



REPUBLIC OF KENYA



KENYA LAW
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**Mountsbay Real Estates Limited v Piroli (Miscellaneous Application
68 of 2021) [2022] KEHC 16034 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 16034 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION 68 OF 2021
SM GITHINJI, J
SEPTEMBER 22, 2022**

BETWEEN

MOUNTSBAY REAL ESTATES LIMITED APPLICANT

AND

MARCO PIROLI RESPONDENT

RULING

1. The applicant herein filed a Notice of Motion application dated June 7, 2022 brought under sections 1A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act, order 45 rule 1 of the Civil Procedure Rules seeking the following orders:
 1. Spent.
 2. That pending the hearing and determination of this application *inter-partes*, there be a stay of execution of order of this court issued on May 25, 2022.
 3. Spent.
 4. That the order of this court issued on May 25, 2022 be reviewed and set aside particularly the orders setting aside the interim award dated August 18, 2021 and staying the proceedings in Nairobi Arbitration between Marco Piroli vs Mounts Bay Estate Limited pending hearing and determination of Malindi ELC no 88/2021.
 5. That the costs of this application be in the cause.
2. The application is supported by the affidavit of Muhuyu Mwaniki sworn on June 7, 2022.
3. He deponed that on May 26, 2022, they were served with the order of this court issued on May 24, 2022. He asserted that the only ground for granting the orders was that there is a pending matter involving the parties herein in Malindi ELC Case no 48/ 2021 which order is an apparent mistake and



error on the face of the record on the basis of the following reasons; firstly, that a pending suit in a court involving same parties is not a ground provided for in section 35(2) of the Arbitration Act, for setting aside an arbitral award. Secondly, an order for stay of arbitration proceedings pending hearing and determination of a suit in ELC or any suit is not a relief provided for under or set out in the Arbitration Act, and lastly that section 10 of the Arbitration Act provides that this court cannot intervene in matters under the Arbitration Act except as otherwise provided by the said Act, hence the orders and grounds given are not for intervention by the court under the Arbitration Act. He asserted that the orders are *ultra vires* the jurisdiction of the court as set out in the Arbitration Act. He further averred that the said ELC Suit no 48/ 2021 forming basis of grant of the impugned orders is a normal suit for preservation orders pending hearing and determination of arbitration proceedings under section 7 of the Arbitration Act and not a substantive suit.

Response

4. The respondent herein filed a Replying Affidavit in response. The affidavit is sworn by Rugeero Sciommeri sworn on June 21, 2022.
5. He deposed that the orders being sought are untenable as they amounts to the court sitting on an appeal on an issue already heard and determined. That the applicant has not met the parameters for the grant of review as there is no error or mistake and the alleged error sought to be reviewed requires an elaborate explanation by the respondent/ applicant.
6. He also deposed that a mis-application of the law or a situation where a court proceeds on an incorrect exposition of the law to reach an erroneous conclusion as alleged by the respondent that the court did in application of section 35 (2) and section 10 of the Arbitration Act is not a ground for review but appeal.
7. It was his assertion that the orders sought in the Plaintiff in Malindi ELC no 48 of 2021 are similar to those sought in the arbitral forum and it was in order for this court to stay proceedings at the arbitration forum between the parties herein pending hearing and determination of Malindi ELC no 48 of 2021. He contended that the order issued by the court in Malindi ELC no 48 of 2021 between the parties herein has not been set aside or reviewed and as such this court was right to stay proceedings at the Arbitral Forum.

Submissions

8. The respondent/ applicant filed submissions on July 13, 2022. Counsel argued that the main and only ground for granting the orders in the ruling delivered on May 24, 2022 was that there is a pending matter involving the parties in Malindi ELC no 48/2021. According to him, the said suit is a normal suit for preservation orders pending hearing and determination of arbitration proceedings under section 7 of the Arbitration Act, and not a substantive suit. Relying on section 35 of the Arbitration Act, counsel submitted that this court in setting aside the arbitral award in the ruling dated May 24, 2022 on the ground that there was a pending case involving the parties, did so on a ground that is not provided by the Act.
9. He also relied on section 10 of the Arbitration Act. It was his submission that failure to observe the Arbitration Act and coming up with a ruling contrary to the said mandatory provisions of the law is a manifestation of *ultra vires* and therefore an apparent mistake and error on the face of the record that should not be allowed to stand. He relied on the cases of Kenya Alliance Insurance Co Ltd v Annabel Muthoki Muteti (2020) eKLR and that of University of Nairobi v Nyoro Construction Company Limited & another (Arbitration Cause E011 of 2021) (2021) KEHC 380 (Commercial and Tax) amongst other authorities which the court has considered.



10. Further, it was submitted that this court did not have the jurisdiction to set aside the Partial Award issued by the court thus *ultra vires* as in the case of *S K Macharia & Another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR. He contended that there is a clear manifest error on the face of the record which does not require an argument as it is evident that the decision of the court was *ultra vires*.
11. The applicant/ respondent on the other hand filed submissions on July 22, 2022.
12. Counsel submitted that the court is *functus officio* the respondent's/ applicant's Notice of Motion dated June 7, 2022 in view of it having exercised its judicial mind and rendering a ruling on the application dated September 14, 2021; and that the court cannot entertain the prayers being sought as it amounts to the court sitting on its own appeal having rendered itself on the issue. He relied on the case of *Telkom Kenya Limited v John Ochanda (suing on his behalf and on behalf of 996 Employees of Telkom Kenya Limited)* (2014) eKLR and that of *Mombasa Bricks & Tiles Ltd & 5 Others v Arvind Shah & 7 Others* (2018) eKLR.
13. On whether there is an error apparent on the face of the record in the ruling delivered on May 24, 2022, counsel relied on the case of *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* in attempting to define what constitutes an error on the face of the record. He submitted that the reasons advanced by the applicant do not constitute an error that is so apparent to stare one in the face.
14. Counsel also submitted that where a court proceeds on an incorrect exposition of the law or where the court misapplies the law or a principle and reaches an erroneous finding is a ground for appeal and not review. That the alleged grounds constituting an error on the face of the record as set out in page 4 (iii) (e-h) in the application are grounds for appeal and not review.

Disposition

15. I have considered the application, the response as well the submissions and authorities by both counsels.
16. What I am being called upon to determine is whether there is an apparent error on the face of the record particularly in the respect of the ruling made on May 24, 2022 based on the provisions of order 45 rule 1. I have carefully analysed the grounds upon which the application dated June 7, 2022 has been brought. The applicant argues that the main and only ground for granting the orders of May 24, 2022 was that there is a pending matter involving the parties herein which the applicant contends goes against the provisions of section 10 and 35(2) of the *Arbitration Act*.
17. The respondent on the other hand suggests that the applicant has not met the parameters granting an order for review since what is alleged to be an error or mistake requires an elaborate explanation by the applicant and in fact a misapplication of the law or a situation where the court proceeds on an incorrect exposition of the law as has been alleged by the applicant by virtue of section 35 (2) and section 10 of the *Arbitration Act*, is not a ground for review but appeal.
18. I am guided by the case of *Republic v Advocates Disciplinary Tribunal xx Parte Apollo Mboya* (2019) eKLR where the court correctly held that the power of review is available only when there is an error apparent on the face of the record which review is confined to; and re appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of appellate jurisdiction which is not permissible.
19. For emphasis, I have looked at grounds of what the applicant alleges to constitute error on the face of the record as set out in the application dated June 7, 2022 and I am of the view that the applicant in



pointing out that there was an erroneous interpretation of law, more so section 35(2) and 10 of the Arbitration Act, according to me is not a ground for review but probably a good ground for appeal.

20. In *Abasi Belinda v Frederick Kangwamu & another* (1963) E A 557, it was held that a point which may be a good ground of appeal may not 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.
21. Simply put, I am not persuaded enough that the applicant has placed sufficient material before me to justify review. The error or omission as has been held in countless authorities must be plain and self-evident so that the court does not have to spend time to locate it. In the same vein, if one relies on any other sufficient reason as the basis for seeking review, the reason must be clear enough to persuade the court to review its decision. In *National Bank of Kenya Limited v Ndungu Njau* (Civil Appeal no 211 of 1996), the Court of Appeal held 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. The error or omission must be self-evident and should not require an elaborate argument to be established.
22. Having said so, I am inclined to dismiss the application dated June 7, 2022. For avoidance of doubt, the applicant did not address me on the prayer for stay of execution and it appears they abandoned that prayer which I am also inclined to dismiss.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 22ND DAY OF SEPTEMBER, 2022.

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S M GITHINJI

JUDGE

In the absence of;-

- 1. Mr Litoo for the respondent/applicant**
- 2. Ms Juaje holding brief for Mr Kilonzo for the applicant/respondent**

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S M GITHINJI

JUDGE

22/9/2022

Mr Litoro;-I seek leave to Appeal.

Court; - 30 days leave is granted.

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S M GITHINJI

JUDGE

22/9/2022

