



Ambwere & 2 others v Ambwere & another (Miscellaneous Succession Cause E18 of 2021) [2023] KEHC 27029 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS SUCCESSION CAUSE E18 OF 2021
PJO OTIENO, J
DECEMBER 18, 2023**

BETWEEN

**MRS FERIDA KANG'EREHA AMBWERE 1ST APPLICANT
MILLY RAVOGA KANGAYA 2ND APPLICANT
JOSEPH ARADI AMBWERE 3RD APPLICANT**

AND

**EBBY INGARDO AMBWERE 1ST RESPONDENT
EBRAHIM O. AMBWERE 2ND RESPONDENT**

RULING

1. Before this court is the applicants notice of motion application dated 31/7/2023 brought pursuant to section 80 of the [Civil Procedure Act](#) and orders 45 rules, 1,2 and 3 and order 51 of the [Civil Procedure Rules](#) seeking for orders that this court sets aside, varies and/or reviews the ruling made on 24/3/2023 dismissing their application dated 15/11/2021 and that costs be provided for.
2. The application is supported by the affidavit of Ferida Kang'ereha Ambwere sworn on 31/7/2023 in which she avers that the court erred at paragraphs 15 and 16 of its ruling in noting that no medical report had been availed as to the medical status of the 2nd respondent yet they had produced a medical report dated 9th December, 2021 from Dr. Feroz Allibhoy indicating that the 2nd respondent was suffering from Mild Cognitive impairment. She further claims that the court failed to make a determination on the other prayers she had sought which include maintenance and repair of her house.
3. The application is opposed by the 2nd respondent in his affidavit sworn on 9/8/2023 in which he contends that the application is bad in law and improper for the reason that the applicants have preferred an appeal against the ruling they are seeking a review on and a person cannot exercise the right of appeal and review at the same time. He further argues that an erroneous conclusion of law or



evidence is not a ground for review but may be a ground for appeal. His averments are reiterated by the 1st respondent in her replying affidavit sworn on 8/9/2023.

4. The 1st applicant filed a supplementary affidavit while the 2nd respondent filed a further affidavit the contents of which appear to echo the substance of the supporting affidavit to the application for review and the response thereto.
5. Parties have filed their respective submissions which are as below;

Applicant's Submissions

6. They identify two issues for determination with the first being whether an application for review filed after lodging a notice of appeal is competent to which they submit that indeed they filed for a notice of appeal dated 6th April, 2023 but took no further steps to prosecute the appeal as they opted to review of the decision of the court. They argue that the mere filing of a notice of appeal without filing the substantive appeal does not divest one of the right to file an application for review and in that regard they cite the case of *Rosemary Wanjiru Njiraini v Office in Charge of Station Molo Police Station & another* (2019) eKLR.
7. The second issue is whether on the substance, the application for review ought to be permitted to which they submit that the court failed to take into account the medical report dated 9/12/2021. They argue that where a court fails to address its mind to a legal requirement, that may constitute a ground for review as opposed to where the court addresses its mind to the same and makes a decision thereon. In this regard, they place reliance on the case of *Mohamed Dagane Falir v Alfonse Mutuku Muli & another* (2020) eKLR. They further contend that the court made an error in failing to take into account the medical report.

1st Respondent's Submissions

8. They identify three issues for determination by this court with the first being whether the applicant has met the required threshold under which it has been filed to which they submit that the applicants having lodged a notice of appeal with the court of appeal, this court cannot hear and determine an application for review and appeal at the same time be it concurrently or one after the other.
9. The second issue is whether the matter at hand is res judicata to which they submit that this court has handled this matter in the form of numerous application dated 30/11/2021, 02/08/2021 and 31/07/2023.
10. The third issue is whether the applicants have established a case for the grant of review orders being sought to which they submit that the remedy of review is not concerned with the merits of the case but the decision making process and cite the case of *R v Kenya National Examination Council Ex Parte Gatbenji & others*, Civil Appeal No. 266 of 1996. They contend that the medical report referred to by the applicants was on record before the ruling of this court and that there is no new evidence that warrants the prayers for review to be granted by this court.

2nd Respondent's Submissions

11. It is their submission that order 40 rule 1(a) of the *Civil Procedure Rules* only allows for review of a decree or order from which an appeal is allowed but from which no appeal has been preferred. They argue that according to section 2(2) of the *Court of Appeal Rules* an appeal includes an intended appeal and in making that proposition they cite the case of *Equity Bank Limited v West Link Mbo Ltd* (2013)



eKLR. They maintain that the applicants having elected the avenue for appeal cannot in law revert back to pursue the direct review process as of right.

12. They contend that in contesting that the ruling of this court only addressed the mental health of the 2nd respondent and not the other prayers sought, the applicants are challenging the manner the honorable judge reasoned, appreciated and applied the law to the facts of the case.
13. It is their assertion that the present application appears to rely on the very evidence that was presented before court before the subject ruling and that the subject application was filed on 31/7/2023 yet the ruling was delivered on 24/3/2023 and the applicants have not explained the inordinate delay.

Issues, Analysis and Determination

14. I have looked at the application dated the 31st July 2023, the responses thereto and the submissions by the parties. Even though terms like setting aside and variation of court orders are used, the invocation of section 80 and Order 45 of the Civil Procedure Act, leaves no doubt that what is sought is review of the decision of Musyoka J rendered on the 24.3.2023.
15. When to issue orders of review is now well defined and tritely set. An applicant seeking review of court orders must bring himself within the requirement that the order sought to be reviewed attracts no appeal or that it attracts an appeal but there has been no appeal so preferred. In addition the applicant must demonstrate that a mistake or error apparent on the face of the record; or a discovery of a new and important matter of evidence that was in existence at the time the order was made but could not be availed even after application of due diligence, or any other sufficient reason.
16. By its ruling delivered on 24/3/2023, the court dismissed an application dated 15/11/2021 in which the applicants moved the court for orders that the 2nd respondent be adjudged to lack the mental capacity to administer his properties; that his properties, be handed over to proposed managers; and lastly that, he the mentally infirm, provides the 1st applicant with a monthly sum of Kshs. 10,000,000/- for her upkeep, medication and repair of her homestead. In coming to its determination, the court observed and observed:-

(QUOTE PARA 14 AND 15 of the ruling of 24.3.2023)

17. It is that decision that has provoked the current application for review which is explicitly founded on the allegations that the court failed to consider the medical report on record, that the finding by the court was erroneous and wrongly applied the provisions of article 57 of the *constitution* and for failure to make a determination on all the prayers of the petition.
18. As said before, the application was resisted by the Notice of Preliminary objection and Grounds of opposition both dated 19th September 2023 as well as Replying Affidavits sworn and filed by the respondents and a further Affidavit by the 2nd Respondent.
19. The starting point is the question raised in the preliminary objection and the Replying Affidavits by the two respondents sworn on the 9.8.2023 and 8.9.2023 respectively. It is founded upon the restriction placed on the remedy of review once an appeal is preferred. In determining whether a notice of appeal is an appeal and whether a notice of appeal defeats an application for review, I resonate with the Court of Appeal decision in the case *Noradhco Kenya Limited vs Gloria Michele* Civil Appeal No. NAI 258 of 1997, (1998) eKLR, where it was held;

“... the remedy of review is open only when the applicant having a right of appeal has not already preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is: Can the lodging of the



notice of appeal be tantamount to preferring an appeal itself? The filing of a notice of appeal in my humble view cannot deprive a party of his right under O.44 r. 1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.”

20. This position was reiterated by the same Court in *Haryanto vs. ED & F. Man (Sugar) Ltd* Civil Appeal No. 122 of 1992 where the court said that for an appeal to be deemed to have been preferred for the purpose of review, there must be an appeal instituted in compliance with rule 81(1) of the [*Court of appeal Rules*](#).
21. Being bound by such unequivocal pronouncements, it is the finding of the court that a substantive appeal is deemed filed on the filing of a memorandum of appeal and not the notice of appeal. A notice of appeal is a mere intention to appeal and for purposes of applications for stay, it is the grounding of jurisdiction on the court of appeal to consider an application for stay even before the appeal itself is filed.
22. On the merits, the application is premised on the ground of there being an error apparent on the face of the record. What constitutes an error apparent on the face of the record by explained by the Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 where it observed 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. The court the asserted the law to be: -

“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.”

23. The above cited decision followed a long line of others to the effect that erroneous interpretation or exposition of the law is never a good a ground for reveal but may be a good reason for an appeal. One only need to to cite [*National Bank of Kenya Ltd vs Ndugu Njau*](#) [1997] eKLR, in which the Court of Appeal said:-

“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”.

(Emphasis provided)

24. That being the undoubted position of the law, the question for the court then becomes whether there is a mistake or an error apparent on the face of the record when one reads the ruling by Musyoka J that is so self-evident and requiring no elaborate explanation.



25. The ruling is centered on the mental state of the 2nd respondent and his ability to have a recollection of events and make sound decisions. The gist of the ruling reproduced above was to the effect that there was investigation by a judge on the cognitive abilities of the 1st respondent which revealed that he was mentally firm, that such finding invited no need for a medical report and that no medical report was tendered to rebut that position yet it was the onus of the applicants to prove their assertions.
26. To this court, the judge expressed his understanding of the provisions of the statute he quoted and discussed in the ruling. It was his exposition and understanding what the provisions meant as applied to the facts before him. A party feeling aggrieved on the basis that the medical report dated 9th December, 2021 was not considered or ignored challenges the judge's exposition of the law and his remedy is in appeal and not review.
27. In any event, the court has now read that very report and notes that it says in clear terms that the 2nd respondent's thought process was clear and judgment was intact save for a mild cognitive impairment. Had this court been the one dealing with the application at the time, it would have still disallowed the application because the report did not adjudge the 2nd respondent to suffer mental disorder, or mental sub normality with mental disorder to be subjected to the application of *Mental Health Act*.
28. The court thus finds that even if it took the detour of abrogating to itself the duty to rehear the application for purposes of giving the due regard to the medical report, the evidence on record would still fall short of the required proof and the application would still fail. It is thus the holding by the court that the current application fails to meet the threshold for review. The same is thus dismissed.
29. Before penning off, it is important to point out that the registration of the petition as a miscellaneous succession cause was in grave error. It ought to have been just registered as a substantive petition under the *mental health act*.
30. In addition, the court take the view that the approach given in this matter was equally erroneous. While *mental health Act* was fronted as the foundation, the disclosed clear goal was to maintenance of the 1st applicant by the 2nd respondent. One also gets the impression that the 1st Applicant seek, without being explicit, the division of property viewed to have been acquired during her marriage with the 2nd respondent and before marriage between the two respondents. With proper counsel, such ought to have been pursued in a more direct and by appropriate procedures
31. Accordingly, for the reasons set out above, I find that the applicant's application dated 31/7/2023 is devoid of merit and the same is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF DECEMBER, 2023



PATRICK J O OTIENO

JUDGE

