Kenya Wildlife Service v Kioko (Suing as legal representative of the Estate of Brian Musyoki Mwanzia-Deceased) (Civil Appeal E035 of 2021) [2023] KEHC 250 (KLR) (25 January 2023) (Ruling)

Neutral citation: [2023] KEHC 250 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E035 OF 2021

LM NJUGUNA, J

JANUARY 25, 2023

BETWEEN

KENYA WILDLIFE SERVICE ..... APPELLANT

AND

MWOMBUA JOHN KIOKO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF BRIAN MUSYOKI MWANZIA-DECEASED) ..... RESPONDENT

RULING

1. The matter for determination before the court is the application dated October 04, 2022 wherein the applicant sought for orders that:

    i. Spent.

    ii. Spent.

    iii. The honourable court be pleased to review its judgment dated September 21, 2022 on such terms as it may deem fit and proper in the interests of justice.

2. The application is premised on the grounds on its face and it's supported by the affidavit of the applicant.

3. The application has been brought under sections 3, 3A, 80 and order 45 rules 1 and 2 of the *Civil Procedure Act* cap 21 Laws of Kenya.

4. It is premised on the fact that this court did not consider the applicant's submissions specifically at the second page which addressed the issues in the appeal, apart from the question of jurisdiction. That the court at paragraph 18 of its judgment delivered on September 21, 2022 intimated that the applicant did not address the issue of common law yet the applicant had submitted on it extensively at pages 2 and 3 of his submissions dated July 14, 2022 and filed on even date. Further that, the applicant has

filed a withdrawal of the notice of appeal to the Court of Appeal, and in the end, he prayed that the application herein be allowed.

5. The respondent opposed the application via a replying affidavit sworn on October 18, 2022 and wherein it was deposed that the issues raised by the applicant herein can only be addressed in an appeal given that this court is *functus officio*. That the applicant is misleading the court that he has since withdrawn his notice of appeal to the Court of Appeal which is not true. As such, this application is bad in law as the law does not permit a litigant to petition the court for review of a judgment or order while at the same time pursuing an appeal. It was prayed that the application be dismissed for want of merit.

6. The court gave directions that the application be canvassed by way of written submissions and wherein only the respondent complied with the directions.

7. The respondent submitted that the main issue for determination is whether the applicant has met the threshold required for review. It was submitted that the allegations by the applicant that this court failed to consider his submissions is not a ground for review. Reliance was placed on the cases of *Ken-Knit Ltd v Ezekiel Ombasa Ombui* (2015) eKLR and *Benard Kiiru Mwangi v Faulu MicroFinance Bank Ltd* (2021) eKLR. In the end, the court was urged to dismiss the application for being destitute of any merit.

8. I have considered the application and the submissions by the respondent and it is my view that the main issue for determination is whether this court can review its judgment delivered on September 21, 2022.

9. The remedy of review is provided for under order 45 (1) of the Civil Procedure Rules and section 80 of the *Civil Procedure Act*.

   Order 45 (1) provides;

   "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 sufficient reason desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.

10. An error within the meaning of section 80 and order 45 of the *Civil Procedure Act* was defined in the case of *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, by the Court of Appeal as thus:-

> "A review may be granted wherever 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".

11. As indicated above, a review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed; the underlying object

of this provision is neither to enable the court to write a second judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

12. Where an applicant in an application for review seeks to rely on the ground that there is discovery of new and important evidence, one has to strictly prove the same. In the case of *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another* (2018) eKLR the Court of Appeal stated as follows:

> " We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

13. In the same breadth, the Court of Appeal in the case of *Rose Kaiza v Angelo Mpanju Kaiza* (2009) eKLR held that not every new fact will qualify for interference of the judgment. In this case, the applicant states that this court delivered a judgement on September 21, 2022 and the court did not consider his submissions specifically at the second page which addressed the issues in the appeal apart from the question of jurisdiction. That the honourable court at paragraph 18 of the judgment intimated that the applicant did not address the issue of common law which the applicant had submitted on extensively at pages 2 and 3 of his submissions dated July 14, 2022. That he was aggrieved by the said judgment.

14. As I have already stated in this ruling, the statutory grounds upon which orders for review can be obtained are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in 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 order was made. Thirdly, that there is sufficient reason to occasion the review.

15. It is trite that other statutory grounds, may also be added in instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury:[See *Serengeti Road Services v CRBD Bank Limited* [2011] 2 EA 395]. Also to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: [See Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited (*supra*)]. However, given that a review application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, 'sufficient reason' ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline.

16. In the case of *Chandrakhant Joshibhai Patel v R* [2004] TLR, 218 the court 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."

17. In the case herein, the applicant submits that the judgment by the court did not take cognizance of the fact that he had extensively submitted on the issue of common law and in that regard, I seek refuge

in the decision by the supreme court of Uganda in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC 1, on what constitutes an error apparent on the face of the record, it stated as follows;

> " it is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law."

18. This court has perused the second page of the applicant's submissions dated July 14, 2022, which he alleges were not considered by this honourable court in its judgment delivered on September 21, 2022. It is indeed true that he submitted on the issue of common law and his right to seek declaratory orders and quoted several authorities *inter alia* that of *Jadiel Muriithi Njeru vs KWS* [2020] eKLR, *Kenya Power and Lighting Company Ltd vs Quentin Wambua Mutisya t/a Bondeni Wholesalers* (2018) eKLR and that of *Stallion Insurance Company Ltd vs Daniel K Nthuku* (1997). Of importance to note is that all those authorities touches on the jurisdiction of the court to grant declaratory orders.

19. Further, I have revisited the pleadings that the applicant filed before the trial court and in particular the plaint dated February 18, 2016 and the reliefs sought therein. The main relief was a declaratory order as follows;

    a. A declaration that the defendant is enjoined to compensate the plaintiff kshs 5,000,000/= as provided for under section 25 of the *Wildlife Conservation and Management Act* 2013.

20. The trial court granted this remedy although not in verbatim but which, this court found was done in error for the reasons that I gave in my judgment which the applicant herein is now seeking to review.

21. Before I conclude, I wish to point out that the application is also bad in law and improperly before the court, in that, the notice of withdrawal of the appeal which is annexed to the supporting affidavit is not filed which means the appeal preferred against the judgment of this court is still pending. It is trite that the applicant cannot petition the court for review when there is a pending appeal against the same judgment.

22. Though in principle this court partly concurs with the submissions made by the applicant as I have set out in paragraph 18 above, in my very humble view, the applicant in so submitting, missed the point as his submissions did not address the issues at hand i.e. the question of common law. Indeed, it is trite that the trial court had jurisdiction to grant declaratory orders but not in the way the applicant sought them in the plaint. As I have explained in my judgment, the applicant did not deserve compensation under section 25 of the *Wildlife Conservation and Management Act* 2013 but under the common law. It is for this reason that this court stated that the applicant did not address the principles that the court should take into account when awarding damages under the common law yet that was the gist of the appeal that gave rise to the judgement which is the subject matter of this application for review. I still reiterate that the applicant did not address the court on that aspect.

23. In the end, I find that the application has no merits and I hereby dismiss the same with costs to the respondent.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25H DAY OF JANUARY, 2023.

L NJUGUNA

JUDGE

.....for the appellant

.....for the respondent