



**Sedco Consultants Limited v Kahingo (Environment & Land Miscellaneous Case E001 of 2023) [2023] KEELC 20702 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20702 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND MISCELLANEOUS CASE E001 OF 2023  
FO NYAGAKA, J  
OCTOBER 16, 2023**

**BETWEEN**

**SEDCO CONSULTANTS LIMITED ..... APPLICANT**

**AND**

**WILSON KARANJA KAHINGO ..... RESPONDENT**

**RULING**

**The Application**

1. The Respondent moved this Court vide an Application dated 5/7/2023. It brought it under Section 3 and 12 (1) of the Environment and Land Court Act. It sought the following reliefs;
  1. ...spent.
  2. ...spent.
  3. That the Honourable Court be pleased to review the ruling of the Deputy Registrar delivered on 30<sup>th</sup> June 2023 dismissing the Preliminary Objection raised by the respondent and proceed to set aside the same and substitute it with an order allowing the Preliminary Objection by striking put the bill of costs with costs.
  4. That the costs of this application be provided for.
2. The Application is supported by the Affidavit of Wilson Karanja Kahingo, the Respondent herein. The grounds were that there was an error apparent on the face of the record on account of the fact that the Deputy Registrar rightly observed that there was no order for costs in the matter herein, but proceeded to find that the party to party bill of costs was properly before the court. The Respondent contended that the learned Deputy Registrar erred in failing to find that the Applicant ought to have filed the party to party bill of costs in the record of the suit in which the order awarding costs was made. He prayed that in the interest of justice the instant application be allowed.



3. In support of the Application, the Respondent deponed that, on 8/03/2023 the Applicant filed a party to party bill of costs dated 6/03/2023. It was captioned as “arising from Kitale ELC Appeal No. E008 of 2022; Wilson Karanja Vs Sedco Consultants Company Limited”. He annexed a copy of the bill and marked it as “A”. He deponed further that on 23/03/2023 and 26/04/2023 through his advocates on record he was served with the bill of costs and a notice of taxation respectively. He annexed a copy of the notice of taxation and marked it as “B”.
4. He contended that in response to the bill of costs, filed a Notice of Preliminary Objection dated 28/03/2023 asserting that there were no orders as to costs made in the matter and that the bill of costs ought to have been filed in the record of the suit wherein the order awarding costs was made. He annexed a copy of the Notice of Preliminary Objection and marked it as “C”. He argued further that pursuant to directions given by the Deputy Registrar the Preliminary Objection was canvassed by way of written submissions. He attached both sets of the said submissions and marked it as “D” and “E” filed. He asserted that on 30/06/2023 the Deputy Registrar made a Ruling dismissing the Preliminary Objection. He ordered further that the parties file their written submissions on the party to party bill of costs. The matter was to be mentioned on 28/07/2023 to confirm compliance and fix a Ruling date. He annexed the copy of the ruling and marked it as “F”.
5. He swore further that the jurisdiction of a taxing master arose from an order awarding costs, and in the instant matter there were no order awarding costs, although the order awarding costs was actually made in Kitale ELC Appeal No. E008 of 2022; Wilson Karanja Vs Sedco Consultants Company Limited. Consequently, the party and party Bill of costs ought to be filed in the record of the said matter. Thus, he prayed that the court reviews the decision of the Deputy Registrar that dismissed the Preliminary Objection and substitute it with an order allowing it.

### **The Response**

6. The Application was opposed by the Applicant by way of a Grounds of Opposition dated 17/08/2023. The Applicant contended that the court lacked jurisdiction to hear and determine the instant application. His contention was that the court did not issue the Ruling of 30/07/2023 which was the subject of the instant application hence it could not sit on review of the Ruling. The Applicant asserted that the errors on record were issues that ought to have been raised before the Deputy Registrar and in case the Respondent was dissatisfied with the decision of the Deputy Registrar, the proper cause of action would have been to file an appeal against the decision and not a review. To this end the Applicant prayed that the application be dismissed with costs.

### **Submissions**

7. The Application was disposed of by way of written submissions. Both the Applicant and the Respondent filed their respective written submissions.
8. In summary the Respondent argued in their submissions that the instant motion was predicated on the provisions of Sections 12(1) and (2) of the Environment and Land Court Act. The provision is to the effect that any person aggrieved with the decision of the Deputy Registrar on matters relating to the function of the court, may apply for a review by a judge of the Court in accordance with the Rules. The judge may in turn either confirm, modify or reverse the said decision. He asserted that the provisions clothed the court with the requisite jurisdiction to sit on review of the decision made by the Deputy Registrar because the word used in the said statute is “review”. That for that reason jurisdiction flows from either the Constitution or statute. To buttress their point, it relied on the case, In the Matter of the Advisory Opinion of the Supreme Court under Article 163(3) of the Constitution, Constitutional



Application No. 2 of 2011 and the Court of Appeal Case of Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 Others (2014) eKLR.

9. They submitted that the jurisdiction of the court had been correctly invoked by the Motion for review despite the Civil Procedure Act and its Rules providing for an appeal against the decision of the Deputy Registrar given that the Environment and Land Court Act is a more recent legislation as compared to the Civil Procedure Act. As such it ought to be given precedence. To support this contention, they relied on the doctrine of implied repeal as stated in the case of *Martin Wanderi & 19 Others v Engineers Registration Board of Kenya & 5 Others* [2014] eKLR.
10. They submitted that indeed there was no order awarding costs in the instant case but the order awarding costs was made in *Kitale ELC Appeal No. E008 of 2022; Wilson Karanja v Sedco Consultants Company Limited* which ought to have been where the Applicant ought to have filed its bill of costs. They relied on the case of *James B. Karuga v Aga Khan Health Services Kenya* [2021] eKLR on the issue of the jurisdiction of the taxing master flowing from an order of costs.
11. In turn the Applicant in their submissions reemphasised the grounds espoused in its Grounds of Opposition. It urged that jurisdiction was everything and when jurisdiction was challenged the court was under a duty to first establish whether it had the said jurisdiction. They placed reliance on the Supreme Court case of *Hon. Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamud* Supreme Court Petition No. 7 of 2018 which determined that a court cannot arrogate to itself jurisdiction. It asserted that only the Deputy Registrar could sit on review of its own Ruling on account of the fact that the Deputy Registrar was the one who issued it and not the instant court. Further that the only time the appellate court would be able to interrogate the Ruling of the Deputy Registrar was only on appeal being preferred against the said Ruling. He thus urged that this was an application for dismissal with costs.

### **Issues, Analysis and Disposition**

12. The Application seeks the review of a Ruling issued by the Deputy Registrar on 30/06/2023 on the basis of an error alleged to be apparent on the face of record. I have considered the application, the facts thereof, the law, the submissions by learned counsel and the authorities the parties relied on. I am of the view that two issues lie before me for determination. These are:
  - a. Whether this court has jurisdiction to review the Ruling of the Deputy Registrar.
  - b. Who pays the costs of the Application?
13. This Court now determines the issues in sequence.

#### **a. Whether this court has jurisdiction to review the Ruling of the Deputy Registrar**

14. The applicable law in regard the review of a judgment or decree of a court is provided under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Needless to say, this court must exercise its power of review only within the scope and ambit of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Section 80 of the Civil Procedure Act 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.”

15. Order 45 Rule 1 of the Civil Procedure Rules which operationalizes the above Section elaborates the grounds on which a judgment or decree can be set reviewed and or set aside. It provides as follows:

- “(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.”

16. In this instant case, the Respondent argues that there was an error apparent on the face of the record. He claims that Deputy Registrar rightly observed that there was no order for costs in the matter herein and nevertheless found that the party and party bill of costs was properly before the court. In my view, the question that lies before this court for determination is whether this Court is clothed with the requisite jurisdiction to review and or vary the purported error apparent that is being alleged by the Respondent.

17. It is trite that the jurisdiction of a court flows from the Constitution and/or statute. In the case of Samuel Kamau Macharia & Another vs Kenya Commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR the Supreme Court when faced with a jurisdictional issue stated;

“A court’s jurisdiction flows from the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred by law.”

18. Similarly, in County Government of Migori v I N B Management IT Consultant Limited [2019] eKLR the court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows: -

- “10 - The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016- “Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama - Versus - Hon. Atoi Aidoko



Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows; -

“...it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost....” Emphasis mine

19. Guided by the aforementioned provisions of the law and the authorities, I am of the view that it is permissible for one to review a Ruling from which an appeal has not been preferred against. However, the Application for review has to be made in the court that made the order. The principle enshrined in Order 45 Rule 1 is that an application for review is to be placed before the judge who rendered the decree or order or if the judge or magistrate is no longer in station or unable to handle it then a judge or magistrate continuing with the proceedings.

20. However, Order 45 Rule 2 provides an exception to Order 45 Rule 1. It provides as follows;

“An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.”

21. Therefore, the exception permits an application for review to be made to a judge other than the one who pronounced the decree or order in two scenarios. This is in respect of a situation that is besides or different from one where a party alleges the existence of a clerical or arithmetical mistake and or error apparent on the face of the decree as is in the instant application herein. Top of Form Even then, the Application has to be made to a court of equal jurisdiction. To this end, and on the basis of Order 45 Rule 2, I find that this court is not clothed with the requisite jurisdiction to hear the application for review despite the ruling not being made by the court.

22. The Applicant moved the Court on the basis that there was an error apparent on the face of record. In my view the error was not one of the nature that would warrant an application to this Court for review but an appeal. The Court of Appeal in an application for review on the basis of error apparent in the case of National Bank of Kenya Ltd v Ndungu Njau (1997) eKLR stated as follows;

“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.”

23. Similarly, in the case of Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243 the Court of Appeal rendered itself as follows:

“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.” Emphasis mine

24. I am guided by the above authorities, and I am not persuaded in the instant case that the error purported by the Respondent is self-evident on the face of the record itself as shown in the extract of the Ruling. In my view the Deputy Registrar made a conscious decision in dismissing the Preliminary Objection on the basis that the objection were not pure points of law and properly exercised his discretion in favour of the Applicant. Furthermore, if at all the Respondent was of the view that the Deputy Registrar arrived at the wrong conclusion on the law, he would have simply filed an appeal against the said decision and not sought for its review. The upshot is that the Application dated 5/07/2023 lacks merits and is hereby dismissed. However, for the reason that the Applicant made an error of judgment as to the procedure to be followed, the orders of stay of proceedings before the lower court granted on the 24/07/2023 are maintained for forty-five (45) days pending the Applicant making appropriate application to this Court.

**b. Who bears the cost of the Application?**

25. It is clear that the prayers by the Respondent have not been granted. Since costs follow the event, the Respondent shall bear the cost of the application.
26. Orders accordingly.

**RULING DELIVERED, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC EMAIL THIS 16<sup>TH</sup> DAY OF OCTOBER, 2023**

**HON. DR. IUR FRED NYAGAKA  
JUDGE, ELC KITALE**

