REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL. APPLICATION NO. 615 OF 2019

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY,

MINISTRY OF INTERNAL SECURITY & ANOTHER.....RESPONDENT

AND

SCHON NOORANI &

JACK & JILL SUPERMARKET LIMITED.....*EX PARTE* APPLICANT

RULING

Introduction

1. On **17th** October 2019, Muriithi J allowed the *ex parte* applicant's application dated **10th** June 2019 and found that the Solicitor General and the Principle Secretary, Ministry of Interior are in contempt of court for failing to satisfy the judgment debt of **Ksh. 821,529.58** in favour of the *ex parte* applicants. The court ordered the Respondents to pay the said sum within **30** days in default, they serve **30** days imprisonment for contempt.

2. The record and the judgment shows that the Respondents were represented by Anita Nyakora, a Litigation Counsel on behalf of the Honourable Attorney General. She filed grounds of opposition dated **5th** August 2019 and made submissions during the hearing. Aggrieved by the judgment, the Respondents lodged a Notice of Appeal dated **31st** October 2019. The first Respondent now seeks to vary, review or set aside the same judgment the subject of the intended appeal.

The instant application

3. Vide the Notice of Motion dated **25th** November 2019, Eng. Dr. Karannja Kibich, the Principal Secretary, Ministry of Internal Security, the first Respondent herein, seeks the following orders:-

a. Spent.

b. Spent.

c. Spent.

*d. **That** this honourable court be pleased to vary, review or set aside its judgment and orders issued on the 22nd October 2019.*

*e. **That** the costs of this application be provided for.*

4. The application is premised on the grounds listed on the face of the application and the annexed supporting Affidavit of Eng. Dr. Karanja Kibicho. Essentially, he states that he was condemned unheard contrary to the principles of natural justice. He also states that the orders were made without jurisdiction and in violation of his rights under Articles **25 (c)** and **50 (1) (2)** of the Constitution.

5. He also states that to the extent that the court applied English common law principles it was bound to strictly abide by the procedure provided for under the English law, which it did not, hence, the proceedings are a nullity. The applicant also states that the order the applicant is said to have violated varies with the one stated in the judgment. Further, he states that the order was never served upon him, and that there is no prove of service of the order. He states that it is unconstitutional for anyone to be committed to civil jail for a public debt. Additionally, he states that the order was made in error, hence it is bad in law.

6. The applicant also states that the sentence is illegal since it is not prescribed by the law, and that he does not owe any money to the *ex parte* applicant. Further, he states that the claim for interest is statute barred, and, that that the *ex parte* applicant did not exhibit authority to sue on behalf of the company. Lastly, the applicant states that the national Government introduced severe fiscal austerity monetary measures

occasioning reduced allocation of funds to satisfy court decrees and development expenditures.

The *ex parte* applicant's Replying Affidavit

7. In opposition to the application, the *ex parte* applicant filed the Replying Affidavit dated **2nd** December 2019 sworn by Schon Ahmed Noorani describing the application as an abuse of court process. He deposed that the applicant seeks to review and at the same time appeal against the ruling since he has filed a Notice of Appeal dated 31st October 2019.

8. Mr. Noorani deposed that an application for review may only be made in specific instances listed in Order **45** of the Civil Procedure Rules, 2010 and that the applicant's grounds do not fall in the categories contemplated under the said rule. Further, he deposed that the applicant is challenging both the judges' exercise of discretion and findings, hence, he is inviting this court to sit as an appellate court against its own decision.

9. Additionally, Mr. Noorani deposed that the Principal Secretary was duly informed of the Contempt proceedings and that he was represented in court by the Office of the Attorney General. He also deposed that the Principal Secretary is obliged to comply with the court orders and he has no right of audience to this court unless he purges the contempt. Lastly, he deposed that the application is aimed at delaying and frustrating the *ex parte* applicant from enjoying the fruits of his judgment dated **28th** June 2011.

Applicant's Advocates' submissions

10. **Mr. Munene Wanjohi,** the applicant's counsel invoked this court's jurisdiction *ex debito justiciae* and argued that the applicant was condemned unheard in breach of natural justice. He submitted that the impugned orders were issued without jurisdiction and that the proceedings were undertaken in contravention of the applicant's right to a fair trial under Articles **25 (c)** and **50 (1) (2)** of the Constitution. He faulted the court for failing to adhere to the English Common law principles and added that the applicant was never served with the court orders. He also argued that it is unconstitutional to commit a person to civil jail for a public debt.

11. Mr. Munene argued the applicant was not afforded an opportunity to be heard nor was he served with the orders. He faulted the court for holding that government officers need not be served with applications for contempt and that service upon the Hon. Attorney General suffices arguing that such a finding is discriminatory and unconstitutional. He placed reliance on *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another*[1] and *Isaacs v Robertson*[2] for the proposition that where an adverse order is made against a party who is affected by it without notice to him, the order is liable to be set aside.

12. Regarding service, he cited *Mike Maina Kamau v Attorney General & 3 others*[3] and *Halsbury's Laws of England*[4] for the proposition that no order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute contempt of court.

13. On the standard of proof, Mr. Munene cited *Re Bramblevale Ltd*[5] which held that contempt of court must be satisfactorily proved. He also cited *Mutitika v Baharini Farm Limited*[6] which held that the standard of prove in contempt cases must be higher than proof on a balance of probabilities, almost exactly, beyond reasonable doubt. Lastly, Mr. Munene submitted that it is unconstitutional for a public officer to be sentenced to imprisonment for a public debt. To buttress his argument, he relied on *Solomon Muriithi Gitandu & another v Jared Maingi Mburu*[7] which held that a person is not liable to be committed to civil jail for in ability to pay a debt.

Respondent's advocates' submissions

14. The *ex parte* applicant's counsel in opposition to the application argued that the applicant is in contempt of court, hence he has no right of audience. To buttress his argument, he cited *Fred Matiangi, The Cabinet Secretary, Ministry of Interior and Coordination of National Government v Miguna Miguna & 4 others*[8] and argued that the applicant has no right of audience unless he purges the contempt.

15. As for prayers for review, he cited Order **45** of the Civil Procedure Rules, 2010 and *Muyondi v Industrial and Commercial Development Corporation & another*[9] which citing *Nyamongo & Nyamongo v Kogo*[10] defined what constitutes an error on the face of the record. He submitted that no error on the face of the record has been proved. In addition, he cited *Pancrast T. Swai v Kenya Breweries Ltd*[11] which explained the need for an applicant to demonstrate discovery of new matters or evidence in a review application.

16. Counsel cited *Abasi Belinda v Fredrick Kangwamu & another*[12] in support of the proposition that a point which may be a good ground of appeal may not be a good ground for an application for review. He maintained that the applicant is seeking to appeal the decision as opposed to review. On the allegation that service of the order was no effected, he argued that the applicant was duly served as evidenced by the annexures to the Replying affidavit, and, that, the Respondents were represented in court at the trial.

Determination

17. It is correct to say that a court has power of review its decision, but such power must be exercised within the framework of Section **80** of the Civil Procedure Act[13] and Order **45** Rule **1** of the Civil Procedure Rules, 2010.[14] Section **80** provides as follows:-

> ***80.*** *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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

18. Order **45** Rule **1** provides as follows:-

***45** Rule **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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

19. It is common ground that the applicant has already lodged a Notice of Appeal dated **31st** October 2019, a copy of which is annexed to the *ex parte* applicant's Replying Affidavit. A reading of section **80** and Order **45** Rule **1** leaves me with no doubt that a litigant cannot prefer an appeal and at the same time apply for review. To the extent that the Respondent lodged a Notice of Appeal and at the same time applied for review, the instant application offends the above provisions. On this ground alone, the instant application collapses.

20. Section **80** gives the power of review while Order **45** sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- ***(a)*** *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;* ***(b)*** *on account of some mistake or error apparent on the face of the record, or* ***(c)*** *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

21. 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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.[15]

22. In *Nyamogo & Nyamogo v Kogo**[16]*** discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

23. The Indian Supreme Court[17] made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. In *Attorney General & O'rs v Boniface Byanyima*,[18] the court citing *Levi Outa v Uganda Transport Company*[19] held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."

24. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.[20]

25. The term "mistake or error apparent" by its very connotation signifies an error which is evident *per se* from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order **45** Rule **1** and Section **80** of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

26. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.[21] Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review. The **review** must be confined to **error apparent** on the **face** of the **record** 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.[22]

27. Discussing the scope of review, the Supreme Court of India in the case of[23] had this to say:-

> *"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" .... means a reason sufficiently analogous to those specified in the rule"*

28. For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court as the time of making the decision. Differently stated, the material presented by the applicant does not qualify to be new evidence.

29. Additionally, a court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Signh and Another*[24] it was 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. **Mulla** in the *Code of Civil Procedure*[25] 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..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[26]

30. In *Tokesi Mambili and others v Simion Litsanga*[27] it was held as follows:-

> *i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)*
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> ii. *Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

31. The reasons offered by the applicant do not qualify to be *'sufficient reason'* within the meaning of the rules nor are they *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.** In *Evan Bwire vs Andrew Nginda*[28] 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.* The principles which can be culled out from the above noted authorities are:-

> *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.*

32. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the applicant do not quality to be any of the grounds prescribed in Order **45** Rule **1**. On the contrary, all the grounds **cited are clear grounds of appeal as opposed to grounds for review.** The applicant is essentially challenging the courts findings and the merits of the decision which is a clear invitation to this court to sit as an appellate court on its own decision. A review is not a re-hearing nor can the court purport to exercise appellate jurisdiction. I decline the invitation to exercise appellate jurisdiction disguised as review power.

33. Flowing from the above conclusions, I find and hold that the instant application is totally unmerited. Accordingly, I dismiss the first Respondent's application dated **25th** November 2019 with costs to the *ex parte* applicants.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this **19th** day of **June** 2020

John M. Mativo

Judge

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[1] {2016} e KLR.

[2] {1984} 3 ALL ER 140, 143.

[3] {2012} e KLR.

[4] Vol 9, 4th Edition, at page 37.

[5] {1970} CH 128, 137.

[6] {1985 KLR 229, 234.

[7] {2007} e KLR.

[8]{2008} e KLR.

[9]{2006} 1 EA 243.

[10]{2001} EA 174.

[11] {2014} e KLR.

[12] {1963} 557.

[13] Ibid

[14] See Sinha J in *Union of India vs B. Valluvan*, AIR 2007 SC 210; (2006) 8 SCC 686

[15] See *National Bank of Kenya Ltd vs Ndungu Njau,* {1996} KLR 469 (CAK) at Page 381.

[16] {2001} EA 170.

[17]In the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047.

[18] HCMA No. 1789 of 2000.

[19] {1995} HCB 340.

[20] see This Court in *Thungabhadra Industries Ltd. v. Govt. of A.P*.1

[21] *Batuk K. Vyas Vs Surat Municipality* AIR (1953) Bom 133.

[22] See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170.

[23] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[24] {1963}EA 557.

[25] Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (CAK)

[26] Ibid.

[27]{2004} eKLR.

[28] Civil Appeal No. 103 of 2000, Kisumu; {2000} LLR 8340.