Chepkwony & another v Chebusit & another (Environment & Land Case 66 of 2013) [2022] KEELC 3080 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3080 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 66 OF 2013

MC OUNDO, J

MAY 26, 2022

BETWEEN

KIPTONUI ARAP CHEPKWONY ..... 1ST APPLICANT

WELDON KIPYEGON CHERUIYOT ..... 2ND APPLICANT

AND

JONATHAN SITONIK CHEBUSIT ..... 1ST RESPONDENT

DAISY CHERONO ..... 2ND RESPONDENT

RULING

1. Pursuant to the dismissal of an application dated the September 14, 2020, where the firm of M/S Migos Ogamba & Waudo Advocates sought leave to come on record on behalf of the Applicants and to set aside the orders made on the May 23, 2018 dismissing the suit for non-attendance so that the suit can be re-instated and set down for hearing on merit, the Applicants have now filed yet another application dated the May 19, 2022 pursuant to the provisions of Section 3 and 3A of the *Civil Procedure Act*, Order 45 Rule 1(b) of the *Civil Procedure Rules*, seeking that the said ruling be reviewed and set aside so that the said application could be re-instated for hearing on its merits.

2. The application is supported by the grounds therein and on the Supporting Affidavit of Mr Phanuel Omondi, Counsel for the Applicant herein sworn on the May 19, 2021, as well as on his submissions filed on the December 14, 2021.

3. The applicant's contention is that there was an error apparent on the face of the record within the meaning of Order 45 Rule 1(b) of the *Civil Procedure Rules*. The Applicant therefore does not to point out the said error but instead delved into what looks like a Memorandum on issues for determination on Appeal.

4. In his submissions Counsel framed his issues for determination as follows;

i. Whether the applicant had made out a good case to justify the order for review.

ii. Whether in(sic) the circumstance of this case, are of a nature that would warrant the court to exercise its inherent jurisdiction and granting orders sought for review.

5. Counsel relied on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1(1) of the *Civil Procedure Rules* to submit that the court has power to review its decision on account of some mistake or error apparent on the face of the record which error must be self-evident and should not require an elaborate argument to be established.

6. That from court's finding at paragraph 22 and 26 of the impugned ruling and from the reading of the provisions of Order 9 rule 10 of the *Civil Procedure Rules,* the applicant had made out his case for review as the record clearly displayed an error relied upon by the court to make its decision. That an error apparent on the face of the record was clearly defined in the case of *Nyamongo & Nyamongo v Kogo* [2001] EA 174 and in the case of *Attorney General & O'rs vs Boniface Byanynyima* (sic)

7. The applicant's Counsel submitted that this court failed to consider the first part of the application as per the provisions of Order 9 Rule 10 (sic) which allow the combination of prayers for leave to come on record with other prayers.

8. The application was opposed by the 2nd Respondent through his Replying Affidavit sworn on February 8, 2022 and submissions of an equal date to which the Respondent submit that there had been no clerical error or arithmetical mistake or error on the court's ruling. That the point of law was that there had been no leave granted to Counsel, contrary to the law as provided for in the *Civil Procedure Rules*. That the applicant's application had dealt with facts and not the law and which facts had not disclosed the evidence granting him leave to come on record. That the provisions of Order 9 Rule 9 of the *civil Procedure Rules* were clear and in mandatory terms that Notice of Change of Advocates after judgment shall be effected by an order of the court or consent by parties. That the Applicant had not disclosed the discovery of new and important matter. That the second prayer of the impugned application could only be granted upon leave having been granted first.

9. The Respondents further submitted that the court did not act beyond its limits in dismissing the application and by the applicants application the court was being asked to sit as an Appellate Court in its own decision when it had no such jurisdiction. That were the court wrong in its appreciation of the law, the same was not a ground for review but the applicant ought to have filed an appeal as per the grounds raised by the Applicant. The errors or omissions if any, must be self-evident. The Respondent sought that the application be dismissed with costs.

Determination.

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

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 judgment to the court which passed the decree or made the order without unreasonable delay."

11. Section 80 of the *Civil Procedure Act* provides as follows:-

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.

12. From the above provisions, it is clear that whereas Section 80 of the *Civil Procedure Act* gives the court the power to review its orders, Order 45 Rule 1 of the *Civil Procedure Rules* sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

i. 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;

ii. on account of some mistake or error apparent on the face of the record, or

iii. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

13. The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.

14. The Applicant seeks to have the court review its ruling and orders of April 29, 2021 for reason that the court erred in law in when it misapprehended the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* thereby failing to determine the Applicant's application dated September 14, 2020 on its merits.

15. Indeed the court in its impugned ruling of April 29, 2021 had found as follows:

'The procedure set out under Order 9 Rule 9 of the *Civil Procedure Rules* above is mandatory and thus cannot be termed as a mere technicality.

Having found that the procedure envisaged above was not followed by M/S Migos Ogamba & Waudo Advocates, I find that the said firm is not properly on record, and has no legal standing to move the court on behalf of the 2nd Applicant and therefore all pleadings filed by it ought and are hereby struck out.'

16. The grounds relied upon in this application qualify to be grounds of appeal as opposed to grounds for review. In the case of *National Bank of Kenya Ltd v Ndungu Njau* [1996] KLR 469 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).

17. *Further Bennett J in Abasi Belinda v Frederick Kangwamu & Another [1963] EA 557* held that:

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

18. It is therefore clear that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. 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 as in the present case.

19. The Applicant has come a dead end as this application does not meet the threshold set out under Order 45 Rule 1 of the *Civil Procedure Rules*. This is is not a proper case for the court to exercise its discretion in favour of the Plaintiff/Applicant and accordingly, I proceed to dismiss the application dated May 19, 2022 with costs.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 26TH DAY OF MAY 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE