



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 240 OF 2015

Bethwel Omondi Okal.....Petitioner

Versus

Managing Director KPLC & Co.....Respondent

RULING

1. By a notice of motion dated 23rd August 2016 the Petitioner (hereinafter referred to as the applicant) moved this court seeking review orders *"to be granted leave to present fresh evidence pertaining to the loss of land due to fraudulent way-leave; that the Respondent committed perjury; that he be granted leave to provide evidence that the Right to property and Right to clean and health environment is being violated."*

2. The grounds in support of the application are that *"the court disregarded the rules of natural justice, that there is glaring omission of the principles of due process which puts the court to open bias and doubt as to fidelity of the law, that the court disregarded Rule of Law."* The applicant also attacks the defence rendered by the Respondent at the trial calling it fraudulent and also casts doubt on the impartiality of the trial court.

3. The application is opposed. On record is the Replying Affidavit of Emily Kirui, the Respondents legal officer. She avers that the application does not meet the grounds for review, namely, an error on the face of the record, discovery of new and important matter or evidence which was not available at the time the orders were made or sufficient reason. Further, the applicant is asking this court to sit as an appellate court and that the grounds raised are grounds for appeal.

4. Also on record is the applicants further affidavit which reiterates his grounds for review the contents of which I considered. At the hearing the application the applicant adopted the contents of his affidavits and urged the court to be guided by the Rules of this court particularly the overriding objective which is to facilitate access to justice. Counsel for the Respondent adopted the Respondents' Replying affidavit.

Issues for determination

5. Only one issue falls for determination, namely; *Whether the applicant has satisfied the grounds for review.*

6. At the outset, I am clear in my mind that there are two things I cannot do in an application of this nature. *First I cannot fault or review the judges' exercise of discretion and secondly I cannot review the decision merely because the judge may have decided the matter on an incorrect procedure or his decision is based*

on the wrong misapprehension of the law. These two, to my mind are grounds of appeal. Further, allegations of bias or breach of natural justice raised by the applicant, whether real, perceived or imaginary are grounds for appeal and not for review.

7. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45, Rule 1 and Section 80 of the Civil Procedure Act.^[1]

8. Section 80 of the Civil Procedure Act^[2] and Order 45 Rule 1 of the Civil Procedure Rules, 2010. In my view, the High Court has a power of review, but such said power must be exercised within the framework of Section 80 Civil Procedure Act^[3] and Order 45 Rule 1.^[4]

9. Section 80 of the Civil Procedure Act^[5] provides as follows:-

80. 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

10. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

45 Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

11. Section 80 gives the power of review and Order 45 sets out the rules. The rules in my view 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 un reasonable delay.**

12. It is important to distinguish grounds of appeal and grounds for review. To my discernment, the grounds cited by the applicant qualify to be grounds of appeal and not grounds for review. In the case of *National Bank of Kenya Ltd vs Ndungu Njau*^[6] the court held:-

“In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge’s alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the

error be apparent on the face of the record and therefore requires no elaborate argument to expose.”(Emphasis added).

13. **Bennet J** was in my humble view correct in *Abasi Belinda vs Fredrick Kangwamu and another*^[7] when he held that:-

“a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”

14. Also of useful guidance is the following excerpt from the judgement in the above cited case of *National Bank of Kenya Ltd vs Ndungu Njau*^[8] where the court stated:-

“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.”

15. 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 for 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.^[9]

16. The applicant has not demonstrated that the alleged new evidence could not be obtained despite the exercise of due diligence. He did not explain that the evidence was not available and could not be procured at the time of the trial. His attempt amounts to re-opening the case which is outside the purview and function of review proceedings.

17. The expression 'any other sufficient reason' means a reason sufficiently analogous to those specified in the rule.^[10] Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out would amount to an abuse of the liberty given to the court under the Act to review its judgement.^[11]

18. Also relevant is the decision rendered in *Tokesi Mambili and others vs Simion Litsanga*^[12] where it was 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.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

19. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

20. The power of **review** is available only when there is an **error apparent** on the **face** of the **record**. The judgment the subject of this application does not suffer any such **error apparent** on the **face** of the **record**. The issues raised are matters touching on the courts finding, interpretation and application of the law. Such matters can only be challenged by way of appeal.

21. I emphasize that **review** proceedings are not an appeal. The **review** must be confined to **error apparent** on the **face** of the **record** and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.[\[13\]](#)

22. I am not persuaded that the applicant has offered '*sufficient reason*' within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order 45 Rule 1. My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda*[\[14\]](#) where the court held that '*an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.*

23. The applicant urged this court to invoke the rules of this court on the overriding objective which is to facilitate access to justice. Article 159 (2) (d) of the Kenya Constitution 2010 propounds that in exercising judicial authority, the courts and tribunals shall administer justice without undue regard to technicalities of procedure.

24. I find nothing in the overriding objective or Article 159 or the Rules of this court to suggest that an application for Review can be allowed where the grounds relied upon fall outside the scope of order 45 Rule 1 of the Civil Procedure Rules as in this case.

25. I must point out that Article 159 of the Constitution is not a panacea for all problems. It is not lost to this court that the provisions of Section 80 of the Civil Procedure Act[\[15\]](#) and Order 45 Rule 1 of the Civil Procedure Rules cited above are very clear on the grounds for Review. The applicant cannot seek refuge under Article 159 (2) (d) of the constitution under the present circumstances in view of the mandatory and express provisions cited above.

26. In view of my findings herein above that the grounds offered do not fall within the scope for review, this application fails.

27. Having so found as herein above stated, I find that this is not a proper case for this court to exercise its discretion in favour of the applicant.

28. Accordingly, the application dated 23rd August 2016 is hereby dismissed with no orders as to costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 15th day of November 2017

John M. Mativo

Judge

[\[1\]](#) Cap 21, Laws of Kenya

[\[2\]](#) Ibid

[\[3\]](#) Ibid

[\[4\]](#) See Sinha J in *Union of India vs B. Valluvan*, AIR 2007 SC 210; (2006) 8 SCC 686

[5] Supra

[6]{1996} KLR 469 (CAK) at Page 381

[7] {1963}E.A 557, also see Chittaley&Rao in the Codev of Civil Procedure, 4th Edition, Vol 3, Page 3227.

[8] Supra

[9] Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608

[10]Sir Dinshah Fardunji Mulla, The Code of Civil Procedure, 18th Edition, Reprint 2012, at Page 1147

[11] Ibid

[12]{2004} eKLR

[13] See [Meera Bhanja v. Nirmala Kumari Choudhury](#), (1995) 1 SCC 170

[14] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340

[15] Supra