REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

MISCELLANEOUS CONSTITUTIONAL APPLICATION NO. 4 OF 2013

IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(6) OF THE CONSTITUTION

AND

IN THE MATTER OF EXERCISING SUPERVISORY JURISDICTION OVER CRIMINAL PROCEEDINGS IN THE RESIDENT MAGISTRATES COURT AT KANDARA

(CRIMINAL CASE NO. 682 OF 2012

REPUBLIC VERSUS PETER RUCHACHU MACHARIA)

BETWEEN

PETER MACHARIA RUCHACHU…….APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTION….1ST RESPONDENT

ATTORNEY GENERAL……2ND RESPONDENT

RULING

The applicant filed a Notice of Motion dated 24th July, 2014 seeking for a review of the judgment delivered on 3rd March, 2014 in a petition filed by the respondent. Besides review of the judgment, which the applicant has erroneously described as a ruling, the applicant also sought that the originating motion be heard afresh and pending the rehearing and determination of the motion, the taxation of the bill of costs, apparently filed by the respondent be stayed.

The application which was filed under **section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules** was supported by an affidavit sworn by the applicant's counsel, Mr Solomon Kimathi Njeru.

The basis of the applicant's application is that there is an error apparent on the face of the record. It is the applicant's case that while the court, in its decision, made a finding that the applicant did not controvert the facts as laid out by the respondent, the applicant had in fact opposed the applicant's application and filed grounds of objection together with a replying affidavit in response thereto.

In particular, Mr Njeru deposed that on 2nd April, 2013, he personally filed the grounds of objection and the replying affidavit and that on 7th October, 2014 when the matter was set to be heard, counsel was

indisposed and his colleague Mr Naulikha held his brief; on that day, so Mr Njeru has deposed, Mr Naulikha asked for an adjournment yet the court stated in its judgment that he sought time to file a response to the application and the grounds of objection.

According to Mr Njeru, when the matter came up again in court, on 20th November, 2013 parties agreed that the respondent's petition be determined by way of written submissions; on the material day, counsel told the court that he would be associating himself with the position taken by the second respondent, the Attorney General, in his submissions. Counsel has stated that the court erroneously understood him to mean that he had not filed any response to the application.

Due to what the counsel for the applicant has stated to be the court's mistake, the applicant has been prejudiced and in his view, it is only meet and just that the entire petition should be heard afresh.

Counsel for the respondent, Ms Wangui Muhoro, opposed the application and filed an affidavit which she swore on 17th October, 2014. It is her position that applicant is guilty of inordinate delay in filing the application and that his counsel neither attended court for the judgment when it was delivered on 3rd March, 2014 nor made any efforts to enquire of the outcome of the case until June, 2014; in view of this delay, so counsel has urged, the application should be disallowed.

Secondly, counsel has urged that the appropriate action the applicant should have taken is to appeal against the judgment because being a constitutional petition, the applicant could not purport to invoke the Civil Procedure Rules to review a judgment delivered in a constitutional petition.

In any event, so she urged, even if the court considered the grounds of objection and the replying affidavit, it is quite likely that it would not have reached any different result; this is because the grounds of objection and the replying affidavit allegedly filed by the applicant did not controvert the issues of fact in the respondent's affidavits in support of the petition but rather sought to justify the actions taken by the respondents.

Counsel for the applicant filed written submissions in respect of the applicant's application; when the application came up for hearing on 21st October, 2014, he submitted that he was adopting his written submissions but added that though this court found that he had not filed any response to the respondent's application, he had filed a replying affidavit and grounds of objection except that these two documents must have been filed in the wrong court file. According to counsel, the facts in the affidavit a copy of which he annexed to his affidavit showed that there was an offence and that these facts ought to have been considered in the judgment.

Counsel also argued that although the respondent had sought to have the original file from the magistrate's court brought to the High Court for purposes of satisfying itself of the proceedings in the subordinate court, this prayer had not been considered in the judgment.

Counsel admitted that though there was an error on the charge sheet, this error was not fatal to the charges against the respondent; the error could have been cured by an amendment under **section 382** of the **Criminal Procedure Code**.

On the procedure he adopted in filing this application, counsel argued that the originating motion whose judgment he was seeking to have reviewed was not a constitutional petition and that in any event the court should not be bound by procedural technicalities.

Ms Muhoro in her submissions largely reiterated what she had deposed to in her affidavit in opposition to the motion; when the court sought to know whether she had been served with the applicant's replying affidavit, she admitted that indeed she was served except that there were no annexures attached.

As far as the prayer calling for the record from the magistrate's court is concerned, counsel submitted that it should be deemed to have been rejected and the fact that it was not considered in the judgment should

not be a basis for review.

I have considered the submissions by both counsel for the applicant and the respondent. I have also carefully considered the affidavit filed by the applicant in support of the application.

One thing that is not in dispute is that the grounds of objection and the replying affidavit that the applicant purported to file in response to the respondent's originating motion have never been on record; these documents were not on record when the respondent's originating motion was heard and neither were they on record when the application herein was argued.

Counsel for the applicant has submitted that it is possible that these documents could possibly have been filed in the wrong court file. While considering this angle of counsel's submissions, the question that kept lingering in my mind was, what was it that could have led any person to have filed the applicant's replying affidavit and the grounds of objection in the wrong file? After careful scrutiny of the applicant's application, more particularly his counsel's affidavit, I noted the case number that was initially indicated in the two documents as Miscellaneous Constitutional Application **No. 4 of 2012** and not **No. 4 of 2013**. From the copies attached to Mr Njeru's affidavit, I noted there was a clear attempt to overwrite by hand and alter the year to read 2013 but it is patently clear that the typed year is the year 2012. It is not clear when these alterations were done, but those alterations in themselves provide an indication as to why these two documents may not have been placed in the correct court file.

The logical conclusion that any reasonable man can make in these circumstances is that, in the absence of the original documents and more importantly, in the absence of any explanation for the applicant's deliberate attempt to alter the year to read 2013 when it is clear that it was initially typed as 2012, the applicant's documents were not filed in this file because the case number that they bore at the material time was obviously inconsistent with the number of this case; the attempt to overwrite the year by hand was a clear but a belated attempt to correct this error.

Having so found, two pertinent questions arise; firstly, would counsel's mistake in misfiling his client's pleadings or affidavits, either through carelessness or negligence or for any other reason, pass as an error apparent on the face of the record? Secondly, would it be plausible for the same counsel to seek to invoke the provisions of **section 80** and **Order 45** of the **Civil Procedure Act and Rules** respectively, assuming that this is the correct procedure in the circumstances of this case, to have a court's decision reviewed when he is the author of such a mistake? My answer to both questions would be in the negative.

As earlier noted, except for the copy of the replying affidavit and grounds of objection attached to the affidavit of Mr Njeru in support of the applicant's application, the affidavit and the grounds of objection have never been on record. How, in these circumstances, would this court have considered the applicant's replying affidavit and his grounds of objection if they were not, and indeed they have never been on record? Strictly speaking, if the number indicated in the applicant's documents corresponds to an existing case and therefore those documents were filed in a file for that particular case which bears that particular number, it cannot be argued that the applicant responded to the application which is in a separate case file in which those documents ought to have been filed. I was, in these circumstances entitled to conclude, and there was no reason for me to conclude otherwise, that applicant did not controvert the respondent's factual claims.

Counsel for the applicant appeared to own up to his mistakes and submitted that counsel's mistakes should not be visited on his client; he reminded the court that it has unfettered discretion to review its judgment and can do this for any sufficient reason; to this end counsel cited **ELC Civil Suit No. 1565 of 2000, Livingstone Kunini Ntutu versus County Council of Narok & 2 Others** and **Industrial Court Cause No. 230 of 2013 John Ojwang Atieno & 13 Others versus Migori County Government & Another**.

I agree with the counsel's submission on this point but his application was specifically made on the premises that there was an error apparent on the face of the record; for reasons I have given, I have not found any basis upon which one could conclude that there is such an error; an error on the part of a party

or his counsel cannot be said to be an error apparent on the face of the record in the context of order 40 of the Civil Procedure Rules.

In **Nyamogo and Nyamogo Advocates versus Kogo (2001) 1EA 173** at **page 174** the Court of Appeal had this to say on what an error apparent on the face of the record means:-

"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 a real distinction between a mere erroneous decision and an error apparent on the face of 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 possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

I would not regard a party's mistake in misfiling his pleadings or affidavits as an *"error on a substantial point of law that stares one in the face"*; it is simply an omission on the part of that party, which omission should not be attributed to the court. In the absence of these documents the question whether there was an alternative opinion to what I came to in my decision does not arise; neither can it be said, and I have not heard the applicant argue, that the determination I made was not a possible one in view of the material before me.

I would also reject the applicant's argument that I did not consider the applicant's position in opposing the respondent's originating motion; although the applicant's replying affidavit and grounds of objection were not on record, I considered, in my judgment, the position his counsel adopted on the respondent's originating motion. The record will bear me out on this question. When the respondent's petition came up for hearing on 20th November, 2013, counsel for the applicant is recorded to have told the court that:-

"The matter is for hearing of the application dated 21st January, 2013. We have agreed that we rely on the pleadings and submissions on record. I am adopting the Attorney General's position on this matter." (Underlining mine).

In my judgment I considered the pleadings and the submissions made on behalf of the Attorney General and I have not heard the Attorney General complain that I did not do so; if the applicant adopted the Attorney General's position which I duly considered in my judgment, the argument that I did not consider the applicant's position in respect of the respondent's motion is, to say the least, self-defeatist.

Finally, the respondents originating motion was supported by two affidavits sworn by the respondent; one of the two affidavits consisted of over 80 paragraphs of factual depositions which I addressed in my judgment. Counsel has attached to his affidavit in support of his client's application a copy of a replying affidavit which was purportedly filed in response to the respondent's affidavit sworn in support of the originating motion. As an exhibit, it has been noted that this copy of the affidavit was not properly marked but even assuming it was, it is difficult to conclude from the depositions made therein that the applicant controverted the specific allegations made against him. Contrary to suggestions by the applicant's counsel, I am unable to see any depositions on facts by the applicant, relevant to the factual claims deposed to in the respondent's affidavits in support of his originating motion. To appreciate my position, it is important to reproduce the applicant's affidavit as sworn; it reads as follows:-

"REPLYING AFFIDAVIT

I NO. 44590 police constable Zachariah Kimere from Kandara police station crime branch and of P.o. Box 22 Kandara within Murang'a County in the Republic of Kenya do hereby solemnly make oath and state as follows:-

1. **THAT** I have been in the police service for the last 30 (thirty) years and currently stationed at the aforementioned police station carrying out crime duties.

2. **THAT** I have been seized with the conduct of the criminal matter No. 682 of 2012 republic versus PETER MACHARIA RUCHACHU now pending before the principal magistrate(sic) court of Kandara.

3. **THAT** I am conversant with the facts and evidence in this matter.

4. **THAT** I am the arresting and investigating officer in this matter the same having been minuted to me by my OCS Chief Inspector JACINTA MWARANIA

5. **THAT** I have had the opportunity to read the application filed by the law firm of KAMAU KURIA and KIRAITU advocate (sic) on behalf of the accused herein PETER MACHARIA RUCHACHU seeking among other orders a permanent a (sic) stay of the criminal proceedings against the applicant.

6. **THAT** I have also sought and been granted legal opinion from the Director of Public Prosecutions Murang'a on the above mentioned subject matter which information I have no doubt in my mind to be true

a. That the charges preferred against the applicant are appropriate, legal, proportionate and within the law.
b. That the facts on record criminal case No. 682/2012 disclose the offence under section 316(a) of the Penal Code cap 63 Laws of Kenya was committed and there is sufficient, consistent and admissible evidence on record to support the same.
c. That pursuant to the provisions of section 193(A) of the Criminal Procedure Code which anticipates the existence of the circumstances where there can be concurrent criminal and civil proceedings instituted against a person or group of persons and this case is the best example for the application of the said provisions of the Law.

7. **THAT** as the investigating officer well acquinted (sic) with both facts and evidence in the criminal case No. 682 of 2012 I swear this affidavit in opposition to the orders (relief) sought by the applicant more specifically a permanent stay of the said criminal proceedings against him.

8. **THAT** what I have deponed (sic) to herein is true to the best of my knowledge belief and information and in the (sic) with the Oaths and Statutory Declarations Act CAP 15 Laws of Kenya.

Sworn at Murang'a by)

The said No. 44590 PC ZACHARIAH KIMERE) signed

This 2nd day of April, 2013)

)

BEFORE ME)

COMMISIONER FOR OATHS)

<u>TO BE SERVED UPON</u>

KAMAU KURIA AND KIRAITU ADVOCATES

CHAI HOUSE 3RD FLOOR KOINANGE STREET

P.O. BOX 51806-00200

NAIROBI."

On that affidavit there is an attachment which is neither marked nor referred to in the affidavit; if the attachment was intended to be an exhibit, it was not properly marked. It is also not clear on the face of the affidavit who drew it and it is quite possible that the police constable may as well have drawn the affidavit himself. Be that as it may, looking at the depositions that have been made by the deponent, I am unable see any that controverts the facts averred to in the respondent's affidavits sworn in support of the originating motion. The implication of this is that even if this affidavit was on record, it would have had very little influence, if any, on my findings on fact in the decision I took on the respondent's originating motion.

I would, therefore, hold that apart from the absence of any error apparent on the face of record there is no evidence of any other reason, sufficient or otherwise, for reviewing the judgment; the applicant has not demonstrated to my satisfaction any of the grounds, upon which a review of a judgment can possibly be made.

For the reasons I have given, I am of the humble opinion that the applicant's application dated 24th July, 2014 has no basis; it is misconceived and I hereby dismiss it with costs.

Signed and dated at Nyeri this 17th day November 2014

Ngaah Jairus

JUDGE

Read and delivered in open court this 13th day of February, 2015

H.P. Waweru

JUDGE