Mwende v Kilili & 3 others; Mulwa (Interested Party) (Civil Case E003 of 2021) [2022] KEHC 10396 (KLR) (6 June 2022) (Ruling)

Neutral citation: [2022] KEHC 10396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL CASE E003 OF 2021

GV ODUNGA, J

JUNE 6, 2022

BETWEEN

JACKELINE MWENDE ..... APPLICANT

AND

STELLAMARRIS KILILI ..... 1ST RESPONDENT

MICHAEL KILILI ..... 2ND RESPONDENT

PETER KIOKO ..... 3RD RESPONDENT

PHILIP MULEI ..... 4TH RESPONDENT

AND

ANDREW KILILI MULWA ..... INTERESTED PARTY

RULING

1. On 21st day of February, 2022, this court delivered a ruling in this matter in which it issued the following orders:

    a. Pending the hearing and determination of the Summons, the Respondents are hereby restrained, either by themselves, their agents, family members, relatives and/or any other person acting under their instructions from evicting or denying the applicant and her children access to her matrimonial property on property known as Kangundo/ Isinga/ 2530 at Kwa Kamba, Kangundo, trespassing, entering, or otherwise interfering with the applicant's quite occupation and possession of the same.

    b. Pending the hearing and determination of the Summons, the Respondents are hereby restrained whether by themselves, their agents, family members, relatives and/or any other person acting under their instructions howsoever from transferring, alienating, disposing,

selling, encumbering, assigning, or in any other like manner dealing with property known as Kangundo/ Isinga/ 2530, Motor Vehicle Registration Number KBX xxxx.

c. I direct that in the event that the Plaintiff is unable to get the Deceased's ID Card, once access to the suit premises are given to her, she be at liberty, either alone or together with the Defendants to apply for the deceased's death certificate vide the photocopies of the deceased's ID Card, as long as none has been issue to anybody else to enable her either alone or together with the Defendants apply for the administration of the estate of the deceased. Such administration does not necessarily confer on them the status of dependency as that is an issue to be determined in the Succession Cause.

2. In arriving at that decision, this Court expressed itself as hereunder:

> " In this case, the Plaintiff contends that the 1st, 2nd and 3rd Respondents forcefully removed her from the suit premises and installed the 4th Respondent therein. When she attempted to halt the intended burial, they said Respondents changed the burial date and moved it forward and interred the deceased in the wee hours of the morning in order to lock her from participating in the burial. At this stage, I cannot conclusively determine these allegations. However, though the said Respondents have contended that the 4th Respondent, Philip Mulei, is a son to the deceased staying in the suit property, the said Philip Mulei has not on her part sworn any affidavit in support of the said averments and the deponent of the replying affidavit has not stated that he was authorized to and did swear his affidavit on behalf of the 4th Defendant as well. In the premises there is no basis upon which I can find that the orders sought, if granted, will have the effect of evicting the4th Defendant from the suit premises."

3. By a Notice of Motion dated 2nd March, 2022, taken out on behalf of the 4th Defendant and the Interested Party, the following orders were sought:

1. Spent
2. THAT the Interested Party Andrew Kilili Mulwa be joined as a party to these proceedings as the 5th Defendant.
3. Spent
4. THAT the High Court orders and ruling made on 21st February, 2022 be reviewed and/or varied to the extent that the court bars the Plaintiff from applying the same to evict the 4th Defendant and IntereestedParty from the suit premises known as Kangundo/Isinga/2530 at Kwa Kamba Kangundo
5. That cost be in the cause.

4. According to the Applicants the 4th Defendant and the Interested Party are sons of the deceased, Gerald Musau Kilili, from the deceased's first marriage with to Brenda Masiitsa Mulindi and that they currently stay at their rural ancestral home on Kangundo/Isinga/2530 at Kwa Kamba Kangundo where they were living with the deceased up to the time of his death. It was averred that since the delivery of the ruling in question, the Plaintiff embarked on the process of evicting them from the said premises notwithstanding the fact that the ruling did not order that they be evicted therefrom.

5. According to the applicants, they have no other home save for their father's home where they have lived all their lives and that they risk being thrown onto the streets and rendered destitute.

6. It was averred that the conduct of the plaintiff by going against the court's express ruling constitute sufficient cause to warrant the review and/or variation of the said order. The applicants averred that it would be injudicious for them to be evicted from their late father's home at an interlocutory stage yet the aspect of dependency and entitlement to the deceased's estate is yet to be determined.

7. In response to the application, the Plaintiff filed an affidavit in which she averred that the applicants are deceiving this Court by alleging that they have been living with their deceased father at the suit premises from the time they were born to date. According to the Plaintiff, they began construction of their matrimonial house on property known as Kangundo/ Isinga/ 2530 jointly with her late husband in the year 2017 and they moved in the same year 2017 upon completion. Prior to the construction of the home, the Deceased, the Plaintiff and their 2 children were residing on rental houses in Kangundo town owned by the 1st and 2nd defendants. According to her, at the time they began construction the said property was vacant and there were no buildings or any sort of developments thereon.

8. The Plaintiff asserted that she had resided on the said property with her late husband and their children since 2017 until his demise in October 2021 and that she never met the applicants herein. She however disclosed that the 4th defendant moved into the suit property in October 2021 after the 1st, 2nd and 3rd defendant chased her out of my property. According to the Plaintiff, from the Annexture marked as PMK 3 in the applicants' Supporting Affidavit, it can be noted that the Brenda Masista Mulindi was known to the deceased for several years and they decided to have a baby, and therefore the applicants' allegations that they were married are baseless.

9. The Plaintiff lamented that since October, 2021 she had been homeless and that efforts to have the defendants grant them access to their home had been fruitless despite the Court Orders issued on November 5, 2021and the Ruling delivered on 21st February 2022 notwithstanding the fact that on February 28, 2022, her advocates on record wrote to the firm of Koceyo & Co. Advocates on record for the defendants, for the defendants allow her and her children access to the said property as per the Ruling of the Court. She averred that they allowed the 4th defendant 2 days to vacate the property failure to which they would cite the defendants for contempt of Court.

10. It was deposed that upon being served with a copy of the ruling, the 4th Respondent became rude and hostile toward and said that he would not vacate the suit property as he did not recognize such Orders and he locked himself and his wife in the house.

11. According to the Plaintiff, the application that the interested party/applicant be joined as a 5th Defendant is an afterthought only meant to delay and frustrate the determination of this matter. It was her view that the interested party/applicant has not demonstrated that whatever grievances, he has if any, cannot be adequately addressed by the present defendants and what prejudice he stands to suffer since he does not reside on the suit property Kangundo/Isinga/2530. It was averred that the 4th defendant has filed the current application with unclean hands and as he is still driving around with motor vehicle registration number KBX 513Q despite the Court's Ruling delivered on 21st February 2022.

12. The Court was therefore urged to dismiss the application with costs.

13. In support of their case, the applicants filed submissions in which they reiterated the contents of supporting affidavit and cited section 80 of the *Civil Procedure Act*, order 45 rule 1 of the *Civil Procedure Rules*, *Agripina Nekesa Wafula vs. Vincent Wesonga Osimata* [2021] eKLR, *Tokesi Mambili & Others vs. Simion Litsanga* Civil Appeal No. 9 of 2001, *Republic vs. Public Procurement Administrative Review Board & 2 Others* [2018] eKLR, *Pancras T. Swai vs. Kenya Breweries Limited*

[2014] eKLR and *Sardar Mohamed vs. Charan Singh Nand and Another* (1959) EA 793 and submitted that they had established sufficient reason for review.

14. On behalf of the Plaintiff, it was submitted that from the applicant's affidavit, there is no new and important matter that could not be produced by the applicants at the time when the Ruling was made. All the issues raised in the present application were same ones raised in the 3rd Defendant's Replying Affidavit dated November 12, 2021 and they were canvassed and well considered by the Court in arriving at its Ruling. In this regard the Plaintiff relied on the case of *Evan Bwire vs. Andrew Aginda* Civil Appeal No. 147 of 2006 cited in the case of *Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR where the Court of Appeal held as follows:

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence."

15. According to the Plaintiff, this Court in its said ruling noted that the 4th defendant had not sworn an affidavit to support his case and there was no authority given to the 3rd defendant to swear the affidavit in his name contrary to order 1 rule 13 (1) & (2) of the *Civil Procedure Rules* 2010. In this regard the Plaintiff cited the case of *Hezekia Kipkorir Maritim & 10 others v Philip Kipkoech Tenai & 2 others* [2016] eKLR where the Court held that:

> " From the foregoing, it is quite clear that a party in a proceeding cannot purport to appear, plead and act on behalf of others until and unless he is authorized to so in writing and the authority is filed in such proceedings. To my mind therefore, a statement in an affidavit that one has the authority of the co-plaintiffs or co-defendants is not enough. Such an authority, properly signed by the party giving the authority must be filed in the proceedings. It would seem that lack of such an authority does not necessarily void the proceedings, what it does is to incapacitate the persons purporting to represent his co-plaintiffs or defendants from doing so."

16. Similarly, the Plaintiff cited the case of *Nyamogo & Nyamogo v Kogo* (2001) EA 170 and *Origo & Another vs Mungala* [2005] 2 KLR 307, cited in J*ameny Mudaki Asava vs. Brown Otengo Asava & another* [2015] eKLR and submitted that the applicants had not elaborated any sufficient reasons to warrant a review of the court's ruling.

17. It was further submitted that the ruling of the Court addressed all of the matters raised by the Applicants. The Applicants are merely dissatisfied with the manner in which the Court exercised its discretion and are not seeking to correct any error apparent on the face of the record. According to her, there was no new information or error apparent on the face of the record raised by the applicant. The 4th defendant's application amounts to a challenge of the court's ruling, and as such ought to have been the subject of an appeal. The application for review has no merit whatsoever and is merely intended to delay and obstruct the Plaintiff from realizing the fruits of the orders issued by the court.

18. It was further submitted that the applicant herein has not approached thiscourt with clean hands. Despite the existence of the court orders issued on 5th November 2021 and the ruling issued on February 21, 2022, the 4th defendant again wilfully, deliberately and flagrantly disobeyed the said Orders. The 4th defendant has adamantly declined to allow the plaintiff and her children access to their home. Secondly, the 4th defendant has been intermeddling with the deceased Estate by using the motor vehicle registration number KBX 513Q despite the express orders of the court.

19. Guided by the above, it was submitted that the Application dated March 2, 2022be dismissed with cost as the same is bad in law, lacks any legal basis and undermines this Court's dignity.

Determination

20. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions filed.

21. As regards the joinder of the Interested Party, it is alleged that he is a son of the deceased. Whether or not that contention is true cannot be determined with finality in these proceedings. If he is a son of the deceased, then he clearly has an interest in these proceedings. In *Civicon Limited vs. Kivuwatt Limited and 2 Others* [2015] eKLR the court observed that:

> "...the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial."

22. In light of the allegations made by the Interested Party it is only fair that he be brought on board so that he can get an opportunity to ventilate his case taking into account the fact that the suit was filed by the Plaintiff and not by the Defendants. Accordingly, I allow the limb seeking his joinder to the suit as the 5th Defendant.

23. In order to justify the Court in granting an application for review sought by the applicant under the provisions oforder 45 rule 1 of the *Civil Procedure Rules*, certain requirements must be met. The said provision states 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
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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."

24. The *Code of Civil Procedure, Volume* III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

25. In *Ahmednasir Abdikadir & Co. Advocates vs. National Bank of Kenya Limited* Nairobi (Milimani) HCCC No. 532 of 2004, Okwengu, J (as she then was) expressed herself as hereunder:

> " In this case the court is being invited to review the order on the grounds that there is an error apparent on the face of the record or other sufficient reason the pleadings, in particular, the plaintiff's reply to the amended defence in which the plaintiff is alleged to have conceded that the defendant's fee policy was illegal and contra statute which was the basis of the Defendant's application for striking out the plaint. It is the defendant's contention that the plaintiff is bound by his pleadings and could not therefore depart from the same...It is my considered opinion that the pleadings went beyond the reply to the amended defence and to understand the matters which were in issue one has to look at the plaint vis-à-vis the amended defence and the reply to the amended defence. A careful reading of the ruling however, makes it clear that the court had the pleadings in mind and moreover, there is no basis for the conclusion that the court would have arrived at any different decision. The court was simply interpreting the provisions of Section 36 and 45of the *Advocates Act* as read with the Advocates Remuneration Order and it was not bound by any position taken by the parties. It may well be that the court was wrong in its interpretation or in the approach it took. However, that is not a matter that can be taken up on review as it is not an error apparent on the face of the record but ought to be subject of an appeal. Moreover to invite the court to set aside the order of dismissal and substitute it with an order striking out the plaint and dismissing the plaintiff's suit in effect is to invite the court to sit on appeal on its own ruling and make a complete turnaround which is not within the purview of Order 44 of the Civil Procedure Rules.

26. That was the Court of Appeal's decision in Court of Appeal case of *Anthony Gachara Ayub vs. Francis Mahinda Thinwa* [2014] eKLR which quoted with approval the judgment of the High Court in Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation, by stating:

> " 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 a 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."

27. With respect to the other issues raised, the Court of Appeal in *Mahinda vs. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

> "The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

28. The decision whether or not to review a court's decision was well captured by the Court of Appeal in *Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited* Civil Appeal No. 270 of 2002, where it was held 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 however 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 a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review.

29. Similarly, in the case of *Nyamogo & Nyamogo vs. Kogo* (2001) EA 170 the court held as follows:

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

30. I agree with Warsame, J (as he then was) in *Sara Lee Household & Body Care (K) Ltd vs. Damji Pramji Mandavia* Kisumu HCCC No. 114 of 2004 that the essence of a review must ordinarily be to deal with straight forward issues which would not fundamentally and radically change the judgement intended to be reviewed, otherwise parties would lose direction as to the finality of a decision made by a particular court as on occasions a review may necessarily entail arriving at a decision different from the one originally arrived at. This was the position in Atilio vs. Mbowe (1969) THCD where it was held that an application for review should not be granted if it will result into the orders, which were not contemplated.

31. I have considered the grounds upon which this application is based. It is clear that the limb for review is based on allegations that the Plaintiff misinterpreted the ruling to justify the eviction of the applicants from the suit premises. A misinterpretation of a court decision by a party, in my view, is not a sufficient ground for reviewing the decision since misinterpretation does not affect an otherwise proper decision. Where a party is of the view that the decision needs clarification, the party ought to move the court to clarify the same rather than seeking review. *In Mawji vs. Arusha General Store* [1970] EA 137, it was held that:

> " A Court must have power to effect its orders. This is not a case of recalling an order but giving effect in one part of the order to the decision arrived at in another part. It would be non-sense to stultify the activities of any court of justice that it would be unable to give effect to a decision which it had just handed down. No provision of the rules should be so construed as to preclude a court from giving effect to its decision...Under the inherent powers of the court, a court should not be precluded by anything incidentally set out in the Code or in the rules made under the Code from giving effect to its decision, and giving effect in a way which will result immediately in justice between the parties and in saving of unnecessary proceedings. Even if section 89(2) does give the power to give effect to this judgement by a separate suit, that would not preclude the High Court from giving effect to its judgement in a more efficacious way. Even if section 89(1) restricts the power given by it to the court of first instance, which in the circumstances of this case has no jurisdiction, to order restitution, and there is no provision elsewhere vesting this power in the High Court, that would not prevent the High Court giving effect to its decision. A court must have power, unless it is most clearly set out to the contrary by legislation, to give effect to its decision and that is all that the court sought to do here. It is not suggested that the discretion, which, of course must lie in the court as to the manner in which to give effect to its decision, was wrongly exercised in this case but the argument is that the court did not have the power to make this order. We are satisfied that it did, and, indeed, that any court must have the power to give effect to its decisions."

32. To the extent that the application seeks review rather that clarification, it is incompetent and lacks merit.

33. For avoidance of doubt, this Court did not direct the eviction of the applicants. What it did was to restrain the eviction of the Plaintiff therefrom and to allow the Plaintiff access to the premises. It would seem that the real issue for determination is who is entitled to the suit property. That is an issue that can only be determined in a succession cause. It was being mindful of the same that I directed the parties herein to commence succession proceedings.

34. Accordingly, I direct the parties to strictly adhere to this court's decision made on February 21, 2022as well as the directions made herein on May 18, 2022.

35. It is so ordered.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 6TH DAY OF JUNE, 2022.

G V ODUNGA

JUDGE

In the presence of:

Mr Koceyo for the Applicants

Miss Mbulukyo for the Respondent

CA Susan