



**Bachu v Cheruiyot & 5 others; KCB Bank Limited (Defendant to the Counterclaim)
(Environment & Land Case 189 of 2015) [2024] KEELC 4717 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4717 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 189 OF 2015**

**LA OMOLLO, J
JUNE 13, 2024**

BETWEEN

AVTAR SINGH BACHU PLAINTIFF

AND

JOSEPH CHERUIYOT 1ST DEFENDANT

RICHARD CHERUIYOT 2ND DEFENDANT

ESTHER MUTAI 3RD DEFENDANT

JANET CHEBET 4TH DEFENDANT

FANCY CHEPKOECH MUTAI 5TH DEFENDANT

ELIZABETH CHESANG TUM 6TH DEFENDANT

AND

KCB BANK LIMITED DEFENDANT TO THE COUNTERCLAIM

RULING

1. This ruling is in respect of the Defendants/Applicants Notice of Motion application dated 31st August, 2023. The said application is expressed to be brought under Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 45 Rule 1 & Order 18

Rule 10 of the Civil Procedure Rules, Section 146 of the Evidence Act and Article 159(2)(d) of the Constitution of Kenya. It seeks the following orders;

a. That this Honorable Court be pleased to review its orders given on 30th January, 2023 and recall the Defendant to produce a list of exhibits in support of his case that had been filed on the



26th day of June, 2018 but which, by an oversight on the part of prosecuting counsel, were not produced when the Defendant testified in court on the material day.

- b. That costs of application be provided for.
2. The application is based on the grounds on its face and the supporting affidavit of Joseph Cheruiyot the 1st Defendant/Applicant, sworn on 31st August, 2023.

Factual Background.

3. The Plaintiff/Respondent vide the Further Amended Plaint dated 7th December, 2021 seeks the following orders;
 - a. An eviction order against the Defendants themselves and/or any other persons occupying land parcel number Kericho/Roret/646 under the authority of the Defendants, payment of mesne profits and a vesting order thereof to the Plaintiffs.
 - b. A permanent injunction restraining the Defendants and/or any other person occupying land parcel number Kericho/Roret/646 under the authority of the Defendants from trespassing into, entering and/or in any other way interfering with the Plaintiffs' occupation, use, possession and/or quiet enjoyment of the suit land.
 - c. Costs of this suit.
 - d. Interest on (c) above.
 - e. Any other relief deemed apt by this honorable court.
4. The Defendants/Applicants filed their Further Amended Defence and Counterclaim on 10th December, 2020 wherein they deny the averments in the Further Amended Plaint and seek the following orders;
 - a. A declaration that the sale of parcel No. Kericho/Roret/646 by a public auction conducted on 9th January, 1997 and subsequent transfer of it to the Plaintiffs is null and void.
 - b. A declaration that the Plaintiffs are holding title to the suit land in trust for the Defendant.
 - c. An order terminating the said trust.
 - d. An order directing the Plaintiff to sign necessary documents restoring ownership of the suit property in the names Henry Taita Tum and in default thereof the Deputy Registrar of this honorable court to do so on their behalf.
 - e. A permanent injunction do issue restraining the Plaintiffs, their servants, workmen, agents or any persons acting under their instructions from entering and/or interfering with LR No. Kericho/Roret/646 in any manner prejudicial to the Defendant.
5. The application under consideration came up for directions on 31st October, 2023 when the court directed that it be heard by way of written submissions.
6. The application was mentioned severally before parties confirmed that they had filed submissions. It was reserved for ruling on 23rd April, 2024.



The Defendants/Applicants contention.

7. The 1st Defendant/Applicant contends that on 26th June, 2018 he filed a list of documents which he intended to rely on during the hearing and adds that the said list of documents was served upon the Plaintiff/Respondent on 25th July, 2018.
8. The 1st Defendant/Applicant also contends that after Kenya Commercial Bank was joined to the proceedings, the Defendants/Applicants advocates on record served its legal department with a mention notice dated 9th November, 2021, the Further Amended Defence and Counterclaim dated 10th November, 2021 together with the witness statement and the list of documents on 17th November, 2021.
9. The 1st Defendant/Applicant further contends that when this matter came up for hearing on 30th January, 2023, he gave his evidence and was cross examined by counsel for the Plaintiff/Respondent and Kenya Commercial Bank Limited.
10. It is his contention that due to an oversight, his counsel did not produce the documents earlier filed on 26th June, 2018 in support of his case.
11. It is also his contention that even though counsel for the Plaintiff/Respondent and Kenya Commercial Bank opposed the production of the said documents on the ground that they were not served, the court held that the documents were in their possession and they knew that the Defendants/Applicants would rely on them.
12. It is further his contention that the failure to produce the said documents were not deliberate but was an excusable mistake.
13. The 1st Defendant/Applicant contends that he is likely to suffer extreme prejudice if the said documents are not included as exhibits.
14. The 1st Defendant/Applicant also contends that the said documents having been filed and served upon all the parties, form part of the record and that the Plaintiff/Respondent was aware that he was going to rely on the said documents in his defence.
15. The 1st Defendant/Applicant further contends that the Plaintiff/Respondent and Kenya Commercial Bank will have the opportunity to cross examine him on the documents if he is allowed to produce them.
16. It is his contention that the other parties in the suit will therefore, not suffer any prejudice as the documents had already been filed in court on 17th November, 2021 but not marked as exhibits.
17. It is also his contention that Kenya Commercial Bank has not closed its case and will not therefore suffer any prejudice.
18. It is further his contention that the said documents if produced shall be useful in determination of the suit influence on the end result of the case.
19. The 1st Defendant/Applicant ends his deposition by stating that it is in the interest of justice that the order issued on 30th January, 2023 be reviewed and he be recalled to produce the said documents.

Plaintiff/Respondent 's Response.

20. In response to the Defendants/Applicants application, the Plaintiff/Respondent filed Grounds of Opposition dated 27th October, 2023 on 30th October, 2023.



21. The grounds are as follows:
- a. The Defendants did close their case on 30th January, 2023. The court then directed that the 3rd Defendant's (in the counterclaim KCB Kenya Limited case be heard on 28th March, 2023 but unfortunately its witness was bereaved and therefore the matter couldn't proceed. (sic)
 - b. That on 30th January, 2023 when the Applicants' Advocates sought to introduce documents during re-examination, the court dealt with the issue substantively and therefore what is being raised in the current application is now res judicature. (sic)
 - c. An application has been brought to the court as an afterthought that is aimed at wasting the court's time. The record shows that the Applicants have kept filing flimsy application so as to delay the conclusion of the matter in a bid to continue occupying the Plaintiff's land.
 - d. That re-opening the matter at this state (sic) is prejudicial to the Plaintiff.
 - e. The application is frivolous, vexatious and that it amounts to an abuse of the process of the court.
 - f. It is trite law that equitable remedies are granted to persons who have moved the court with clean hands. The application lacks merit and has been brought to court in bad faith. It is noted that the Applicants are blaming their Advocates. The Applicants can seek to be remedied in another forum where their Advocate's negligence can be addressed.
 - g. The Applicants are guilty of laches. It has not been explained why the application has been brought to court close to one year later than 30th January, 2023. (sic).

Issues for Determination.

22. The Defendants/Applicants filed their submissions on 25th January, 2024 while the Plaintiff/Respondent filed his submissions on 22nd April, 2024.
23. The Defendants/Applicants submit on whether their application meets the requirements under Order 45 of the Civil Procedure Rules.
24. The Defendants/Applicants reiterate the averments in the 1st Defendant/Applicant's supporting affidavit and rely on Order 45 Rule 1 of the Civil Procedure Rules and the judicial decisions of *Coftea Machinery Services Ltd v Akiba Bank Ltd & 2 Others* [2004] eKLR, *Joseph Kipkreli Lotukei v Stephen Toroitich Korkou* [2021] eKLR.
25. The Defendants/Applicants submit that the court should review its orders given on 30th January, 2023 and allow them to produce their list of documents that was filed on 26th June, 2018 as they have been condemned unheard because of an error apparent on the face of the record.
26. The Plaintiff/Respondent submits on the following issues;
- a. Whether the Defendants/Applicants application is res judicata?
 - b. Whether the Defendants/Applicants application meets the threshold to be granted leave to file additional documents.
27. On the first issue, the Plaintiff/Respondent relies on Section 7 of the *Civil Procedure Act*, *Kenya Commercial Bank Limited v Muiri Coffee Estate Ltd & another* [2016] eKLR and submits that the court had given directions and denied the defence leave to produce documents after the witness had



testified and therefore the present application to produce documents is an ambush and is prejudicial to the Plaintiff/Respondent.

28. On the second issue, the Plaintiff/Respondent relies on Order 3 Rule 2, Order 7 Rule 5 of the Civil Procedure Rules, Johana Kipkemei Too vs Hellen Tum [2014] eKLR and submits that this court has a constitutional mandate to ensure that a trial is fair and therefore has the power to disallow one party from tabling evidence that was not provided to the other party.
29. The Plaintiff/Respondent also submits that it is only with leave of court that documents can be filed at a later stage which needs to be done at least fifteen days before the pretrial conference as provided for Order 11 Rule 7 of the Civil Procedure Rules.
30. The Plaintiff/Respondent relies on Raila Odinga & 5 Others vs IEBC & 3 Others [2013] eKLR in support of his submissions.
31. It is the Plaintiff/Respondent's submissions that the Defendants/Applicants are guilty of laches and that the court on 30th January, 2023 declined to allow the Defendants/Applicants counsel to produce documents at the re-examination stage and therefore the present application is flimsy having been filed eight months later.
32. It is also the Plaintiff/Respondent's submissions that since he has already closed his case, the re-opening of the matter will prejudice him and that the Defendants/Applicants application should be dismissed with costs to him.

Analysis and Determination.

33. I have considered the application, the response thereto and the rival submissions.
34. In my view, that the only issue that arises for determination is whether this court should review its orders issued on 30th January, 2023 and allow the Defendants/Applicants to produce their list of documents filed on 26th June, 2018.
35. Section 80 of the *Civil Procedure Act* 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.”
36. Order 45 Rule 1 of the Civil Procedure Rules provides as follows;
 - “(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.”

37. In the judicial decision of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR the court held as follows;

“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.”

38. As was held in Republic v Public Procurement Administrative Review Board & 2 others (supra) cited above, the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.

39. In the present case, the Defendants/Applicants are seeking that the court reviews its orders issued on 30th January, 2023 and they be allowed to produce their list of documents filed on 26th June, 2018.

40. The Defendants/Applicants argue that they did not produce the said documents due to an oversight on their part and that the other parties will have opportunity to cross examine their witness once the said documents are produced.

41. The Defendants/Applicants also submit that they served the said documents on the other parties to the suit and that the determination of the court that the documents were not served on the other parties amounts to an error apparent on the face of the record.

42. In response, the Plaintiff/Respondent submits that on 30th January, 2023, the Defendants/Applicants sought leave to produce their documents during re-examination but the court declined and therefore the present application is res judicata.

43. A perusal of the court records shows that on 30th January, 2023 Joseph Cheruiyot testified as DW1. He tendered his evidence, was cross-examined and during re-examination, his counsel on record stated as follows;

“I seek that my client do produce the documents filed in court as his exhibits. It was an oversight on my part. The documents have already been served. It is the Defendants list of documents dated 26th June, 2018”

44. Counsel for the Plaintiff/Respondent and the 3rd Defendant/Respondent in their response opposed the granting of the said orders. The court in its ruling held as follows;

“I have considered the sentiments of counsel for the Plaintiff and 3rd Defendant in the counterclaim. Indeed, the parties had already cross examined the witness and therefore the production of the Defendants documents which were not even served upon the 3rd



Defendant in the counterclaim at this stage would result in an ambush and contravention of their right to fair hearing. The application is hereby rejected.”

45. As aforementioned, the Plaintiff/Respondent argues that the Defendants/Applicants application is res judicata. The Plaintiff/Respondent contends that since the court already declined the Defendants/Applicants request to produce the documents on 30th January, 2023, the present application is res judicata.
46. Section 7 of the *Civil Procedure Act* provides as follows;
- “7. Res judicata
- No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
47. On whether the doctrine of res judicata applies in similar applications filed in the same suit, the Court of Appeal in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR held as follows;
- “...That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that section 89 of our *Civil Procedure Act* caters for.”
48. As aforesaid on 30th January, 2023, the Defendants/Applicants counsel sought leave to produce the documents on the Defendants/Applicants list of documents during re-examination. The other parties opposed the grant of the said orders and the court in its ruling did not grant the Defendants/Applicants leave to produce the said documents and observed that they had not been served on the other parties.
49. In the present application, the Defendants/Applicants are seeking for the court to review its orders issued on 30th January, 2023 on the ground that there is an error apparent on the face of the record. It is their contention that the other parties to the suit were served with the said list of documents.
50. My view is that the issue of res judicata does not arise in the present application which is for review.
51. As mentioned in the preceding paragraphs, the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and for any other sufficient reason.
52. The ground for review as set out in the Defendants/Applicants application are that there is an error apparent on the face of the record. It is important to distinguish between an error apparent on the face of the record and a ruling or judgment made in error.

The subsequent paragraphs are intended to make this distinction.



53. The Court of Appeal in *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243 held as follows;

“In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 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 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 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 apparent on the face of the record even though another view was also possible. Mere 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.”

54. An error apparent on the face of the record must be a self-evident error which does not need elaborate arguments to support it.
55. In *Saham Assurance Co. Ltd v Shimoli (Civil Suit 2 of 2018)* [2022] KEHC 14372 (KLR) (27 October 2022) (Ruling) the court held as follows;

“23. What the Applicant has demonstrated before this Court is that there was a mistake during the filing of its case leading to the exclusion of a crucial exhibit. That is not a mistake apparent on the face of the record. It is an error on the part of the Applicant’s counsel and the same cannot be used to reopen the case for fresh litigation to the prejudice of the Respondent. This statement finds support in the holding in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR that:

“Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. There was no response to the replying affidavit in so far as it accused the Respondent of lack of diligence. The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence...It was quite clear therefore that the Respondent having found out why the Judge decided against it went back to the drawing board and fished out evidence that would bolster its case. This was too late in the day as the horse had already bolted from the stable.

24. The Applicant has not established any ground for reopening the case. It has not demonstrated any error or mistake on the face of the record. The record here meaning the Court record. There is no mistake on the part of the Court to warrant a review of the judgment. The application is therefore for dismissal.” (Emphasis mine)



56. The Court of Appeal in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR held as follows;

“An application for review must be specific on the ground on which it is brought. And if the complaint was that the Judge made an error, then he should have pursued an appeal which it had already commenced. Clearly then the learned Judge fell into error when he allowed the application for review based on an inadvertent error or mistake on the part of the respondent yet the respondent itself had disclosed that it was an error on the part of the court.”(Emphasis mine)

57. The Defendants/Applicants argue that since they had served their list of documents on the others parties to the suit, the order issued by the court on 30th January, 2023 that the same had not been served amounted to an error apparent on the face of the record.

58. As has been held the judicial decisions cited in the preceding paragraphs, an error apparent on the face of the record must be self-evident. In the event that a party argues that the court made an error in arriving at a decision, then that party should pursue an appeal.

59. The Defendants/Applicants argument is that the court made an error when it held that they had not served the documents attached to their list of documents. This can only be a ground of appeal and not review.

Disposition.

60. I find that the Defendants/Applicants have not demonstrated that there is an error apparent on the face of the record to warrant a review of the orders issued on 30th January, 2023.

61. Consequently, the Defendants/Applicants application dated 31st August, 2023 is hereby dismissed with costs to the Plaintiff/Respondent.

62. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 13TH DAY OF JUNE, 2024.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kefa for the Defendants/Applicants.

Mr. Sigira for the Plaintiff/Respondent.

The firm of Kibichi for the interested party (Kenya Commercial Bank). Absent

Court Assistant; Mr. Joseph Makori.

