REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 7 OF 2020

REV PATRICK LIHANDA ....1ST APPELLANT

NEBERT MUDAKI..2ND APPELLANT

JOTHAM AMUKOYE ....3RD APPELLANT

EZEKIEL ALUSIOLA ....4TH APPELLANT

PENTECOSTAL ASSEMBLIES OF GOD (K) ....5TH APPELLANT

VERSUS

GEDION KIVISI ....1ST RESPONDENT

SAMUEL OUMA ....2ND RESPONDENT

EDWARD MAVISI...3RD RESPONDENT

JULIUS ESHIBANE ....4TH RESPONDENT

RULING

1. The application I am called upon to determine is dated 24th March 2020. It seeks stay of execution of the orders of 4th February 2020 in Kakamega CMCCC No. 100 of 2019, an order of injunction against the respondents to bar them from evicting the appellants from houses owned by the 5th appellant or interfering with the their discharge of official duties attached to their offices within the 5th appellant, an order of injunction to restrain the respondents from taking over the appellants offices within the 5th appellant or purporting to discharge the functions of the aforesaid offices, review and setting aside of the orders made on 13th March 2020, stay of proceedings in this matter save for the present application and further proceedings in Kakamega HC Constitutional Petition No. 6 of 2018 and all other suits directed to be consolidated with the said petition for purposes of determination of the disputes involving the 5th appellant, an order that this matter, Kakamega HC Constitutional Petition No. 6 of 2018 and all other suits involving the 5th appellant be transferred to the Principal Judge of the High Court Nairobi for purposes of consolidation with Nairobi HCC Petition No. 116 of 2020 and for further purpose of seeking the directions of the Honourable Chief Justice to set up a 5 judge bench to hear and determine the disputes consolidated.

2. The application is opposed by the respondents through grounds of opposition dated 24th April 2020.

3. Due the Covid-19 pandemic, the application proceeded by way of submissions.

4. The appellants submitted that there was urgent need for the court to issue an injunction as the respondents were out to execute and their abnormal conduct was putting the appellants' rights at risk. They further submitted that the application was not *res judicata* as it was not the same as the one determined on the 13th March 2020. They urged court to allow the application and review its ruling, stating that the same is not subject to any appeal and that the ruling had serious implications on the appellants right to fair trial as stipulated by Article 50 of the Constitution as the presiding Judge, through the said ruling had made known his perception of the 1st appellant. They also submitted on the need of a 5 bench judge to determine the suit as it had intricate issues for determination

5. The respondents, on their part, challenged the merits of the application. It was their submission that the same is *res judicata* as the issues raised in it had been determined by the court in the ruling of 13th March 2020. They submitted that the application had no merit as the prayers sought could not be granted. They relied on the decisions in *Republic vs. President & 5 others and Omutata vs Ag* eKLR.

6. The main issue for determination is whether the appellants have furnished the court with sufficient reasons to warrant grant of the orders sought in the application. It is clear that the appellants seek two main substantive orders, of injunction and review.

7. The prayers for injunctions are worded in such a way as to suggest that the appellants were seeking injunctive relief pending the hearing and determination of the application. The prayers are not for injunction pending hearing and determination of the appeal. The application was filed under certificate of urgency. It was placed me on 20th April 2020, due to the directions that the Chief Justice had given for conduct of matter during the period the courts had scaled down during Covid-19 pandemic, I directed that the application proceeds by way of written submissions. No interim orders were given. It, therefore, goes without saying that the prayers 1, 2, 3, 4 and 5 are now spent, since they sought orders pending hearing of the application, and the application has since been canvassed.

8. With respect to review, it will be noted that the ruling of the 13th March 2020, emanates from an application by the appellants in which they had sought orders of stay of execution of the orders that had been made on the 4th February 2020 in Kakamega CMCCC No. 100 of 2019. In the ruling of 13th March 2020, I declined to grant stay of execution on the basis that the appellants had failed to demonstrate the substantial loss they stood to suffer had the orders sought not been granted.

9. The concern by the appellants is that the court in the impugned ruling had directed that the appeal dated 7th February 2020 be heard together with Kakamega HC Constitutional Petition No. 6 of 2018. Directions had already been given in Kakamega HC Constitutional Petition No. 6 of 2018, and the same was listed for hearing on 23rd March 2020, before this court. The appellants raise issue with an aspect of the ruling, which allegedly described the 1st appellant as a serial contemnor lacking the right of audience, and argue that that was the reason why that application for stay failed. The appellants submit that they are apprehensive that the applications in the Kakamega HC Constitutional Petition No. 6 of 2018 are likely to fail, and thus they are not guaranteed of justice.

10. The grounds upon which an order of court may be reviewed is set out in Order 45 of the Civil Procedure Rules 2010, in the following terms:

> "*(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 way 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, 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."*

11. Section 80 of the Civil Procedure Act, Cap 21, Laws of Kenya, provides that:

> "*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."*

12. Going by the above provisions, a court reviews its orders if the following grounds exist: -

> a) discovery of a new and important matter which, after the exercise of due diligence, was not within the knowledge of the appellant at the time the decree was passed or the order was made; or
>
> b) mistake or error apparent on the face of the record; or
>
> c) other sufficient reasons; and
>
> d) the application is made without undue delay.

13. The Court of Appeal, in *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR, stated, that:

> "*The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay."*

14. The main issue for determination in this ruling is whether the appellants have established any of the above grounds to warrant an order of review.

15. What amounts to an error on the face of the record was described by the Court of Appeal in *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, as follows:

"…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 isindeed applicable in the matter before us."

16. The same court in *Anthony Gachara Ayub vs. Francis Mahinda Thinwa* [2014] eKLR**,** added:

"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 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."

17. Then there is *Peter Keen Kiboi vs. Terence Naibei Lubusi* [2020] eKLR**,** where the Court of Appeal stated:

"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. It will not be 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 proceeds on an incorrect expansion of the law".

18. In the instant application, the appellants have not alluded to any error on the face of the record, or at least sought to bring the matter within the parameters of error on the face of the record as described by the Court of Appeal in the two decisions that I have recited above. It is my finding, therefore, that this ground has not been satisfied.

19. The appellants have also not raised the ground that they discovered any new information or evidence that was not at their disposal at the time the ruling of 13th March 2020 was being delivered.

20. That then leaves us with the general ground, other sufficient reason. The court in *Nasibwa Wakenya Moses vs. University of Nairobi & Another* [2019] eKLR, the court observed, concerning this ground, that:

"An application for review may be allowed on any other "sufficient reason." The phrase 'sufficient reason' within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in Sadar Mohamed vs Charan Singh and Another [13] where the court held that: -

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

29. Mulla in the Code of Civil Procedure [14] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

30. Perhaps it is worth citing Evan Bwire vs Andrew Nginda [15] where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh."

21. Similarly, the Court of Appeal in *Assets Recovery Agency vs. Charity Wangui Gethi & 3 Others* [2020] eKLR, said, that:

"The ground "other sufficient reason" has been held to be consonant with the first two grounds: See Kuria v Shah [1990] KLR 316."

22. In the present application, the appellants have not demonstrated that any other sufficient ground exists to warrant the orders for review being granted. In their application and submissions, the appellants, rather than identifying any mistake in the record or demonstrate discovery of any new matter of evidence or any other sufficient reason for review analogous to the other two, seem to be content with the findings in the impugned ruling. What they address in their filings have nothing to do with a review application, but rather they express their dissatisfaction with the ruling, and then go ahead to make a future assumption on how the other applications before this court, consolidated in Kakamega HC Petition No. 6 of 2018, will be determined.

23. The appellants, in their application, are challenging the application of the law by the court and the decision of the court, and, therefore, their case does not meet the test for review, the arguments they raise ought to have been raised by way of appeal against the impugned orders and findings in the ruling of 13th March 2020. It is my conclusion, therefore, that the appellants have utterly failed to demonstrate that the

impugned orders and findings in the ruling of 13th March 2020 are available for review on grounds of error on the face of the record, or discovery of new evidence, or on any other sufficient reasons.

24. With regard to the issues raised by the respondents, that the application is *res judicata*, or *sub judice*, or both, it should be noted that the instant application is not similar to one for stay of execution, the subject of the impugned ruling, owing to the nature of the orders sought and the prayers made.

25. The appellants also seek that this court transfers this matter to the Principal Judge of the High Court, for the purpose of it, and Kakamega HC Constitutional Petition No. 6 of 2018 and others, being consolidated with Nairobi HC Petition No. 116 of 2020, and the consolidated suits being thereafter referred to the Chief Justice, so that the same, and the others, can be heard and determined by a multi-judge bench, to be appointed by the Chief Justice, as all these matters raise substantial issues of law.

26. Kakamega HC Constitutional Petition No. 6 of 2018, which pends before this court, is a consolidated cause, where other suits, filed both within Kakamega and elsewhere, between the same parties and relating to the same or allied issues, have been brought together. The suits consolidated include Kakamega HC Petition No. 8 of 2018 (formerly Nairobi HC Petition No. 364 of 2018), Kisii HC Petition No. 16 of 2018 and Kisumu CMCCC No. 421 of 2018. If the appellants desire that the consolidated causes be transferred to the High Court at Nairobi for further consolidation with Nairobi HC Petition No. 116 of 2020, then what they should do is to seek the transfer and consolidation orders in Nairobi HC Petition No. 116 of 2020, and not in the instant cause. Matters have already been transferred from other courts to this court for consolidation, and that has been done. I do not think it would be a proper thing, for this court, to again order transfer of the same matters to the High Court at Nairobi for consolidation with another matter there.

27. In an upshot, it is my conclusion that the application herein has no merit. The same is for dismissal, and I hereby dismiss the same with costs.

DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 29TH DAY OF MAY, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE