



**Busaidy as Trustee of Seif Bin Salim Trust v Pirani & 3 others (Environment & Land Case 132 of 2022) [2023] KEELC 21933 (KLR) (29 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21933 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 132 OF 2022  
NA MATHEKA, J  
NOVEMBER 29, 2023**

**BETWEEN**

**SAIF SAID SAIF AL BUSAIDY AS TRUSTEE OF SEIF BIN SALIM  
TRUST ..... PLAINTIFF**

**AND**

**SHAMIM SHAKIR PIRANI ..... 1<sup>ST</sup> DEFENDANT  
JAMIL SHAKIR PIRANI ..... 2<sup>ND</sup> DEFENDANT  
IMRAN SHAKIR PIRANI ..... 3<sup>RD</sup> DEFENDANT  
ABBSAKI INVESTMENTS LTD ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application is dated 18<sup>TH</sup> April 2023 and is brought under Section 80 of the [Civil Procedure Act](#) and Order 45(I) of the [Civil Procedure Rules](#) 2010 and Sections 1A, 1B & 3A of the [Civil Procedure Act](#) Cap 21 of the Laws of Kenya seeking the following orders;
  1. That this matter be certified as urgent and heard *ex parte* in the first instance.
  2. That this Honorable Court be pleased to review and/or set aside the whole of the ruling issued on 22<sup>nd</sup> March 2023 and direct that this suit be consolidated with HC ELC No. E127 OF 2022, Shamim Shakir Pirani & 3 others v Saif Said Saif Al Busaidy as trustee of Seif bin Salim trust.
  3. That in the alternative, the Honourable Court be pleased to review and/or set aside part of the ruling issued on 22<sup>nd</sup> March 2023 and direct that this suit be struck out and each party to bear its own costs.
  4. That an appropriate order be made for the costs of this Application.



2. It is based on the grounds that by the Ruling dated 22<sup>nd</sup> March 2023, the Hon. Court allowed the notice of preliminary objection dated 23<sup>rd</sup> November 2022. A perusal of the said ruling by the advocates for the applicants reveals that the court made an error / mistake on the face of the record in finding that the present suit was filed on 6<sup>th</sup> December 2022 whereas it was filed on 14<sup>th</sup> November 2022 as is evidenced by the court receipt and stamp affixed on the plaint. Accordingly, at the time of filing the present suit, the applicant was not aware that the respondent herein had filed HC ELC No. E 127 OF 2022, Shamim Shakir Pirani & 3 others v Saif Said Saif Al Busaidy as of Seif bin Salim trust on the 9<sup>th</sup> November 2022 since they only entered appearance to the said suit on 15<sup>th</sup> November 2022, one day after filing the present suit. The Applicants will suffer such substantial loss that cannot be compensated by way of an award of damages by the Court if this application is not allowed as prayed. In the circumstances, the applicants recommend that the Honourable Court reviews its whole ruling and consolidates the two cases. In the alternative, if the court must strike out the present suit, it ought to do so without subjecting the applicant to costs payable to the respondent noting that filing the present suit was purely unintentional.
3. The Defendants/Respondents do not dispute that they filed suit ELC No. E127 OF 2022 on 9<sup>th</sup> November, 2022 while the instant suit was filed on 14<sup>th</sup> November, 2022. That the error in the Ruling which read that the present suit was filed on 6<sup>th</sup> December, 2022 must have been inadvertent. That upon filing ELC No. E127 OF 2022, they immediately instructed a process server to effect service upon the Defendant which was done on the 9<sup>th</sup> November, 2022. That the misquoting of the date this suit was filed in the Ruling does not outweigh the actual date it was filed as the latter is a matter of record while the former is a mere inadvertent mistake. That the inadvertent mistake does not go to the substance of the Preliminary Objection and/or Ruling to the extent of having the Ruling reviewed and/or set aside.
4. This court has considered the application and submissions therein. This suit was struck out pursuant to a preliminary objection by the Respondents for being sub judice. The court is now asked to review and set aside that decision. In the case of *Kwame Kariuki & Another v Mohamed Hassan Ali & 4 Others* [2014] eKLR, the Court observed that;

“It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot purport to review or further interfere with the said order as such action is likely to affect the outcome of the appeal.”
5. In the case of *Mwihoko Housing Company Limited v Equity Building Society* [2007] 2 KLR 171 is relevant. It was held, that;

“A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent



on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of *Rose Kaiza v Angelo Mpanju Kaiza* 2009, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

6. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section 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.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

7. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states 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.”

Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In Court of Appeal, Civil Appeal No. 211 of 1996, *National Bank of Kenya v Ndungu Njau*, the Court of Appeal held that;

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 evidence 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 proceed on an incorrect expansion of the law”.

8. From the above provisions of the law, authorities cited and facts of this case I find that the applicant has shown an error apparent on the face of record and/or sufficient reason to enable this court partially



to set aside its decision. I have carefully perused the court record in the instant case and find that the Defendants/Respondents filed suit ELC No. E127 of 2022 on 9<sup>th</sup> November 2022 while the instant suit was filed on 14<sup>th</sup> November, 2022. That there is an error in the Ruling which read that the present suit was filed on 6<sup>th</sup> December, 2022. The issue for determination is whether or not the Applicant knew of the existence of the previous suit before filing the instant suit. The Respondent submitted that upon filing ELC No. E127 OF 2022, they immediately instructed a process server to effect service upon the Defendant which was done on the 9<sup>th</sup> November, 2022. They have annexed an affidavit of service dated 26<sup>th</sup> April 2023 by one Peter Simiyu. However, this affidavit does not have an official stamp of the court to show it was filed in court and this court cannot ascertain for sure if the Applicant was served. Be that as it may I still find that the instant suit is sub judice and the ruling/order of 22<sup>nd</sup> March 2023 striking the suit out remains but the order for costs is reviewed and each party is to bear its own costs including the costs of this application.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29<sup>TH</sup> DAY OF NOVEMBER 2023.**

**N.A. MATHEKA**

**JUDGE**

