Njoka v Gichuki (Civil Appeal 28 of 2018)
[2023] KEELC 22583 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22583 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

CIVIL APPEAL 28 OF 2018

A KANIARU, J

DECEMBER 6, 2023

BETWEEN

LINUS GITONGA NJOKA ..... APPELLANT

AND

PETER MUYA GICHUKI ..... RESPONDENT

RULING

1. I am called upon to determine a Motion on Notice filed here on July 18, 2022 and dated June 17, 2022. It is expressed to be brought under Sections 1A, 1B, 3A of the *Civil Procedure Rules*, 2010, and all other enabling Law. It is essentially an application for review and it has the following prayers;

    1. That the honourable court be pleased to review/ set aside the judgment and decree of the court delivered on May 10, 2022.

    2. That the honourable court be pleased to determine the appellant/ applicants appeal on merit.

2. The application is premised on the grounds, interalia, that the applicant was aggrieved by the judgment, and decree of the court delivered on May 10, 2022; that the judgment struck out the applicants suit on the ground that it was time-barred; that the applicant became aware of breach of contract in the year 2006; that the applicants suit was within the 6 year Limitaion period; and that the respondent didn't bring up the issue of Limitation during cross-examination or as a preliminary objection.

3. The application came with a supporting affidavit that generally elaborates the grounds upon which it is premised.

4. The respondent responded to the application via grounds of opposition filed on January 27, 2023. He stated, interalia, that the application is fatally defective, incompetent, and an abuse of the court process. He averred that there has been inordinate and unexplained delay in filing the application considering that judgment was filed on May 10, 2022 while the application was filed on July 18, 2022 and was not

served until December 14, 2022. He further averred that there is no error apparent on the face of the record and that the lower court record and evidence show that the suit was time-barred and that the court was therefore correct in striking it out. Lastly, the respondent stated that the issue of limitation was actually raised and the record is clear about it.

5. The application was canvassed by way of written submission. The applicant's submission were filed on 27.3.2023. The appicant submitted, interalia, that there is an error apparent on the face of the record as evidence on record shows that the cause of action arose in the year 2006. This would mean that the suit is not time-barred contrary to the court findings that it was. The cases of *south Nyanza sugar company Limited v Dickson Aoro Owour* MGR: HCCA No 85 of 2015 (2017)eKLR and *Diana Katumbi Kiio v Reuben Musyoki Muli* (2018)eKLR were cited to guide the court.

6. It was the applicants position that he was condemned unheard as the respondent did not raise the issue of limitation during cross-examination or as a preliminary objection. The case of *Kenya Trypanosomiasis Research Institute v Antony Kabimba Gusinjilu* (2019) eKLR was cited and quoted for persuasion and guidance.

7. On the issue of delay as alleged by the respondent, the same was said to have been caused by late instructions given to file the application. It was said to be a regrettable situation that delay occurred.

8. The respondents submissions were filed on March 29, 2023. It was submitted that after delivery of judgment, the applicant had time to file an appeal but did not. The application now before court was said to be a back-door way of appealing. It was also submitted that there was inordinate delay in filing the application. The cases of *Akinyi v Gladys Kemunto Obiri & Another* (2016)eKLR, *ET Monks Company Ltd v Evans and 3 others* (1974) eKLR, *Dickson Miriti Kamonde v Kenya Commercial Bank Ltd* (2006) eKLR and *Mobile Kitale Service Station v Mobile Oil Kenya Limited & another* (2004) eKLR were cited and quoted in an effort to persuade the court.

9. It was further submitted that there is no error apparent on the face of the record. After citing and quoting the case of *Republic v Principal Secretary Ministry of Internal Security & another Exparte Schon Nooran & another* (2020) eKLR, it was submitted that there is no error apparent on the face of the record as the pleadings and the records of appeal show that the issue of limitation was raised. Various parts of the record were actually quoted to show that the issue was raised.

10. The applicant was also faulted for not extracting a decree that he seek to review. It was submitted that such decree should have been annexed to the application. Ultimately, the court was asked to dismiss the application with costs to the respondent.

11. I have considered the application, the response made, and the rival submissions. The case law made available by both sides has also been considered. The judgment of the court actually turned on whether or not the entire suit was caught up by the limitation period. A large part of the judgment actually states what each side had said on the issue, the courts own findings on it, and the courts appreciation of the applicable law. In my view, the applicant can not come back to the court asking it to revisit the issue. His only recourse was to appeal the court's decision. I agree with the respondent that no error apparent on the face of the record has been shown. No such error is obvious or glaringly apparent on the record.

12. Infact, a look at the grounds on which the application is premised shows clearly that the applicant is faulting the court mainly on its finding concerning the issue of limitation of time. The respondent is faulted for not raising the issue of limitation during cross-examination in the lower court or as a preliminary objection. The issue of limitation of time is clearly an issue of law. Being such, it need not be raised by any party at all. The court can even raise it *Suo Motu*. But in this matter, it is clear that the issue was raised. The defence filed in the lower court clearly raised the issue. The applicant also

faults the respondent for not raising the issue as a preliminary objection. This averment is based on a misapprehension of the law. And this is so because one of the cardinal principles to observe and uphold in raising a preliminary objection is that it should be based on admitted or incontrovertible facts. The applicant in this matter had not admitted the fact of limitation of time. He is contesting that fact even at this stage. Infact, that is one of the reasons he filed the application under consideration. The fact of the matter is that had the respondent raised the issue by way of a preliminary objection, the applicant herein would most likely have opposed it on the basis that it is based on a disputed fact.

13. The applicant had no business coming to the court for review given the grounds he has advanced to support his application. It was not open to him to come to court that way as it is clear that he is faulting the court on its appreciation of law and evidence.

14. In *National Bank of kenya Limited v Ndung'u Njau* Civil appeal 211 of 1996 (1997) eKLR the court expressed itself as follows;

> "A review may be granted whenever the court consider 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 diferrent 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 the law. Misconstruing a statute or other provision of law can not be a ground for review". (emphasis: mine).

15. Further, in *Francis Origo & another v Jacob Kumali Mungala*; Civil Appeal No 149 of 2001 (2005) eKLR the court also observed:

> "Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for the appeal, we are satisfied that the learned commissioner was right when he found that there was absolutely no basis for the appellants application for review. We have therefore no option but to dismiss this appeal with cost to the respondent".

16. I think it is sufficiently clear at this stage that where, as in this case, one is faulting the court on the appreciation of law or evidence, one cannot apply for review. The only option left is to go on appeal. The applicant in this matter was therefore labouring under a serious misdirection of the applicable law when he opted to come to court by way of review. Finally, I think the delay in filing the application was not sufficiently explained. It is not enough to say the delay is regrettable. A good explanation was necessary.

17. The upshot in light of the foregoing, is that the application herein is for dismissal and I hereby dismiss it with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6TH DAY OF DECEMBER, 2023.

In the presence of;

Eddie Njiru for Muthoni Ndeke for appellant

Mwangi for kinyua Mureithi for respondent

Court Assistant – Leadys

A. KANIARU

JUDGE

6.12.2023.