Case Number:	Environment and Land Case 340 of 2017 (Formerly Nrb ELC 290 of 2014)
Date Delivered:	08 Oct 2021
Case Class:	Civil
Court:	Environment and Land Court at Thika
Case Action:	Ruling
Judge:	Lucy Nyambura Gacheru
Citation:	Teresia Njeri Mwangi & another v Roseline Kamunyu & 2 others [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kiambu
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. 340 OF 2017

(FORMERLY NRB ELC NO. 290 OF 2014)

TERESIA NJERI MWANGI.....1ST PLAINTIFF/RESPONDENT

FRANCIS MAINA NDUNGU.....2ND PLAINTIFF/RESPONDENT

VERSUS

ROSELINE KAMUNYU.....1ST DEFENDANT/APPPLICANT

ENINAH NJOKI KARIUKI.....2ND DEFENDANT/APPLICANT

PHYLIS NJERI KARIUKI.....3RD DEFENDANT/APPLICANT

RULING

By a Notice of Motion Application dated **23rd February 2021** the Defendants / Applicants sought for the following orders;

1. That this Honorable Court be pleased to review and correct its judgment and Decree issued on the 12th September 2019 to the effect that the suit property is Title No. Ruiru West Block 1/768 and not Ruiru Kiu Block 1/768, instead thereof indicate that the same is owned by the 3rd Defendant Phylis Njoki Kariuki .

2. That the cost of this Application be provided for.

The Application is premised on the grounds that the Defendants/Applicants case and evidence was that the subject property **Tile No. Ruiru West Block 1/768** is owned by the 3rd Defendant/Applicant **Phylis Njoki Kariuki** . That the Court in its Judgment found for the Defendants/ Applicants and final orders of the Court were to the effect that a Declaration is issued that the Defendants / Applicants are lawful proprietors of the suit property Title **No.Ruiru Kiu Block 1/768 .** That the said Declaration is incorrect and mistaken for reason that the evidence led and the documents produced showed that the suit property in the matter was **Ruiru West Block 1/768,** owned solely by **Phylis Njoki Kariuki** . That failure to indicate **Phylis Njoki Kariuki** as the owner of the suit property is mistake apparent on the face of the record and which can be rectified on review. That the issue raised herein are matters of record which the Defendants/ Applicants Advocate is competent to present and depone on . That the said mistake has prejudiced the 3rd Defendant/ Applicant who is unable to effect the Decree in the matter and procure title documents for the reason that the Decree does not expressly provide that she is the owner of the suit property .

In her Supporting **Phylis Njeri Kariuki** averred that the final orders of the Court were to the effect that a Declaration is issued that the Defendants/ Applicants are lawful proprietors of the suit property **Title No. Ruiru/Kiu Block 1/768,** instead of **Ruiru West Block 1/768**. That the mistake in the description by omission of the word **West** and instead thereby use of the word **KIU** is purely inadvertent and does not affect of findings of the Court in the matter. That the Court has the jurisdictional competence to correct errors and mistakes apparent on the face of the record and which appear in a final Judgment. Further that the mistake apparent on the face of the record has frustrated and prejudiced the giving effect to the said final decree in the matter and she is unable to procure title documents from the lands office in Ruiru, despite several follow ups and it is only fair that the orders sought are granted.

The Application is opposed and the Plaintiffs/ Respondents filed a Replying Affidavit sworn by **Francis Maina** on **9th April, 2021** and **filed on 25th May, 2021**.He averred that it is clearly indicated in the Judgment and in his pleadings that he brought a suit against the Defendants / Applicants for suit property Number **Ruiru West Block 1/768** . That it is clear from the Defendants/

Applicants pleadings and more particularly their Counter Claim that they sought Judgment against him and his Co Plaintiff for a different property being **Ruiru Kiu Block 1/768** and **Ruiru Kiu Block 2/4546**. That him and his Co Plaintiff have never owned **Ruiru Kiu Block 1/768,** which is a completely different property in terms of description and location as was pleaded by the Applicants . That **L.R Ruiru Kiu Block 2/4546,** though belonging to him was never an issue before Court though the Court ordered for cancellation of the said Title. That the Applicants having pleaded for **L.R Ruiru Kiu Block 1/768** and asking for cancellation of its title, cannot be heard to say that the property is **L.R Ruiru West Block 1/768,** which title he holds as parties are bound by their pleadings . That was evident from the pleadings and the Judgment, there is no mistake apparent on the face of the Judgment record nor **Decree** that is capable of being cured by the Application. Further that it is clear in law and principles that the evidence that is led by a party to a suit of their witnesses against the pleaded issue do not in any way help the party providing such evidence and it is immaterial what evidence the Applicants led if it wasn't in tandem with pleadings.

That the Application is an abuse of the Court process and they have filed an Appel against the Courts Judgment and Decree. That the issues raised in the instant Application are issues appealed from before the Court of Appeal. That the Appeal has progressed way too far and submissions have been tendered and closed and scheduled to be highlighted. That there being an Appeal and the issue sought to be reviewed being not an error on the face of record as it goes to the root of the pleadings and evidence tendered by the Applicant, the Application should be dismissed.

The Application was canvassed with by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the Application, affidavits and the annextures thereto and the provisions of law and finds that the issue for determination is ***whether the Defendants/ Applicants are entitled to the orders sought***.

The Defendants/ Applicants have sought for the review of the Courts Judgment and subsequent Decree issued on the **12th September 2019** to the effect that the suit property is **Title No. Ruiru West Block 1/768** and not **Ruiru Kiu Block 1/768,** instead thereof indicate that the same is owned by the 3rd Defendant **Phylis Njoki Kariuki .** The crux of the matter is that the Plaintiffs/ Respondents had filed a suit against the Defendants/ Respondents seeking amongst other orders a permanent injunction.

The Defendants/Respondents would thereafter file a Counter Claim. After adducing evidence, the Court delivered its Judgment allowing the Defendant's/ Applicants Counter Claim and a Decree was issued to that effect. In delivering its Judgment the Court allowed the Counter Claim in its entirety. However, it turns out that in seeking their prayers in the Counter Claim, the Defendants/ Applicants had sought to be registered as owners of L**.R Ruiru Kiu Block 1/768** Instead of L**.R Ruiru West Block 1/768,** which words **KIU** and **WEST** were replaced and the said property belongs to a different person. Further in their prayers the Defendants/ Applicants had in their prayers sought for a Declaration that the Defendants/ Applicants to be registered as the owners instead of the 3rd Defendant/ Applicant and they have thus been unable to effect the orders as framed and hence they are seeking for a review.

The powers of the Court to amend judgments, decrees or orders Clerical or arithmetical mistakes is to be found under the provisions of **Section 99 and 100 of the Civil Procedure Act** which provides that ;

99. Amendment of judgments, decrees or orders Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

100.The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

It is thus not in doubt that the provisions of **Section 100 of the Civil Procedure Act** grants the Court powers to amend any defect or error in any proceedings in a suit for the purposes of determining the real question or issue raised by or depending on the proceeding.

Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules provides as follows:-

Section 80. Review

"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."

[Order 45, rule 1.] Application for review of decree or order.

"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.

(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"

The Court of Appeal had the following to say in an application for review in the case of **National Bank of Kenya Ltd ….Vs…Ndungu Njau**.

***"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."**

Further in the case of **Muyodi …Vs… Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

" In Nyamogo & Nyamogo -vs- 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 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."*(emphasis mine)***

In **the case of Chandrakhant Joshibhai Patel …Vs…R [2004] TLR, 218 it** had been held that an error stated to be apparent on the face of the record:

"....must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

The Plaintiffs/Applicants in opposing the Application have contended that they had already filed an Appeal in the instant matter and that the Appeal has already progressed to submissions stage in the Court of Appeal. The Court has seen the annextures by the Plaintiffs/ Applicants and indeed it is true that there were directions that were granted by the Court of Appeal that parties filed written submissions and a Mention on 26th May 2021 had been given. It is not in doubt as per the Memorandum of Appeal filed by the Plaintiffs/ Applicants that the issues sought to be reviewed by the Defendants/

Applicants are issues that are part of the Appeal filed by the Plaintiff/ Applicant . The Court having perused the Memorandum of Appeal and there being no evidence to the contrary, it is thus clear that the Review seeks for the determination of issue that are before the Court of Appeal. These issues stem from the pleadings filed by the Defendants/ Applicants and not necessarily clerical error by the Court .

While this Court would have been in a position to make a determination on whether sufficient reasons had been given for it to exercise its discretion and review the Judgment, it is unfortunate that at this juncture, the Court is not in a position to do the same as the matter is before the Court of Appeal and this Court has no jurisdiction to entertain issues that are before the Court of Appeal. See Order 45 (2) of the Civil Procedure Rules which provides;

(***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.***

Reviewing the Judgment at this juncture after an appeal has been filed on the same issues that the Applicants sought to be reviewed will have the effect of altering the Judgment and affecting the issues before the Court of Appeal, which would be prejudicial to the Appeal. This Court states so as it takes notice that the Review Proceedings were filed more than a year after the Judgment was delivered. Though this would not be an issue if the Court was to determine the Review, considering the circumstances, the effect is that the issues are already before an Appellate Court and that the same has progressed far too long. This Court finds and holds that though it is not the Defendants/ Applicants who have filed the Appeal, the Court is unable to grant the orders sought as the issues are before the Court of Appeal and the same issues ought to be raised before the said Court Consequently, the Court finds the Application dated 23rd February 2021, is not merited and the same is dismissed entirely with costs to the Plaintiffs/Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy