Muathe & 52 others v Kenya Pipeline Company Limited & 2 others (Environment & Land Petition 15 of 2019) [2023] KEELC 17620 (KLR) (17 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17620 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT & LAND PETITION 15 OF 2019

TW MURIGI, J

MAY 17, 2023

BETWEEN

RUFUS MULATYA MUATHE & 52 OTHERS .... PETITIONER

AND

KENYA PIPELINE COMPANY LIMITED .... 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 2ND RESPONDENT

WATER RESOURCES AUTHORITY .... 3RD RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 8th June, 2022 brought under Articles 48, 50 and 159 of the *Constitution*, Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* in which the 1st Respondent/Applicant seeks the following orders: -

    i. Spent.

    ii. That pending the inter partes hearing and final determination of this application there be stay of implementation of directions issued by Honourable Mr. Justice Mbogo C.G. on 3rd of March, 2020.

    iii. That this Honourable Court be pleased to review and or set aside the ex parte orders issued by Honourable Mr. Justice Mbogo C.G. as against the Respondents.

    iv. That this Honourable Court be pleased to grant access to the 1st Respondent to decommission the oil spill area site.

    v. That this Honourable Court be pleased to make any other order it deems fit and just in the circumstances.

vi. That costs of this application be in the cause.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Elizabeth Rop sworn on 8th June, 2022.

The Applicant's Case

3. The deponent averred that on or about 12/05/2015, the 1st Respondent was informed of the oil spillage along Thange River in Makueni County. That the 1st Respondent reacted immediately and repaired the damaged part of the pipeline in accordance with its safety policies and other accepted standards worldwide. The deponent contended that ever since the spillage was sealed, there has been no additional oil leakage at KM 256 along Thange River.

4. The deponent further averred that following the oil spill, the 1st Respondent informed the relevant Government agencies including the 2nd Respondent. That the 1st Respondent has taken restorative and remedial measures on the ground towards alleviating the damage of the oil spillage and has also requested the authorization of the 2nd Respondent to decommission the site after the clean-up process.

5. The deponent further averred that on 03/03/2020, the Petitioners appeared before Hon. Justice Mbogo wherein the Court issued ex parte orders. That vide the letter dated 07/03/2022, the 2nd Respondent gave authorization to the 1st Respondent to decommission the site and as a consequence, the 1st Respondent sent its experts to the oil spill area to decommission the site but were denied access by the Petitioners.

6. It was averred that the delay in filing the present application was because the 1st Respondent had to get approval from the 2nd Respondent so as to decommission the site.

7. The deponent averred that it is imperative to set aside the orders issued on 03/03/2020 since it will not affect the Petitioners' case because experts had been engaged to clean up the oil spill. It was further averred that the Petitioners had not exhibited proof of ownership of land within the area of the oil spill so as to deny the 1st Respondent access to enable it to decommission the site.

8. Again, it was averred that from the 1st Respondent's investigations, it found that most of the Petitioners do not reside within the oil spill area. Finally, it was averred that, it will be in the interest of justice to allow the application since not all the Petitioners were affected by the oil spill.

The Respondent's Case

9. In opposing the application, the Respondents vide the Replying affidavit sworn by Rufus Mulatya on his behalf and that of his Co-Petitioners on 20th September, 2022 averred that the 1st Respondent failed to attend Court despite having been duly served with the hearing notice. That the 1st Respondent was served with the Court order on 12/03/2020 but still chose not to act on the same.

10. He averred that the 1st Respondent had not approached the Petitioners with the view to undergo medical examination, that of their livestock and the affected area by independent health and soil experts. He maintained that the 1st Respondent ought to comply with the Court order before being allowed to decommission the site.

11. He argued that the Petitioners will be highly prejudiced if decommissioning of the site is done without their health, the health of their livestock and the soil being tested by medical experts.

12. Again, it was averred that a report by Dr. Kowino had recommended that the 1st Respondent does medical tests on the Petitioners but the said activity is yet to be carried out.

13. He further averred that the Petitioners are the owners and beneficial owners of the affected land and have their homes in the said area. He contended that the 1st Respondent had removed all its machines and security personnel from the Petitioners' land more than a year ago.

14. He further averred that the soil in some few trenches on the ground is contaminated with petroleum products while the air within the affected region of the oil spill still reeks of petroleum products. He urged the Court to visit the site before any orders are issued in this Petition.

15. The Respondents contended that the filing of the instant application is an abuse of the Court process and amounts to a waste of judicial time and urged the Court to dismiss it with costs to the Petitioners.

16. The 2nd and 3rd Respondents did not file their responses to the application.

17. The application was canvassed by way of written submissions.

The Applicant's Submissions

18. The Applicant filed its submissions on 17th November, 2022. On its behalf, Counsel submitted that there is discovery of new evidence that warrants the review of the Court Order dated 3rd March, 2020.

19. That the new evidence was that the 1st Respondent had been allowed to decommission the site by the 2nd Respondent meaning that all the regulatory requirements on clean-up had been completed but access has been hampered by the Petitioners. Counsel contended that the issuance of the orders sought will not affect the Petitioners' case because experts had been engaged to clean up the oil spill.

20. On the issue of whether there is an error apparent on the face of the record, Counsel submitted that Order No C in the ruling was granted in error due to misrepresentation by the Petitioner as the same would be in vain and tantamount to an abuse of the Court process.

21. Counsel for the Applicant argued that soil and medical testing is supposed to be done by the Petitioners' own independent experts in accordance with the provisions of Section 109 of the *Evidence Act* which provides that the burden of proof of any particular fact lies on the person who wishes the court to believe in its existence. Counsel submitted that the 1st Respondent had already conducted respective soil and medical tests and submitted the said reports to the Petitioners as requested.

22. Counsel contended that Article 50 of the *Constitution* guarantees the right to a fair hearing for every citizen and that the same should be extended to the Applicant for reason that the orders were issued ex parte and due to the discovery of new evidence which affects the petition.

23. Lastly, it was submitted that Section 3A of the *Civil Procedure Act* in addition to Articles 50 (1) and 159 of the *Constitution* empower this Court to make such orders as may be necessary for the ends of justice.

24. To buttress his submissions, Counsel relied on the case of *Sylvester Nthenge v Johnstone Kiamba Kiswili* (2021)eKLR.

The Petitioners' Submissions

25. The Petitioners' submissions were filed on 26th January, 2023. On their behalf, Counsel submitted that decommissioning of a site does not amount to discovery of a new and important matter that was not within the Applicant's knowledge after due diligence. Counsel argued that the Court order dated 03/03/2020 was not issued in error or by a mistake apparent on the face of the record. That the Applicant was aware of the of the hearing of the Petitioners' application as it was served with the Court order but chose to ignore the same completely.

26. Counsel contended that the Applicant is under an obligation to ensure that all the Petitioners are in good health in the same way as the environment. Counsel submitted that the Applicant has not bothered to offer an explanation for disregarding the Court order which was served upon itself on 12/03/2020. Counsel contended that there had been an unreasonable and unexplained delay of two years before the application herein was filed.

27. Finally, Counsel submitted that the Petitioners will be highly prejudiced as the Applicant is yet to comply with the impugned Court order. It was argued that the application is not merited as it does not meet the threshold for the grant of review or setting aside. Counsel relied on the following authorities to buttress his submissions:-

    1. *Hosea Nyandika Mosagwe & 2 Others v County Govenment Nyamira*(2022) eKLR.

    2. *Ruth Kwachimoi & Another v Charlse Nalika Cheloti & Another* (2021) eKLR.

Analysis And Determination

28. Having considered the pleadings, the application and the rival submissions, the only issue that arises for determination is whether the order issued on 3rd March, 2020 should be reviewed.

29. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the *Civil Procedure Rules*.

30. Section 80 of the *Civil Procedure Act* provides as follows;

    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.

31. Order 45 Rule 1 of the *Civil Procedure Rules* provides that: -

    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 the judgment to the court which passed the decree or made the order without unreasonable delay.

32. The provisions of Order 45 were restated by the Court of Appeal in the case of *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited* (2014) eKLR where the Court held that: -

> " In the High Court both the *Civil Procedure Act* in section 80 and the *Civil Procedure Rules* in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review."

33. Similarly, in *Republic v Public Procurement Administrative Review Board & 2 Others* (2018) eKLR the Court held that: -

> " Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review."

34. It is apparent from the above provisions that in an application for review, an Applicant must satisfy the following requirements;

    a. Discovery of new and important matter or evidence which after the exercise of due diligence was not with the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.

    b. Existence of some mistake or error apparent on the face of the record.

    c. Any other sufficient reason.

    d. Application be made without unreasonable delay.

35. The Applicant is seeking to have the order issued on 3rd March, 2020 reviewed. The orders were issued pursuant to the application dated 02/12/2019 as follows:-

    1. That the Respondent, its agents and/or representatives to stop further digging of trenches and trespassing on the Petitioners land pending hearing and determination of the application and main suit.

    2. That the Respondent do produce and serve the Petitioners all reports, results, recommendations, review studies, briefs and any other relevant information in their custody relating to Thange oil spill.

    3. That soil and medical testing and examination of all Petitioners, their households, their livestock and their land in the affected area be carried out by independent health and soil experts and prepare reports to be relied upon as the basis for compensation, their livestock, households and land and the cost be borne by the 1st Respondent under "polluter pay principle".

    4. That cost of this application be borne by the 1st Respondent.

36. The Applicant averred that the orders were issued ex parte. The Respondent on the other hand averred that a hearing notice was served upon the Applicant who chose not to attend Court. In this regard, the Respondent annexed a hearing notice to the replying affidavit Exhibit marked "RM1" which shows that the 1st Respondent was indeed served with a hearing notice on 06/12/2019. There was no appearance on the part of the 1st Respondent.

37. When the Court order was issued, it was indeed served upon the 1st Respondent on 12/03/2020 as the Exhibit marked "RM2" confirms. The Applicant's contention that the Order issued on 03/03/2020

albeit being actually dated 03/02/2020 was issued ex parte is patently false. A cursory glance at the Exhibit marked "ER3" confirms the date of the Order.

38. On the issue of whether there has been a discovery of new and important matter or evidence which was not within the knowledge or accessibility of the Applicant after the exercise of due diligence, the Court of Appeal in the case of *Rose Kaiza v Angelo Mpanju Kaiza* [2009] eKLR aptly observed as follows: -

> " An application for review under Order 44 R 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is
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> ".........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......."
>
> The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by *Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726*, thus:
>
> > " "Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

39. Similarly, in *D. J. Lowe & Company Limited v Banque Indosuez* [1998] eKLR, the Court of Appeal held as follows: -

> " Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."

40. The Applicant relied on the 2nd Respondent's letter dated 22/02/2018 approving the 1st Respondent's decommission plan Exhibit marked "ER1". The said letter was received by the 1st Respondent on 27/01/2018.

41. The Applicant had about two years to present the said approval letter in evidence before the Court issued the order dated 03/02/2020.

42. The 2nd Respondent's letter was at all times within the custody of the Applicant. The Applicant has not shown that there is discovery of new or important matter of evidence that the Applicant could not have placed before the Court during the hearing of the application.

43. The Applicant must establish that there is an error apparent on the face of the record. In the case of *Nyamogo & Nyamogo Advocates v Kogo* (2001) I EA 173 the Court of Appeal held as follows;

> “ 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 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 is certainly no ground for review though it may be one for appeal.”

44. Similarly, in the case of *Timber Manufacturers and Dealers v Nairobi Golf Hotels (K)* HCCC No. 5220 0f 1992, Emukule J held that;

> “ For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

45. The Applicant contends that there is an error apparent on the face of the record to review the ruling of this Court. The basis of this argument is that Order No C of the application was granted in error due to misrepresentation by the Petitioners. The Applicant contended the order is tantamount to abuse of the Court process.

46. The grounds laid by the Applicant do not disclose an error apparent on the face of the record but in my view the grounds for an Appeal. In the case of *Abasi Belinda v Fredrick Kangwanu and Another* (1963) EA 557 Bennet J aptly held as follows;

> “ A point which may be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal.”

47. In the present application the Applicant has not pin pointed the errors that are apparent on the face of the record.

48. The Court is also mandated to consider if there are sufficient reasons to review the Court’s order dated 03/02/2020. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of *The Official Receiver and Liquidator v Freight Forwarders Kenya Ltd* (2000) eKLR stated that;

> “ These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”

49. The Applicant has not demonstrated any sufficient reason to warrant a review of the court’s order.

50. Finally, the Applicant must demonstrate that the application has been made without unreasonable delay.

51. In the present matter, the order sought to be reviewed and set aside was issued on 3rd February, 2020. The instant application was filed on 15th of June, 2022 a little over two years since the impugned Court order was issued. That duration is far from reasonable and the same has not been explained. In the case of *John Agina v Abdulswamad Sharif Alwi* C.A Civil Appeal No. 83 of 1992, the Court stated as follows;

> " An unexplained delay of two years in making an application for review under Order 44 Rule 1 (now Order 45 Rule 1) is not the type of sufficient reason that will earn sympathy of the court."

52. In the end, I find that the application dated 8th June, 2022 is devoid of merit and the same is dismissed with costs to the Petitioners/Respondents.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 17TH DAY OF MAY, 2023.

HON. T. MURIGI

JUDGE

In the presence of

Court assistant - Mr. Kwemboi

Mugun for the 1st Respondent.