Keter v Ecobank Kenya Limited (Civil Case 16 of 2018)
[2022] KEHC 13352 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13352 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 16 OF 2018

EKO OGOLA, J

SEPTEMBER 28, 2022

BETWEEN

DAPHINE EBLINDA KETER ..... PLAINTIFF

AND

ECOBANK KENYA LIMITED ..... DEFENDANT

RULING

1. By Notice of Motion the Defendant/Applicant prays for the following orders:
    1. Spent
    2. THAT the Honourable Court be pleased to review its Ruling and Order delivered on 20th April, 2021.
    3. THAT the Honourable Court be pleased to make an Order allowing the Defendant's Notice of Motion application dated 2nd June, 2020.
    4. THAT the costs of this application abide by the outcome of this application.
2. The application is based on the grounds set out therein and the contents of the affidavit of Sammy Mirungu sworn on 5th May 2022 in support of said application.

Applicant's Case

3. The Applicant filed submissions dated 6th May 2022. The Applicant submitted that the Court should review the Ruling and Order of Honourable Lady Justice H. A. Omondi (J. A.) delivered on 20th April, 2020 in which the Judge dismissed the Defendant's application dated 2nd June, 2020. The applicant quoted the judge's observation at paragraph 21 which stated thus;

21. I certainly have a sense of indignation, that a party gets a loan, fails to pay, halts the recovery under the pretext that there is an appeal filed and pending hearing, then does nothing. However, two facts militate against this Court granting the orders sought:

    a). The applicant has filed the application no. 59 of 2019 before the Court of Appeal. I agree that the applicant cannot have a pending application before the Court of Appeal and at the same time argue this one all of them intended to achieve the same result.

    b). There is a contention that a Notice of Appeal is not an appeal. The Court of Appeal rules allow striking out of a Notice of Appeal at the instance of the aggrieved party where no appeal has been preferred within the time prescribed by the law or within such reasonable and in my opinion that is an issue that the applicant ought to address before the Court of Appeal."

4. The Applicant contended that the Honourable Judge was not aware that the Notice of Appeal had already been struck out by Honourable Justices Ouko, Karanja and Musinga in Court of Appeal at Nairobi Civil Application Number 14 of 2020 (Exhibit SM2) and which application had initially been filed in Eldoret Court of Appeal as Civil Application Number 59 of 2019. The Honourable Judge was also not made aware that the Ruling striking out the Notice of Appeal had indeed been remitted to the Court by the Defendant's Advocates vide a letter dated 1st February, 2021 (Exhibit SM4). At the material time when the Ruling was remitted, this suit was before Honourable Justice Kibunja of Environment & Land Court before he made a Ruling transferring the same to the High Court. The Defendant had already placed before the Court the documents that formed the substratum of the decision of Honourable Judge but she was not aware of the said position. In essence therefore, the Judge made a finding that the Notice of Appeal was still subsisting when indeed it had been struck out.

5. Citing Order 45 of the *Civil Procedure Rules 2010*, the Applicant stated that it is evident that the Ruling by the Appellate Judges striking out the Notice of Appeal could not be availed before the Judge when she rendered her ruling. The Applicant submitted that they had demonstrated sufficient reasons for the Court to review the Order.

Respondent's Case

6. The Respondent filed submissions on 20th May 2022 and a replying affidavit dated 2nd June 2021. The respondent submitted that there are no new issues that have arisen since delivery of the ruling to call for review. The Respondent deposed that even if the Notice of Appeal was truck out, that dismissal notwithstanding, the trial Court is bound by law to commence the whole suit afresh. She contended that all orders and decisions made by the Environment and Land Court prior to this suit are null and void because they were made by a court devoid of jurisdiction.

7. The Respondent's position is that this court correctly addressed itself to the issue of an appeal before the Court of Appeal and what should now follow is that this suit should start denovo as it is now a commercial transaction and no longer an Environment and Land matter. The Respondent submitted that a review will not change the position because the Environment and Land Court was handling issues touching on sale of land that is used as collateral in the case, which land is family land which is what brought her to the court. This court is now handling the commercial aspect of the case and the contention at the moment is over the unpaid loan facility. The Respondent urged the Court to dismiss the application.

8. Upon perusing the pleadings and the submissions, the issue for determination is whether the application can be granted.

9. Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows;

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.

10. It follows that there are three limbs required to be satisfied for the court to review its own decision.

a) Discovery of new and important matter or evidence.

b) Mistake or error apparent on the face of the record.

c) Any other sufficient reason.

11. Further, in *Republic vs Advocates Disciplinary Tribunal ex parte Apollo Mboya*, the following principles were determined to be relevant in applications for review: -

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

12. The order in question in this matter was delivered on 20th April 2021. The ruling therein disallowed the defendants' application dated 2nd June 2020. The Court listed its reasons for dismissing the application inter-a-alia that the applicant had filed an application no. 59 of 2019 before the Court of Appeal which was intended to serve the same purpose as the one that was before the High Court.

13. To satisfy the test under the rules, an applicant must demonstrate discovery of new evidence which he could not procure at the time the application was heard despite exercise of due care and diligence. The Applicant's contention is that the notice of appeal was struck out by the Court of Appeal and the Judge was not aware of this at the time she struck out the Applicant's application. I take note of the fact that the notice of appeal was struck out on 29th January 2021, four months or thereabout before the application dated 2nd June 2020 was dismissed. I have perused the ruling. The Court was under the impression that at the time of the ruling the application to strike out the Notice of Appeal was still pending in the Court of Appeal. I have also perused the letter dated 1st February 2021 where the Applicant wrote to the Deputy Registrar in regard to the ruling of the Court of Appeal. It is clear that the Court was not aware of the striking out of the Notice of Appeal. This begs the question; what amounts to discovery of new and important matters of evidence? Clearly, the applicant made an effort to inform the court of the ruling before the decision was delivered.

14. Keeping in mind that the main reason the application was disallowed is that there was an application seeking to strike out the notice of appeal when in fact there wasn't, it is my view that there existed new and important evidence.

15. The application dated 2nd June 2020 sought a review of the orders issued on 7th September 2018 and varied on 4th December 2018 granting stay of execution by way of barring the sale of Land Reference Numbers 9699/32, 9399/34 and 9399/36 and substitute the same with an order granting leave to the defendant to sell the said properties by auction.

16. The Respondent's argument is that the suit is to begin afresh as it is now a commercial dispute and not an Environment and land court matter and therefore the decisions made by the Environment and Land Court do not stand. Further, that they only touched on the sale of land used as collateral in the case. There is a long line of decisions to the effect that a court cannot purport to transfer an incompetent suit. In the case of *Albert Chaurembo Mumba & 7 Others vs Maurice Munyao & 148 Others* [2019] eKLR the Supreme Court held that a suit filed before a court without jurisdiction could not be transferred to another court. The Court held as follows at paragraph 153:

> "In that context, the purposive reading and interpretation of Article 162 together with Article 165(5) of *the Constitution* leaves no doubt that the original and appellate jurisdiction

over disputes related to Employment and Labour relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie, that meant that, any dispute subject to any other statutory or constitutional limitations emanating from the disputes contemplated under Article 162(2) supra, must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

However, as it was well elucidated in the case of Kagenyi v Musiramo & Another (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law." [emphasis mine]

17. In his ruling delivered on 9th December 2020, Hon. Kibunja transferred the file to the High Court upon the discovery that the dispute before the court was commercial in nature. The question arising therefrom is whether the suit was brought in the first instance to a court that had jurisdiction to try it.

18. The substratum of the suit relates to the legal charges and the subsequent statutory power of sale. The High Court has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the charge. In *Thomas Mutuku Kasue vs Housing Finance Company Ltd (HFC) & Another* [2021] eKLR the court held;

> The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.

19. It is trite that a court cannot confer jurisdiction upon another court by transferring the suit. The Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited vs M. Thiga t/a Newspaper Service* [2019] eKLR held as follows:

> " We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction...These words were echoed by this Court in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR in the following words: -
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> "In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their

consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer."

20. However, this Court is not in this application concerned with the legality of the said transfer. However, the legality of the transfer of the suit to the High Court remains disputed. This issue should be ascertained first before any further proceedings can take place in this matter. I therefore decline to entertain the application before the Court as for now.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 28TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE