



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 16 OF 2019

**IN THE MATTER OF: ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS OF THE INDIVIDUAL AS
ENSHRINED UNDER THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: ENFORCEMENT OF ARTICLES 29(C), 27(1), 29(A), 40 & 47 OF THE CONSTITUTION OF KENYA

BETWEEN

1. EUSOPHIA NYAGA KANYIFA

2. IRENE NDUTA NJOMO

**3. LUCY MUSINYA (All Suing on behalf of members of NORTH COAST
BEACH MANAGEMENT COMMITTEE.....PETITIONERS**

VERSUS

1. COUNTY GOVERNMENT OF MOMBASA

2. THE MINISTER OF NATIONAL HERITAGE & CULTURE

3. CABINET SECRETARY FOR TREASURY

4. COMMISSIONER FOR LANDS

5. NATIONAL LANDS COMMISSION.....RESPONDENTS

RULING

Introduction

1. There are two applications coming up for determination in this ruling. I shall set out each application serially beginning with the first one in time.

2. The first application is the Notice of motion dated 17/9/2020 brought under Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B, 3, 3A and Section 63 (e) of the Civil Procedure Act and all other enabling provisions of the law. The application is premised on the grounds set out therein and supported by affidavit sworn on 17/9/2020 by **Jimmy Waliula** who is the 1st Respondent's Ag. County Attorney. The deponent avers that the 1st Respondent being dissatisfied with the Court's judgment, it has deemed it necessary to appeal against the said judgment, and a Notice of Appeal has already been filed.

3. The deponent avers that the other Respondents have begun the execution proceeding, more specifically by filling a party-to-party costs (coming up for hearing on 18/7/2020). A Notice of Taxation and a Notice of Entry of Judgment have been served upon the 1st Respondent. Therefore, if the same proceeds, the Appeal will be rendered nugatory.

4. The deponent further avers that the 1st Respondent stands to suffer substantial and irrecoverable loss if execution proceeds and in the likely event, the Appeal succeeds. Therefore, it is just and fair for the execution proceedings to be stayed pending the hearing and determination of the appeal.

Response

5. In response to the Application for stay, the Petitioner filed Grounds of Opposition dated 5/11/2020 raising the grounds summarized herein as follows:

a. That a draft Memorandum of Appeal has not been annexed together with the Notice of Intended Appeal as set out in Section 86 of Appellant Jurisdiction Act Cap 9 Court of Appeal Rules 2010 to merit the Appeal arguable on which execution should be inferred.

b. That the 1st Respondent/Applicant failed to meet the threshold as envisaged in Order 42 Rule 6(2) of the Civil Procedure Rules 2010.

c. The 1st Respondent being the County Government of Mombasa is capable of giving security where the Appeal fails.

d. That the Application is frivolous and is intended to delay the realization of fruits of Judgment.

6. The Second Application is brought under the provisions of Section 80, 63(e) and 3A of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules and all enabling provisions of the law. The application is premised on the grounds set out therein and supported by the affidavit sworn on 25/9/2020 by 1st Petitioner.

7. The 1st Petitioner avers that vide judgment delivered on 27/7/2020, the Court, under paragraph 31, barred the applicants from the suit property unless the Tourism Regulatory Authority renews their licences. However, at paragraph 32(iii) of the judgment, the Court issued a permanent injunction against the Applicants and the Respondents to the Cross-Petition, restraining them from entering and in any way dealing with the suit property. Therefore, according to the Applicants, there is an error on the face of the judgment as the provisions of paragraph 31 and 32 are in conflict.

8. The 1st Petitioner avers that they are in receipt of a letter dated 28/11/2019 from the Tourism Regulatory Authority requesting the applicants herein to renew their licence to operate their business, and some of the applicants' members have commenced paying for the licences so as too be allowed to operate their businesses. However, the applicants' members cannot commence businesses on the suit property due to the permanent injunction issued in the Court's judgment and any attempt to commence business on the suit property shall constitute contempt of the said judgment.

9. The 1st Petitioner also avers that its application for review should be allowed, for reason that the letter dated 28/11/2019 was not in their possession at the time of issuing the subject judgment, and therefore, it could not be adduced in Court as evidence.

10. In response to the Application for review, the 2nd 3rd & 4th Respondents filed Grounds of Opposition dated 11/11/2020 raising the grounds summarized herein as follows:

a. That the remedies sought by the applicants are unavailable and should not be granted

b. That the ground the Applicant seeks review on has erroneously been quoted.

c. That the Court pronouncement on renewal is well reasoned and is not an error on the face of the Judgment

d. That the ratio decidendi and the Obiter dicta in the Court's Judgment are not contradictory.

e. That the decision of the Court on issuance of a permanent injunction the Cross-Petition is not an error apparent of the Judgment and cannot be faulted as an error apparent of Judgment.

11. The 1st Respondent vide Replying Affidavit sworn on 11/12/2020, by **Asha Abdi**, who is the 1st Respondent's Chief Officer Tourism opposed the Application for review by the Petitioners and stated that in the Fourth Schedule, part 2 and more specifically Sections 4 (i) and 7 vests the powers to manage beaches and any trade practices carried out at the beach upon the 1st Respondent. Therefore, it has the mandate to ensure trade practices at the beach are supervised and it is the only authority to issue such licences.

12. The deponent avers that the Court erred in concluding that the Tourism Regulatory Authority licence was the only licence required in Order for the Petitioners to operate on the suit property. This is because, it is the 1st Respondent that approves the setting up of temporary or permanent structures on the suit property, and it is a punishable offence under the Physical Planning Act to build structures without the 1st Respondent's approval.

13. The deponent also avers that the issue of the Petitioners not having valid licences from the Tourism Regulatory Authority was only raised because of the issue of *locus standi* and not that it was the only requirement for the Petitioners to be allowed on the suit property. Furthermore, the suit property is a public beach gazette conservation area and as per the Fourth schedule, under part two, public beaches

form part of the functions of the 1st Respondent. Therefore, the State Government and the 1st Respondent jointly ought to be allowed to formulate requirement on readmission of the Petitioners back to the suit property.

14. The 1st Respondent states that since pendency of this Petition, a lot has changed on the suit property. The 1st Respondent with the blessing of the National Government and for the benefit of the traders and general public has taken steps to regenerate the Jomo Kenyatta Beach. Therefore, currently allowing the Petitioners access to the said suit property shall delay the project, which has already been advertised by the 1st Respondent, and public funds have already been invested and utilized toward regeneration of the suit property.

15. The deponent avers that the letter dated 28/11/2019 from the Tourism Regulatory Authority has no basis in this Application since the Petitioners did not have *locus standi*, and at the time, the aforementioned letter was written, the regeneration project had not been advertised.

Submissions

16. Parties filed and exchanged submissions together with relevant authorities, which I have considered.

Application for Stay

17. The issues I raise for determination are as follows:

i. Whether the Applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending Appeal.

ii. What Orders this Court should make

18. **Order 42 Rule 6 of the Civil Procedure Rules, 2010** lays down the conditions that must be satisfied for this Court to Order stay of execution. The Rule provides: -

“No Order for stay of execution shall be made under sub Rule (1) unless—

(a) the Court is satisfied that substantial loss may result to the applicant unless the Order is made and that the application has been made without unreasonable delay; and

(b) such security as the Court Orders for the due performance of such decree or Order as may ultimately be binding on him has been given by the applicant.”

19. An Applicant is supposed to prove that substantial loss may result unless the order is made; that the application has been brought without unreasonable delay; and such security as may be ordered by the Court.

20. **Dr. Khaminwa** Learned Counsel for the Petitioners/ Respondents submitted that a draft Memorandum of Appeal had not been annexed together with the Notice of intended appeal as set out in Section 86 of Appellant Jurisdiction Act Cap 9 and Court of Appeal Rules 2010.

21. There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the conditions in Order 42 Rule 6, the Court exercises discretion to Order a stay. In the exercise of the discretion, the Court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits. This was so held by the Court of Appeal in the case of **Butt v Rent Restriction Tribunal [1982] KLR 417**. It was stated that discretion must be exercised in a manner that would not prevent an appeal. The purpose of a stay of execution maybe stated to be a measure to prevent the subject matter so that the right of appeal can be exercised without any prejudice to the Applicant, since the Appeal would be rendered nugatory if stay is not ordered. All that an Applicant needs do is to invoke the discretionary powers of the Court.

22. As to what substantial loss is, it was observed in **James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR**, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

23. The 1st Respondent is apprehensive that the Respondents/Petitioners will commence execution of the judgment/decree, and Kshs. 25,000,000/= of public funds shall be lost should the intended appeal succeed, since recovery of funds will be a daunting task and the intended appeal would be rendered nugatory.

24. The sum of Kshs. 25,000,000/= is a substantial amount. The Petitioners/Respondents have not demonstrated their ability to refund the decretal amount in case the intended appeal is successful. Therefore, it would be in the interest of justice for the Order of stay sought to be granted on the basis that the 1st Respondent/Applicant herein has demonstrated that it will suffer substantial loss if the same is not granted.

25. With regard to security for costs, in *Kenya Commercial Bank Ltd v Sun City Properties Ltd & 50 Others* the Court stated: -

“...In an application for stay, there are always two competing interests that must be considered. These are that a successful litigant should not be denied the fruits of his judgment and that an unsuccessful litigant exercising his undoubted right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced. In a bid to balance the two competing interests, the Courts usually make an Order for suitable security for due performance of the decree as the parties wait for outcome of the appeal...”

26. From the above decisions, it is clear that the issue of security is discretionary and it is upon the Court to determine the same, depending on the circumstances of the case. It is my view that a conditional stay should be granted, and that the entire decretal sum shall be deposited in Court to secure the stay.

27. In the upshot, I find that the application meets the threshold for the grant of stay of execution. I therefore Order as follows: -

1) There be stay of execution pending the hearing and determination of the appeal on condition that:

a. The Applicant /1st Respondent shall deposit the decretal sum in Court within 21 days from today.

b. Costs in the cause.

Application for Review

28. I have considered the application, the grounds in support in the motion, the supporting affidavits, as well as the replying affidavit. I have also considered submissions by counsel for the Applicant and the Respondents. The application was stated to have been brought under Section 80 of the Civil Procedure Act, Cap 21 as read together with Order 45 of the Civil Procedure Rules.

29. Section 80 provides-

“Any person who considers 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 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”

30. On the other hand, Order 45 (1) provides as follows: -

“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”.

31. It is noteworthy that Constitutional petitions are *sui generis* proceedings. They invite special jurisdictions which are neither Civil nor criminal: see *Commissioner of Lands v Kunste Hotels Limited [1995-98] 1 EA* and *Sanghani Investments Limited v Officer In-charge of Nairobi Remand And Allocation Prison [2007] 1 EA 354*.

32. Nevertheless, neither the Constitution nor the Mutunga Rules, have any specific provisions for an application for review of Orders or decrees in Constitutional Petitions. However, In *Wananchi Group Limited v Communications Commission of Kenya & Others [2013] eKLR*, the Court citing with approval the case of *Anders Bruel T/A Queen Cross Aviation v Kenya Civil Aviation Authority & Another [2013] eKLR*, held that even in the absence of express statutory powers of review the Court may when sufficient reason is shown review its decision.

33. I would adopt approach taken in the aforesaid authorities, and hold that for the Petitioners/Applicants herein to succeed and have an order reviewed in Constitutional Petitions, they must demonstrate sufficient reason.

34. The statutory grounds are that, first, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in 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 Order was made. Thirdly, that there is sufficient reason to occasion the review.

35. The reasons advanced for the review sought herein, have been recapitulated elsewhere, para (7), (8) & (9), in this ruling. The 2nd, 3rd, and 4th Respondents in opposition submitted that the pronouncement on renewal of the applicant’s licences is well reasoned, and is therefore

not an error on the face of the judgment. Therefore, the permanent injunction against the applicants cannot be faulted since the Cross-petition was never challenged. On the part of the 1st Respondent, it was submitted that a valid Tourism Regulatory Authority licence cannot be the only condition that the Petitioners need to fulfil to be allowed to enter and operate business at the suit property, since the Petitioners are required to obtain a licence of the 1st Respondent also.

Is there an error on the face of the record?

36. The legal principle to be followed when a Court is faced with an application for review under Order 45 of the Civil Procedure Rules on the basis of “an error apparent on the face of the record” was well captured by the Court of Appeal in *Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*. The Court then spoke of an error apparent on the face of the record thus:

“In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said 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. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

37. Is there an error apparent on the face of the record? Did the Court err by issuing a permanent injunction against the Applicants and the Respondents to the Cross-Petition, restraining them from entering and in any way dealing with the suit property?

38. A Review is impermissible without a glaring omission, evident mistake, or worrying error. The power of **review** is available only when there is an **error apparent** on the **face** of the **record**. Therefore, re-appraisal of the entire evidence or how this Court applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.

39. From the foregoing, I find that the permanent injunction issued against the Petitioner/Applicants was as a result of the failure by the Petitioner to controvert the Cross-petition filed by the Attorney General and if the Petitioners are dissatisfied with the said finding, they ought to exercise their right of appeal. The upshot is that there is no evidence or information presented to this Court to warrant a review of the orders made. The application dated 25/9/2020 is therefore dismissed with no orders as to costs.

DATED, SIGNED, AND DELIVERED AT MOMBASA THIS 23RD DAY MARCH, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Tajbhai for 1st Respondent

Ms. Rukia for 2nd, 3rd and 4th Respondents

Ms. Peris Court Assistant