



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NAIROBI

ELCA/E081/2021

FLAMINGO TOWERS LIMITED.....1ST APPELLANT/APPLICANT

CITISCAPES VALUERS & ESTATE AGENTS LIMITED....2ND APPELLANT/APPLICANT

VERSUS

HOMELAND MEDIA GROUP LTDRESPONDENT

RULING

1. Before this Court for determination is the Application dated 2/12/2021 duly filed under Section 1A, 1B, 3A & 80 of Civil Procedure Act Cap 21, Order 45 Rule 1, of the Civil Procedure Rules 2010. The two (2) appellants are seeking orders infra; -

1. Spent

2. Spent

3. THAT Honourable court be pleased to review and/or set aside the Order made on 29/11/2021 dismissing the Appellant'/Applicants' Application dated 12/10/2021 and determine the said Application on merit.

4. THAT the cost of this application be provided for.

2. The motion is premised on the Supporting Affidavit of the advocate on record for the Appellants/Applicants, Stephen Oyugi Okero and grounds (a) to (i) set out on its face.

3. This Application is opposed. There is a Replying Affidavit sworn by Joe Musyimi Mutambu dated 17/12/2021.

4. On 25/01/2022, the parties agreed to canvass with the matter through written submissions and a Ruling date was reserved when they came to court on 14/02/2022.

5. Having considered the motion, supporting affidavit, replying affidavit and the rival written submissions, this court is of the considered view that the only issue falling for determination is whether the applicant's motion is merited. I will proceed to analyze the legal and jurisprudential framework on the issue.

6. The appellants/applicants explained that they had filed their Memorandum of Appeal before filing the Application dated 12/10/2021. They contend that the same was filed on 8/10/2021 and went ahead to attach a receipt that was issued. It is their contention that the file number for the Appeal was generated pursuant to this. The Respondent, on the other hand, contended that there is no new and important matter that could not be produced by the applicants at the time when the Ruling was delivered. They further contend that the present application has not elaborated any sufficient reason to warrant a review of the Court's ruling and that it is defective as the appellants/applicants did not attach the Ruling that is subject to this application for review.

7. From the outset, the substantive law on this is Order 12 rule 7 of the Civil Procedure Act provides that:

'Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.'

8. Additionally, Section 80 of the Civil Procedure Act confers upon the court the necessary authority to review a decree or order it has made.

Further, Order 45 of the Civil Procedure Rules sets out the rules for setting aside a judgment or order made by a court. See the case of **Stephen Gathua Kimani –Vs- Nancy Wanjira Waruingi / Providence Auctioneers (2016) eKLR** and **Republic –Vs- Public Procurement Administrative Review Board & 2 Others (2018) eKLR** where it was held as follows:-

“That the rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds:

(a)

(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 unreasonable delay.”

9. In the case of **Timber Manufacturers and Dealers –Vs- Nairobi Golf Hotels (K) Ltd HCCC No.5250/92** (reported in Odunga’s Digest on Civil Case Law and Procedure Vol. IV at page 3553) Emukule – J. held:-

“For it to be said that there is a mistake or an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

10. The Respondent herein contends that this Court is functus officio and that the Ruling can only be set aside by the Court of Appeal, it noteworthy that the Appellants/Applicants have applied for a review and not an appeal, which this Court has power to do so. In the case of **Raila Odinga –Vs- the IEBC & 3 others**, the Supreme Court made the following remarks regarding the doctrine of functus officio:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors, nor does it prevent a Judicial change of mind even when a decision has been communicated to the parties....”

11. That decision by the Supreme Court is obtained in the circumstance of this case. Section 80 CPA as read with Order 45 CPR gives court jurisdiction to review a judgment or an order on an account of some mistake or error apparent on the face of the record or for any other reason, decision to obtain a review of the decree or order. See the case of **Afit Kumar Rath- Vs- State of Orisa & Others (a Supreme Court cases) 596** at page 608.

12. In the case of the **Registered Trustees of the Archdiocese of Dares Salaam –Vs- The Chairman Bunju Village Government & Others**, the Court of Appeal of Tanzania held that:

“It is difficult to attempt to define the meaning of the words sufficient cause; it is generally accepted however, that the words should receive a liberal construction in order to advance substantive justice, when no negligence, or in action or want of bona fides, is imputed to the appellant.”

13. The Court was equally shocked that a party failed to file a Memorandum of Appeal which is a basic requirement as contended to by the Appellants/Applicants counsel. The said document was not reflected on the E-Filing platform by the time of writing the Ruling in question. The Court requested for assistance from the Registry and the Deputy Registrar, and they also found that the Memorandum of Appeal had not been filed. It was unexplainable that such an error could be made in the first place. Be that as it may, this was a technical lapse and with these technological advances being new, hitches do happen. Evidence produced indicates that the Memorandum of Appeal was duly filed on 8/10/2022. I also note that the Appellant/Applicant applied for a review without unreasonable delay.

14. From the foregoing, the Court finds that sufficient cause has been advanced seeing that the Application dated 12/10/2021 was dismissed as result of this technological lapse and that prejudice will not be occasioned to the Respondent.

15. Section 1A, 1B and 3A of the Civil Procedure Act grants the Court inherent powers to make such orders as may be necessary to meet the ends of justice. It is a decision that is within the discretion of the court where sufficient cause is shown.

16. The Court of Appeal in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** stated as follows regarding the overriding objective:

“On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the court’s considerable latitude in the exercise of its discretion in the interpretation of the law and rules made there under. (See the case of Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008). The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness(See the case of Kariuki (Supra); that in applying or interpreting the law or rules made there under, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamami and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009);....”

17. Furthermore, in the case of **Abdirahman Abdi also known as Abdirahman Muhumed Abdi v Safi Petroleum Products Limited & 6 Others (2011) eKLR**, the learned judges of appeal held:

“...The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice....”

18. Based on the facts before me and relying on the legal provisions cited above, I am satisfied that the Appellants/Applicants’ reasons are sufficient. I disagree with the Defendant that the application is unmerited. Consequently, it is the finding of this Court that the motion is merited.

19. Ultimately, in the upshot, I am of the view that the Applicant has satisfied the conditions for the grant of the orders sought under Section 80 CPA as read with Order 45 Rule 1 CPR. Accordingly, I allow the Application dated 2/12/2021 in the following terms:-

a. The Order of this Honourable Court made on 29/11/2021 dismissing the Appellants/Applicants’ Application dated 12/10/2021 is hereby set aside and/or reviewed.

b. The Appellants/Applicants’ Application dated 12/10/2021 is hereby reinstated.

c. The Parties to appear before this Court on 27/04/2022 for directions on the Application dated 12/10/2021.

d. Costs shall be in the cause.

20. Orders Accordingly

DATED AT NAIROBI THIS 14TH DAY OF MARCH, 2022

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MOGENI J

JUDGE

In the Presence of

Mr. Manyara for the Appellant/Applicant

Ms. Azangalala h/b for Mr. Mbuvi for the Respondent

Mr. Vincent Owuor.....Court Assistant