



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

MISC. APPLICATION NO. 24 OF 2016

JULIUS MASIVA OBUGA.....APPLICANT

-VERSUS-

JACKSON MANDAGO.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF UASIN GISHU.....2ND RESPONDENT

SYLVESTER METTO.....3RD RESPONDENT

RULING

[1] The application dated **27 February 2018** was filed herein by the Applicant, **Julius Masiva Obuga** pursuant to **Section 3A** of the **Civil Procedure Act, Order 12, Order 36 Rule 10** and **Order 45 Rules 1, 2 and 3** of the **Civil Procedure Rules** for orders that the Court be pleased to review, vary and set aside the *ex parte* orders issued herein on **26 July 2017** to pave way for the *inter partes* hearing of the Respondents' Preliminary Objection; and that the costs of the application be costs in the cause. The application was based on the grounds that the Respondents proceeded *ex parte* and yet he was ready and prepared to respond to the Preliminary Objection; and that he had been to court a day before and the file could not be traced; and that it would therefore be in the interest of justice that the orders sought be granted.

[2] The application was supported by the Applicant's affidavit, sworn on **27 February 2018** in which he deposed that this matter came up for hearing of the Preliminary Objection on **27 June 2017** and that before the hearing date of **27 June 2017**, he had been to the court registry on several occasions with a view of filing an application dated **5 June 2017**, but the court file could not be traced. He added that on the hearing date of **27 June 2017**, he was at the court registry looking for the file as the same was not cause listed; only to learn later that the matter had proceeded *ex parte*. The applicant therefore averred that his failure to attend court on **27 June 2017** was not of his own making. He accordingly sought that the ensuing Ruling of **26 July 2017** be reviewed and set aside along with its consequential orders.

[3] The application was opposed by the Respondents and a Replying to that effect sworn and filed by **S.K. LeI**, the County Attorney of the 2nd Respondent. He averred that he personally attended court on **4 July 2017** when the hearing date of **20 July 2017** was taken by consent; and that the matter was indeed cause-listed for **20 July 2017**. He further averred that, since the Applicant had filed his written submissions in respect of the Preliminary Objection, it was incorrect to say that the same was unopposed. It was further the contention of the Respondents that the orders sought, if granted, would go against the spirit of **the Constitution** and the overriding objective of the **County Government Act**, as they are likely

to cause harm to the public, halt the County Government's grandiose plans for the years 2018-2022. They were therefore of the view that the application is scandalous, frivolous and vexatious, and therefore ought to be dismissed with costs.

[4] The application was urged on **25 July 2018**. The applicant reiterated his averments in the Supporting Affidavit and added that having been advised by the court registry staff to go home and await communication from court, it was a travesty of justice that the matter was proceeded with *ex parte* without any notice to him. It was also his submission that the Court ignored the written submissions filed by him in making its determination on the Preliminary Objection.

[5] **Ms. Chesoo**, on the other hand, was of the argument that the Applicant had failed to satisfy the requirements of **Order 45** of the **Civil Procedure Rules**, which gives the parameters for review, in that, he did not establish that there was a mistake or error on the face of the record, or prove that there was discovery of new and important facts or some other sufficient cause to warrant a review of the Ruling dated **26 July 2017**. She submitted that a review cannot be granted merely to allow the Applicant an opportunity to argue his case. She also questioned the unreasonable delay of 7 months that it took the Applicant to file the instant application; which delay was, in her view, totally unexplained.

[6] **Order 45 Rule 1** of the **Civil Procedure Rules**, provides that:

(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, 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.

[7] From the aforesaid provisions, a party seeking review is under obligation to demonstrate that:

[a] there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at that time;

[b] there is some mistake or error apparent on the face of the record; or

[c] that there was any other sufficient reason; and

[d] that the application had been brought without unreasonable delay.

[8] As has been stated hereinabove, the Plaintiff's application is hinged on the ground that, before the hearing date of **27 June 2017**, the Applicant had been to the court registry on several occasions with a view of filing an application dated **5 June 2017**, but the court file could not be traced. He added that on the hearing date of **27 June 2017**, he was at the court registry looking for the file as the same was not cause listed; only to learn later that the matter had proceeded *ex parte*. He did not contend that there was an error apparent on the face of the record, or that a 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 Ruling and the orders therein were made. Thus, it is to be presumed that he believes there is sufficient reason to warrant a review.**

[9] A perusal of the record shows that when the date of **27 June 2017** was taken for the disposal of

the Respondent's Preliminary Objection, the Applicant was in attendance. He was fully aware of the hearing date and therefore ought to have been in attendance, more so because he was admittedly within the precincts of the Court on that particular date. His explanation that he was in the Registry with a view of securing a date for his application dated 5 June 2017 does not seem to tally with the court record, for the record shows that that application was placed before the Judge (Hon. Ogembo, J.) on 6 June 2017 and was fixed for hearing on 11 July 2017.

[10] A preliminary objection, by its very nature, is a point of law taken on the basis that the facts are agreed and can be raised by the court *suo motu*. In the Owners of Motor Vessel "Lilian s" vs. Caltex Oil (K) Ltd [1989] KLR 1, it was held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

[11] And in the work, The Major Law Lexicon, Volume 4, jurisdiction is defined thus:

"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it, or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by Statute or Chapter or Commission under which the Court is constituted and may be extended or restricted by similar means. If no restriction or limitation is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind or nature of the actions or the matters of which the particular court has cognizance or as to the area over which the jurisdiction extends, or it may partake of both these characteristics..."

[12] Accordingly, if the Applicant was unhappy with the ruling of the Court then an appeal on the issue of jurisdiction would have been more appropriate. In this regard, I find instructive the decision of the Court of Appeal the case of Nyamogo & Nyamogo Advocates vs. Kago (2001) 1 EA 173 that:

"...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 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, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

[13] In the premises, I find no merit in the Plaintiff's application dated 27 February 2018. The same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF NOVEMBER, 2018

OLGA SEWE

JUDGE