



Akenga Kimutai & Associates Advocates v Yator & 2 others; Marakwet Development Association (Applicant) (Miscellaneous Civil Application 59 of 2022) [2023] KEELC 22393 (KLR) (11 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22393 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION 59 OF 2022
JM ONYANGO, J
DECEMBER 11, 2023**

BETWEEN

AKENGA KIMUTAI & ASSOCIATES ADVOCATES RESPONDENT

AND

JOHN KIPCHUMBA YATOR 1ST RESPONDENT

NIXON KIPCHIRCHIR TUM 2ND RESPONDENT

THE KIPLOMBE GREENFIELD FARM GROUP 3RD RESPONDENT

AND

THE MARAKWET DEVELOPMENT ASSOCIATION APPLICANT

RULING

1. The Marakwet Development Association, the Applicant herein filed a Notice of Motion dated September 25, 2023 pursuant to order 12 rule 7 of the [Civil Procedure Rules 2010](#), sections 1A, 1B 3,, 3A , 63(e) and 80 of the [Civil Procedure Act](#) seeking the following orders:
 - a. Spent
 - b. That the firm of Isiaho Sawe & Co Advocates be granted leave to come on record in place of Joseph C.K Cheptarus & Company Advocates.
 - c. That pending the hearing and determination of this application inter partes, the ruling delivered by this court on 27th July, 2023 an all its consequential orders be stayed.
 - d. That the consent dated November 29, 2023 be set aside.



- e. That the ruling delivered on July 27, 2023 and all its consequential orders be varied and /or set aside on the ground of mistake.
 - f. That costs be provided for.
2. The application is anchored on the grounds set out on the face of the notice of motion supported by the affidavit of Ben Chebii sworn on September 25, 2023.
 3. In his affidavit he deposes that he is a member of the Applicant and duly authorized to swear the Supporting Affidavit. That he attended the meeting of the Association held on October 3, 2020 whose sole agenda was to discuss Eldoret ELC Petition N0. 12 of 2020 which had been scheduled for hearing on October 27, 2020. The said Petition had been instituted by a few members of the Association against the Association and the officials of the Association concerning the allocation and transfer of plots meant for members to non-members.
 4. It was his deposition that the parties to the Petition were asked to step out of the meeting after which the members agreed to resolve the case through Alternative Dispute Resolution. To that end, a committee of seven members including him were chosen. The said committee was to be chaired by Samuel Chemweno.
 5. He deposes that none of the parties to the Petition took part in the deliberations and the extract of the resolutions that were annexed to the affidavit of John Kipchumba Yator does not reflect the correct position of what was discussed at the meeting.
 6. He further avers that the said Samuel Chemweno died soon after the meeting before confirming to the members whether he had filed the resolutions in the Petition as he had undertaken to do. He was therefore shocked to learn that the Chairman John Kipchumba Yator had misled this honourable court by furnishing an extract of the minutes of the meeting held on October 3, 2020 which does not reflect what was deliberated as no legal representation was agreed upon and the firm of Akenga Kimutai was not sanctioned by the members as they agreed to resolve the petition by way of Alternative Dispute Resolution.
 7. He deposed that what the court relied on in reaching its decision was a forgery and what was attached to the said extract of the resolutions was an attendance list signed by the members before the meeting started as proof of endorsement by members of the alleged forged resolutions, a position that is incorrect.
 8. He is of the view that the foregoing amounts to discovery of new and important evidence which was not availed before the court at the time of filing the application dated December 19, 2022 and that the said mistake warrants a review of the court's ruling.
 9. The application was resisted by the respondent (the firm of Akenga Kimutai & Associates) through the replying affidavit of Karanja Francis Advocate sworn on the October 12, 2023. In the said affidavit he deposes that the application is made with intent to re-litigate a matter that the court had decided and which decision had not been appealed against. He took issue with the fact that the Applicant was a stranger who was not a party to ELC Petition No. 12 of 2020 which gave rise to the Client-Advocate relationship between their firm and the Respondents.
 10. He deposed that since they knew that one of the parties they were dealing with was a company, they obtained a copy of the resolution giving them authority to appoint them as the company's advocates. They also obtained a copy of the Association's constitution and the instructions given to them were still valid at the time of making the consent.



11. It is his deposition that after they filed their notice of appointment of advocates, the parties in the Petition and the firm of Cheptarus & Co Advocates communicated and served them with court documents without any problem. He wondered what the new evidence the Applicant sought to rely on was as the minutes alluded to by Mr. Chebii have been in court since the petition was filed. He was of the view that in an application for review on the ground that there was discovery of new and important evidence the court ought to exercise the greatest care as a party who has lost may be tempted to procure evidence which will strengthen his case and put a different complexion under the guise that the evidence could not be obtained at the time the application was filed.
12. Mr. Karanja deposed that the Applicant herein (Marakwet Development Association) herein who gave instructions to his firm had not denied that they instructed them but instead a foreigner in the name of Ben Chebii was the one complaining and alleging that he had discovered new evidence.
13. He denied that the minutes relied on to give them instructions were forged. He was of the view that the court had determined the issue based on the evidence before it and the matter was res judicata. He averred that if the minutes were a forgery as alleged, then the Applicant ought to have taken legal action.
14. He averred that the consent had been reached after lengthy deliberations and they had received a letter from the Applicant's Chairman dated 5th August, 2022 promising to pay their fees in full. He took the view that the Applicant was using the deponent (Ben Chebii) who is a stranger to the proceedings to bring up issues which cannot be resolved in a miscellaneous application.

Parties' Submissions

15. The application was argued orally. Miss Isiaho learned counsel for the Applicant submitted that the application was anchored on section 80 of the *Civil Procedure Act*. On learning that a notice of appeal had been filed by the Applicant, she informed the court that she wished to withdraw the said Notice of Appeal as the Applicant had chosen to pursue the application for review. She submitted that order 45 of the *Civil Procedure Rules* provides for review on three grounds, namely; where there is discovery of new evidence, where there is an error apparent on the face of the record and where there is sufficient cause.
16. It was her submission that the application was based on all the three grounds. She relied on the affidavit of Ben Chebii who was appointed as one of the committee members to oversee the adjudication of Petition No. 12 of 2020 which forms the substratum of this application. She submitted that there was an error apparent on the face of the record as the consent was entered into by officials who did not attend the meeting held on October 3, 2020. She stated that the resolutions relied on by the court were at variance with the minutes of the meeting that took place on October 3, 2023. She pointed out that the court had erroneously relied on the attendance list attached to the extract of the minutes to determine that the members who attended the meeting had approved the appointment of the firm of Akenga Kimutai & Co Advocates to represent the Association instead of the list attached to the actual minutes of the meeting.
17. She submitted that Marakwet Development Association was not a stranger to this matter as it has always been a party to these proceedings. She was of the view that the court's reliance on the attendance list was a tenable matter which the court was able to resolve through a review.
18. On his part, Mr. Ogutu learned counsel for the Respondent submitted that it was imprudent for the Applicant to apply for review in a matter where there was a Notice of Appeal which had not been formally withdrawn. He submitted that the ground that there was an error apparent on the face of the record was untenable as the court had exhaustively dealt with the issues that were being raised in



paragraphs 25-32 of the court's ruling. He was therefore of the view that the Applicant was attempting to re-litigate matters that the court had already dealt with.

19. He maintained that Ben Chebii was stranger to this suit and he had no locus standi to apply for review of the court's ruling as he was not a party to the proceedings. It was his contention that the Marakwet Development Association had passed a resolution allowing them to act for the said association and enter into a consent. He submitted that the officials who authorized them to enter into the consent attended the meeting held on 3.10.2023. It was his further submission that the instant application to set aside the consent was res judicata as the prayers sought were similar to the ones sought in the instant application.
20. In her response counsel for Applicant stated that Mr. Ogutu had not denied that there were two sets of minutes- annexures "BC 2" and "BC 3". She maintained that the resolution that was extracted by the Respondents was at variance with the minutes annexed to Mr. Chebii's affidavit as annexure "BC 2". She stated that the minutes relied on by the Applicants was not availed to the court as Samuel Chemweno who was supposed to avail the said minutes passed away soon after the meeting was held. She submitted that the Respondents had not produced any minutes from which the resolutions were extracted.
21. It was her submission that the application was not res judicata as the court could only review a matter that it had determined. Regarding the Notice of Appeal, she submitted that rule 83 of the *Appellate Jurisdiction Act* allowed a party to withdraw their appeal.
22. Having considered the application, Replying Affidavit together with all the annexures on record and the rival submissions, the sole issue for determination is whether the court ought to review its ruling delivered on July 27, 2023 and set aside the consent dated November 22, 2022 and adopted by the court on December 5, 2022.

Analysis And Determination

23. The provisions governing orders of review are found in section 80 of the *Civil Procedure Act* and Order 45 (1) of the *Civil Procedure Rules* which provide as follows:

Section 80: Review

" 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(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 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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

24. In the instant case, the Applicant relies on all the 3 grounds for review. With regard to the first ground, counsel for the Applicant submitted that the court erroneously relied on the extract of the minutes of a meeting held on October 3, 2020 with an attendance list annexed to the affidavit of Karanja Francis as annexure “FK-2” while the correct minutes are those annexed to the affidavit of Ben Chebii as annexure “BC-2”. Counsel submitted that annexure BC- 2 had not been placed before the court in the earlier application as Samwel Chemweno, the Chairman of Marakwet Development Association who was supposed to avail the minutes died soon after the meeting held on October 3, 2022.
25. Counsel for the Respondent however differed with this position as he submitted that the said minutes “BC- 2” have all along been part of the court record since Petition No. 12 of 2020 was filed. This court took the trouble to peruse the file in Petition No. 12 of 2020 and confirmed that indeed the said minutes were part of the record. Moreover, they were annexed to the affidavit of Paul Kasarkit Kipruto as annexure PKK 2 in the application dated 19.12.22. It is therefore not true that the said minutes constitute new evidence.
26. With regards to the second ground which relates to an error apparent on the face of the record counsel for the Applicant submitted that the consent was signed by officials who did not attend the meeting held on 3.10.20 and their action could not bind the members of the Association. This is also not true because the names of the officials (John Kipchumba Yator, Allan Chelimo and Elizabeth) appear in annexure “BC- 2” among the members who attended the meeting held on October 3, 2023.
27. The explanation given by Mr. Chebii in his affidavit that the officials were requested to leave the meeting before the deliberations started is not reflected in the minutes. What is apparent is that the Applicants did not extract a resolution from their minutes to counter the resolutions presented by the Respondent which were admittedly not supported by any minutes. To the extent that the court relied on the resolutions that were at variance with the minutes presented by the Applicants, the court may have erred, but assuming that both parties had presented minutes with matching resolutions, it would have been difficult to tell which resolutions were accurate and which ones were fake.
28. The courts have had occasion to determine what constitutes an error apparent on the face of the record. 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 so possible. Mere error or wrong view is certainly no ground for a review although it may be a ground for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

29. The question I have to answer in the instant case is whether an erroneous view of the evidence is a ground for review. I think not, as this would amount to sitting on appeal on my own decision which I cannot do. In the case of *Pancras T. Swai v Kenya Breweries Ltd* (2014) eKLR, the court cited the authors, Chittaley & Rao in *The Code of Civil Procedure* (4thEdn) Vol.3, pg 3227 who in explaining the distinction between a review and an appeal had this to say:

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal.”

30. Similarly, the point raised by the Applicant is a good ground for an appeal but not for review.

31. Consequently, the application lacks merit and it is hereby dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 11TH DAY OF DECEMBER 2023.

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J.M ONYANGO

JUDGE.

In the presence of;

Miss Isiaho for the Applicant

Mr. Ogutu for the Respondent

Court Assistant: A. Oniala

