West Kenya Sugar Co. Ltd v Alividza & another (Suing as Joint Administrators of the Estate of David Mukhwana) (Civil Appeal E019 of 2021) [2023] KEHC 420 (KLR) (20 January 2023) (Ruling)

Neutral citation: [2023] KEHC 420 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E019 OF 2021

DK KEMEI, J

JANUARY 20, 2023

BETWEEN

WEST KENYA SUGAR CO. LTD ..... APPELLANT

AND

ROSELYNE MASIBO ALIVIDZA ..... 1ST RESPONDENT

CATHERINE NEUNUNA NDIMU ..... 2ND RESPONDENT

SUING AS JOINT ADMINISTRATORS OF THE ESTATE OF DAVID MUKHWANA

RULING

1. The Respondents/Applicants filed an application dated June 28, 2022 seeking the following reliefs:

   (i). Spent

   (ii). Spent

   (iii). Spent

   (iv). That this court be pleased to review, vary and/or set aside the judgement delivered on May 18, 2022 and grant leave to the Respondents/Applicants to file their written submissions on the appeal and/or participate in the Appeal herein.

   (iv). That costs be provided for.

2. The application is supported by the grounds set out on the face of the application plus the affidavit of Claire Wanyama, the Applicants Advocate sworn on even date. The Respondents/Applicants' gravamen is inter alia; that the court delivered judgment on May 18, 2022 in the absence of the Applicants; that the Applicants were never involved in the processes including admission of the appeal

and taking directions therein; that the appeal proceeded without the Applicants being accorded their constitutional rights to be heard; that the Applicants were never served with any notices and/or the Appellant's submissions to enable them respond in opposition to the appeal; that the appeal proceeded on a misapprehension by the court that the Applicants were not opposed to the appeal; that the court ordered for interest from the date of the appeal and not from the date of judgment in the subordinate court; that there is an error apparent on the record; that the application has been brought promptly and in utmost good faith.

3. The Appellant/Respondent opposed the application and filed grounds of opposition dated July 28, 2022 wherein it raised several issues *inter alia*; that the application is full of falsehoods and misrepresentation of facts; that the application has not met the threshold for grant of the orders sought; that there is no discovery of new and important matter or error apparent on the face of the record, to warrant the orders sought; that no proceedings were conducted in absence of the Applicants as they were duly served through their Advocates using the e-mail address belonging to their Advocates and that there are affidavits of service to that effect; that the judgment of the court encompassed all the issues on the record of appeal and the lower court in arriving at its determination.

4. The application was canvassed by way of written submissions. Both parties have duly filed and exchanged submissions.

5. Vide submissions dated November 18, 2022, the Applicants raised five issues for determination namely;

   (i) Whether the application is properly defended.

   (ii) Whether the instant application is merited.

   (iii) Whether the application was made without undue delay.

   (iv) Whether the Applicants were denied their right to be heard.

   (v) Whether the Applicants were served with notices to participate in the proceedings.

6. On whether the application is properly defended, it was submitted that the same is not challenged on the facts deponed to since the Appellant did not file a replying affidavit and that grounds of opposition are deemed general averments and cannot amount to a proper or valid denial of allegations made on oath. Reliance was placed on the cases in *Faustina Njeri Njoka v Kimunye Tea Factory Ltd* [2022] eKLR, *Daniel Kibet Mutai and 9 others v Attorney General* [2019] eKLR.

7. On whether the application is merited, it was submitted that the applicants were not involved in the process of admission of appeal to directions on the disposal. It was submitted that the application has been brought under section 80, 1A, 1B and 3A of the *Civil Procedure Act*. Order 45 Rule 1 and 2 of the *Civil Procedure Rules*, Articles 50 and 159 (2) (d) of the *Constitution of Kenya 2010* and that in view of the error apparent on the record, the review should be granted.

   On whether the application was made without undue delay, it was submitted, that there was no delay at all since the same was made on June 28, 2022 while the judgment was delivered on May 18, 2022.

8. On the issue of the Applicants being denied a chance to be heard, it was submitted that the Applicants' rights under Articles 25 (c), 159(i)(a) of the *constitution* were violated and that the failure to hear a party is an error which goes to the root of the matter and is fatal.

   On the final issue of notices, it was submitted that the Appellant has not filed an affidavit deposing to the alleged service of notices upon the Applicants' Advocate and further that the e-mail address allegedly used was erroneous and does not belong to the Applicants' Advocates. Applicants learned

counsel finally submitted that the application should be allowed as prayed in view of the error apparent on the face of record.

9. Vide submissions dated September 23, 2022, the Appellant/Respondent submitted that there were no proceedings which were conducted without the involvement of the Applicants since they were duly notified through their Advocate's e-mail address- wanyamacsadvocates@gmail.com. Two issues were raised for determination namely:

    (i). Whether the judgment delivered on May 18, 2022 should be reviewed, varied and/or set aside.

    (ii) whether the application dated June 28, 2022 is merited.

10. As regards the first issue, it was submitted that vide Order 45 Rule 1 of the *Civil Procedure Rules*, there is no discovery of new and important matter or an error apparent on the face of the record to warrant the orders being sought. It was also submitted that the process of admission of appeal and direction is purely administrative in nature by the Deputy Registrar and the court in line with Order 42 Rule 11 and 13(4) of the *Civil Procedure Rules*. It was also submitted that the Applicants' Advocate was duly served through their e-mail address i.e wanyamacsadvocates@gmail.comand that there are affidavits of service filed on the court file and that the Applicants upon being served with the record of appeal way back in 2021 had been aware of the existence of this appeal but opted to sit back despite being served. It was contended that the failure by the Applicants to attend court amounts to flagrant and culpable inactivity in the matter herein.

11. As regards the second issued, it was submitted that the application has not met the threshold for grant of an order of review and that the judgment of the court encompassed all the issues and that the court considered not only the submissions filed but the court record and the subordinate's court record. The court was urged to dismiss the application with costs.

12. I have considered the application and the submissions herein. The applicant's application is pegged on the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rule 1 and 2 of the *Civil Procedure Rules* regarding their request for an order of review of the judgement entered on the May 18, 2022. It is useful to examine the said provisions which guide the court in exercising its discretionary power of review of its orders. Section 80 of the *Civil Procedure Act* provides as follows: -

    80. 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 think fit.

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

    45 Rule 1 (i). 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 defence, 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

13. The thrust of the Applicants' application is that they were not involved in the proceedings leading to the judgement delivered on the May 18, 2022. The applicants contend that they were never served with notices either by the appellant or the court and they have indicated that the purported e-mail address used by the Appellant to communicate with them is unknown to them. They have indicated that their e-mail address is wanyamacsadvocates@gmail.com and not the one used by the Appellant namely wanyaadvocates@gmail.com. It is the view of the Applicants that as a result of lack of service, they were condemned unheard and that their rights enshrined under the construction have been infringed. According to the applicants, the lack of service has led to a situation where this court proceeded on an erroneous assumption that they had participated in the proceedings. The applicants have now maintained that due to the aforesaid state of affairs, there is a mistake or error apparent on the record which warrants a review of the judgement delivered on May 18, 2022. They now want the said judgement reviewed and or set aside based on that ground. Even though the Applicants also raised the issue of the court's failure to award interest on the amount awarded from the date of the trial court's judgement, I will not delve into the same since it was based on discretion of the court and the applicants have not challenged the court's discretion. Hence, the Applicants application solely relies on the issue of mistake or error apparent on the face of the record.

14. It is trite 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 and that the error must be self-evident and should not require an elaborated 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 since misconstruing a statute or other provision of law cannot be a ground for review. (see *National Bank of Kenya Ltd v Ndungu Njau* [1996] Eklr 381).

    In *Nyamogo & Nyamogo v Kogo* [2001] EA 170 the court held;

> "An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness interest 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 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."

15. Gleaning through the Applicants' application and the rival submissions boils down to two issues necessary for determination namely:

    (i). whether the Applicants were served with the requisite notices by the court or the Appellant.

    (ii) what orders may the court grant.

16. As regards the first issue, it transpired that the Appellant used the e-mail wanyaadvocates@gmail.com while communicating with the Respondents. The Respondents maintain that their email address is wanyamacsadvocates@gmail.com. I have perused the affidavits of service filed by the Appellant

regarding the mention notices as well as a few e-mails filed by the Appellant and note that there are three e-mails filed by the Appellant and note that there are three (3) e-mail addresses used namely wanyaadvocates@gmail.com, wanyamaadvocates@gmail.com and wanyamacsadvocates@gmail.com. A perusal of the latest mention notice dated April 1, 2022 clearly captured the address of the Respondent Applicants as wanyamacsadvocates@gmail.com. Even though the Respondents maintain that they did not receive any mails, i am satisfied that if the mails were dispatched to the aforesaid e-mail addresses, the same ought to have landed with the Respondent's counsel via the correct e-mail address. For instance, the appellants e-mail of March 24, 2022 at 10.00 a.m. and April 7, 2022 at 11.24 a.m. were dispatched to wanyamaadvocates@gmail.com and wanyamacsadvocates@gmail.com. It is unlikely that the Respondents' counsel would have missed to receive even one of the mention notices from the Appellant's counsel. That being the position, I find that the Applicants claim that there is a mistake or error apparent on the record for having been locked out of the appeal proceedings is not convincing. I am satisfied that the applicants had been made aware of the matter of the appeal and hence I find that there is no mistake or error apparent on the record. Further, the Applicants' claim that the courts failure to award interest from the date of the trial court's judgment amounted to an error apparent on the record to be misplaced since the issue of costs and interest are always granted at the court's discretion. If the Applicants are aggrieved about the same, then the proper recourse lay in an appeal and not a review.

17. It is also noted that most civil appeals are disposed of via written submissions and that the appellate court can still proceed to come up with a judgement even if submissions are not filed since the court usually relies on the record of appeal and the original record of the subordinate court to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion. Hence, even if the Respondents submissions were not filed, the court was not harm strung in its deliberation of the matter before it. The Applicants claim that they, were condemned unheard are exaggerated. Suffice here to add that the Applicants in their application are seeking leave in order to file their written submissions yet they have not even annexed a draft copy thereof for perusal and consideration by the court. The filing of written submissions after the judgment has been entered is similar to a presentation of a draft defence by a party seeking to set aside an exparte judgment. It behoves on the Applicants to annex a copy of their draft written submissions as a sign that they really wanted the same considered by the court but they did not do so. The judgement delivered on May 18, 2022 was a re-evaluation and analysis of the lower court record and that the court was not harm strung by the absence of submissions from the Respondents in any way. Iam not convinced that the applicants have met the threshold for an order for review of the judgement delivered on May 18, 2022. The applicants have also contended that the appellant has not filed a replying affidavit and that the grounds of opposition haven't answered the averments in the supporting affidavit. However, the evidence on whether the applicants were served with notices is available on the court file and the record and thus the court is not barred from perusing them in order to get the clear picture now that the applicants have claimed that there is a mistake or error apparent on the record.

18. Finally, the applicants have sought to have the judgement delivered on the May 18, 2022 set aside on the basis of the alleged mistake or error apparent on the face of the record. The court's power to set aside judgements is always exercised with a view of doing justice between the parties. In the case of *Patel v EA Handling Services Ltd* [1974] EA 75 it was held that the discretion of the court should be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but not to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the cause of justice. The applicants herein having been notified via e-mail as observed above, appear to be all out to see to it that the judgement is set aside yet they failed to attend court. I find the conduct

of the applicants as one intent at delaying the matter and hence their request for the setting aside the judgement must be declined.

19. In view of the foregoing observations it is my finding that the Respondents application dated June 28, 2022 lacks merit. The same is dismissed with costs to the Appellant.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JANUARY, 2023.

D. KEMEI

JUDGE

In the presence of

No appearance for Wanyama for Respondents/Applicants

Miss Were for Onyinkwa for Appellant/Respondent

Kizito Court Assistant