Kemoni & another v Omwoyo (Environment & Land Case 105 of 2021)
[2023] KEELC 20312 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20312 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND CASE 105 OF 2021

JM KAMAU, J

SEPTEMBER 26, 2023

BETWEEN

YOBENSIA KEMUNTO KEMONI ..... 1ST PLAINTIFF

MARGARET NYAITONDI GWOMA ..... 2ND PLAINTIFF

AND

GEOFFREY MANGERA OMWOYO ..... DEFENDANT

RULING

1. The Plaintiff's Application dated 22/06/2023 and interestingly filed in court on 21/06/2023 seeks the review and setting aside of the orders dated 08/06/2023 disallowing a Notice to show cause dated 14/12/2022. I have gone through the entire Application and the Supporting Affidavit as well as the Ruling delivered in court on 08/06/2023 and taking into consideration the provisions of Section 80 of the *Civil Procedure Act* and Order 45; Rules 1 & 2 of the Civil Procedure Rules, I don't see any new facts or evidence that has come up to warrant the Review and the setting aside of the Ruling of this court.

2. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

> " Any person who considers himself aggrieved—
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> by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
>
> a) 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."

2. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

> " 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."

3. In Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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 unreasonable delay."

4. In Pancras T. Swai v Kenya Breweries Limited [2014] eKLR the Court of Appeal held:-

> " Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limps therein stated or "for any sufficient reason....."

5. In Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793 the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

6. Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others 9 Supreme Court Cases 596 at Page 608. 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 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"

7. In Tokesi Mambili and others vs Simion Litsanga the Court 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.

   ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

8. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -

   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.

9. In Republic. v Principal Secretary, Ministry of Internal Security & another Ex Parte Schon Noorani & another [2020] eKLR Justice Mativo had this to say on the subject:

> " .....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.....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.....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. 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....."

10. From the foregoing, it is clear that an error apparent on the face of the record must be a self-evident error which need not require elaborate arguments to support it.

12. The Court of Appeal in the case of Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243 rendered itself thus:

> " In Nyamogo and Nyamogo v 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 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. Mere 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."

13. In the present case, the Court made a conscious Decision on the matters in controversy and exercised its discretion and delivered a Ruling from the material on record. I do not buy the argument that the same ought to be reviewed just because the Applicant does not agree with the Ruling of the Court.

14. In the case of Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006 cited fin the case of Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR the Court of Appeal held as follows:

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh....."

15. The current Application falls under the above category. The effect of allowing it would amount to re-hearing the Application afresh. Litigation must come to an end. Parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Decision. What is demonstrated by the Application is a case of poor preparation of the case which is not what was envisaged under Section 80 of the *Civil Procedure Act* nor the Rules under Order 45.

16. The Applicant has not demonstrated that there is an error/omission apparent on the face of the record which would necessitate a review of the Ruling. I need say no more. The remaining duty is to dismiss the Applicant's Application dated 22/06/2023 with costs. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 26TH DAY OF SEPTEMBER 2023

MUGO KAMAU

JUDGE

In the Presence of:

Court Assistant: Sibota

Plaintiffs: Mr. Anyona

Defendant: N/A