further, that the matter is *res judicata* as the issues raised by the applicant were determined in Appeal No. 7 of 2019.
  5. Counsel agreed to canvas the application vide written submissions but by the time of writing this ruling only the respondent had filed submissions despite the Applicant being granted 14 days to do so on June 7, 2022.
  6. Counsel for the respondent submitted that this suit is *res judicata* as the issues raised herein were dealt with in the Appeal No 7 of 2014 when the matter was dismissed for want of prosecution and relied on the case of *Gurbachan Singh Kalsi v Yowani Elkori* and *Virgin Atlantic Ltd v Zodiac Seats UK Limited*.
  7. Counsel further submitted that the respondent was served with the application dated December 16, 2019 and filed a response vide a replying affidavit and a Notice of Preliminary Objection dated January 30, 2020.
  8. Counsel submitted that the application lacks merit hence should be dismissed with costs.

#### **ANALYSIS AND DETERMINATION**

9. The issue for determination is whether there was an error apparent on the face of record to allow the application for review.
10. Section 80 of the *Civil Procedure Act* cap 21 provides 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.”

11. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -

“ 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 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.”

12. Similarly, in the case of *Parliamentary Service Commission v Martin Nyaga Wambora & others* 2018 eKLR the Supreme Court summarized the principles for an application for review as follows: -

- a. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this court.
- b. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the court;
- c. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- d. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically.
- e. During such review application, in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review.
- f. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
  - (a) as a result a wrong decision was arrived at; or
  - (b) it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

13. The applicant alleges that there is an error apparent of the face of the record as the court addressed itself on a nonexistent Preliminary Objection which the applicant was not aware of.

14. It is on record that the Respondent was served with the application dated December 16, 2019 and in response filed a replying affidavit and a Notice of Preliminary Objection dated January 30, 2020.

15. It is further on record that on February 10, 2020 Mr. Kazungu holding brief for Ms Marubu indicated to the court that they were served with a Notice of Preliminary objection.



16. It is procedural that when a preliminary objection is raised on the jurisdiction of the court, the same must be heard first unless it is withdrawn or parties agree that it can be dealt with during the full hearing. This is what the court did and if the Applicants were not happy with the outcome, then they should have filed an appeal stating that the court dealt with a non-existent Preliminary Objection.
17. The court is further guided by the case of *National Bank of Kenya Limited v Ndun'gu Njau* [1979] eKLR which sets out the distinction between cases suitable for appeal and review where the court stated that an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law or that he exercised his discretion wrongly in the case.
18. I have considered the application, the submission by counsel and find that there was no error apparent on the face of the record hence the application is dismissed with costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 13<sup>TH</sup> DAY OF FEBRUARY 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

