Aboki v Nyamira County Government (Environment & Land Case 58 of 2021) [2023] KEELC 22604 (KLR) (23 October 2023) (Ruling)

Neutral citation: [2023] KEELC 22604 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ENVIRONMENT & LAND CASE 58 OF 2021

JM KAMAU, J

OCTOBER 23, 2023

(FORMERLY AT ENVIRONMENT AND LAND COURT AT KISII CASE NO.16 OF 2018)

BETWEEN

ENOCK OGECHI ABOKI .... PLAINTIFF

AND

NYAMIRA COUNTY GOVERNMENT .... DEFENDANT

RULING

1. Judgment in this case was delivered on 14/08/2023 in favour of the Plaintiff against the Defendant for the sum of Kshs. 6,353,500/= being the value of destroyed trees. On 14/09/2023, the Defendant/ Judgment Debtor filed an Application for the Review of the said Judgment on the following grounds: -

    1. There is an error apparent on the fact of record of the court's Judgment herein warranting review of the same by this Honourable Court.

    2. The Honourable Court entered Judgment, on June 5, 2023, in favour of the Plaintiff as against the Defendant.

    3. Pursuant to the said Judgment, liability was found in the amount of Kshs. 6,353,500/= in favour of the Plaintiff as against the Defendant.

    4. The Honourable Court awarded the Plaintiff a total of Kshs. 6,603,500/= as value of trees. However, in computing the said sum the Honourable Court failed to clearly disclose its tabulation matrix and more specifically the number of trees used in the tabulation devoid of a report by a Forester or an Agriculture Officer.

    5. Further, in the Judgment the court erroneously stated that the Defendant admitted to acquiring a parcel, of land measuring 6 metres by 360 feet while in truth, Mr. Lamech Nyariki, during cross examination categorically stated that, on the basis of the law, county roads measure

a maximum of 6 metres by 120 feet. In this regard, therefore, the witness stated that a parcel measuring 6 meters by 120 feet would only hold a maximum of 800 trees.

6. That in consideration of the actual size of the road the amount of Kshs. 5,603,500/= awarded to the Plaintiff is exorbitantly high.

7. Further, the Honourable Court in the said Judgment granted the Plaintiff a decretal sum with interest at court rates with effect from the date of filling this suit instead of from the date of Judgment as this was not a claim for liquidated damages but for general damages.

8. Extraction of the attendant Decree and subsequent execution thereof is sure to occasion substantial injustice.

9. This Honourable Court has the jurisdiction and power to grant the orders herein to prevent abuse of court process and avert substantial injustice.

10. It is in the interest of justice that the Application be heard and determined expeditiously.

2. The Applicant states that there is an apparent error on the face of record of the Court's Judgment, the court failed to disclose the tabulation matrix and the number of trees used in the said tabulation devoid of a Report by a Forester or an Agricultural Officer. She further argued that the court erroneously stated the Defendant admitted to acquiring a parcel of land measuring 6 metres by 300 feet and that the amount awarded was exorbitantly high and that the court granted the Decree Holder interest with effect from the date of filing suit.

3. The Applicant/Decree Holder opposed the said Application through his Replying Affidavit sworn on 22/09/2023 where he depones that the Application is not properly before the court since the Affidavit in support is sworn by the Advocate contrary to the law and that all the issue raised in the said Application are a preserve of the Appellate Court and not subject of Review. He also said that he doesn't see any error apparent on the face of the record or any new matter to warrant the invoking of Order 45 of the *Civil Procedure Rules*.

4. My attention has been drawn to the case of *Raila Odinga & Others -vrs- William Ruto & Others* presidential Election Petition Nos. E001, E002, E003, E004, E005, E007 & E008 of 2022 (consolidated) where at paragraphs 135 to 137 (inclusive) the Supreme Court of Kenya held that: -

> " The Affidavits of Celestine Anyango Opiyo and Arnold Ochieng Oginga, while containing sensational information, were not credible as the Registrar's Report confirmed evidence to the contrary. All the Forms 34A attached to those Affidavits and purportedly given to them by agents at select polling stations were significantly different from the originals, certified copies and those on the public portal. The purported evidence of Celestine Opiyo and Arnold Oginga sworn in their respective Affidavits was not only inadmissible, but was also unacceptable. It has been established that none of the agents on whose behalf the Forms were being presented swore any affidavit; that there is nothing to show that they had instructed both Celestine Opiyo and Arnold Oginga to act for them. Yet the two had gone ahead to depone on matters that were not within their knowledge. It is noting that the two are Advocates of the High Court and are on record as representing the 1st Petitioner in the Petition before us.
>
> This court cannot countenance this type of conduct on the part of counsel who are officers of the court. Though it is elementary learning, it bears repeating that affidavits filed in court must deal only with facts which a deponent can prove of his own knowledge and as a general rule, counsel are not permitted to swear affidavits on behalf of their clients

in contentious matters, like the one before us, because they run the risk of unknowingly swearing, to falsehoods and may also be liable to cross-examination to prove the matters deponed to…………

In stating so, we echo the words of Ringera, J in *Kisya Investment Limited & Others vrs Kenya Finance Corporation Ltd* HCCC No. 3504 of 1993 (Unreported) that "It is not competent for a party's Advocate to depone to evidentiary facts at any stage of the suit. By deponing to such matters, the Advocate courts an adversarial invitation to step (down) from his priviledged position at the Bar, into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an Advocate to discharge his duty to the court and his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel's affidavit is defective for the reason that it offends the proviso (to) order XVIII Rule 3 (1) (now order 19 rule 3 of the *Civil Procedure Rules* failing to disclose who the sources of his information are and the grounds of his belief."

5. But I wish to distinguish this case with the current one since the facts therein are all on record and are not in contention. They are contents of the Judgment on record and the only thing that the Deponent may have done is to get the law it wrong on the interpretation of the law.

6. To begin with if the sum awarded as special damages is highly exorbitant this is a good ground of Appeal. If any other or reasonable issue is not agreeable to the Applicant the only recourse he has is to appeal but not to ask the court to review its Judgment. Likewise, if the court lost its way in granting interest on special damages, the recourse is equally to appeal.

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

" 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."

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."

8. 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."

9. 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.........."

10. 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.

11. 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"

12. 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.

13. An erroneous order/decision cannot be corrected in the guise of exercise of power of review. 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 on record. 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. 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 detailed examination. In the present case the Petitioner has not been able to point out any error apparent on the face of the record.

14. The case herein is not one of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Plaintiffs' knowledge.

15. The Application could also not pass the test of:

> " ....or for any other sufficient reason................"
>
> which reasons must be analogous to the other grounds mentioned under the *Act* and *Rules*, a reason sufficiently analogous to those specified in the Rule"

16 In the case of Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006 cited in 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. ...."

17. The effect of allowing it would amount to re-opening the case 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 Judgment. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal. What is demonstrated by the Application is a case of poor pleading which is not what was envisaged by Section 80 of the *Civil Procedure Act* nor the Rules under Order 45.

18. Finally, the Application is irregularly in Court since an Applicant in an Application for Review ought to have annexed a formal extracted decree or order in respect of which the review is sought.

19. In the case of *Suleiman Murunga v Nilestar Holdings Limited & Another* (2015) eKLR the court held as follows:

> " The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's application was fatally defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the *Civil Procedure Rules* as relates to review of the decree or order"

20. No such a Decree was attached to the present Application which makes the Application fatally defective.

21. An issue which went through the entire motion of preparing pleadings, interrogatories, trial conference and hearing such as in this case cannot be reviewed by the same Court which had adjudicated upon it. If that is done it would set a very unsustainable precedence.

22. The Applicant's Application dated 14/9/2023 is therefore dismissed with costs.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 23RD DAY OF OCTOBER, 2023

MUGO KAMAU

JUDGE

In the presence of: -

Court Assistant: - Brenda

Mr. Okenya for the Plaintiff

Ms Moeche for the Defendant