



Kipsirgoi Investments Limited v Local Authorities Pension Trust Registered Trustees; National Environment Management Authority (Interested Party) (Petition E033 of 2021) [2022] KEELC 3220 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3220 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION E033 OF 2021
OA ANGOTE, J
MAY 26, 2022**

BETWEEN

KIPSIRGOI INVESTMENTS LIMITED PETITIONER

AND

LOCAL AUTHORITIES PENSION TRUST REGISTERED TRUSTEES RESPONDENT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

RULING

1. Before this Court for determination is the Respondent's /Applicant's Notice of Motion application dated 9th December, 2021 seeking for the following orders:
 - a. That the Honourable Court be pleased to review and/or vary the Ruling and Orders of the Honourable Justice O.A Angote delivered on the 2nd December, 2021 which found the Respondent/Applicant guilty of contempt of the court and to apply to Dr. George Kwedho, Hosea Kili, Julius Korir, Matilda Kimetto, John Oscar Juma, Peter Musa Kitesho, Lucy Munjuga, Hon Joseph Kaberia I.a Mbs And Winfred Syombua being the Trustees of the Respondent/ Applicant.
 - b. That the costs of the Application be in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Hosea Kili, one of the Trustees of the Respondent, who deponed that on or about 16th September, 2021, the Petitioner vide an e-mail, served them with a Motion brought under a certificate of urgency



- dated 13th September, 2021 as well as a hearing notice and a court order indicating that the aforesaid application would proceed for inter partes hearing on 5th October, 2021.
3. The Respondent's/Applicant's Trustee deponed that the Petitioner further served them with a court order dated 17th September, 2021 which stated that pursuant to the application of 16th September, 2021, the court had issued temporary conservatory orders restraining the Respondent from carrying out any activities on the Petitioners' property pending inter partes hearing of the Application on 30th September, 2021.
 4. It was deponed that shortly thereafter, on 29th September, 2021, the Petitioner filed contempt proceedings against the Respondent which its Advocate responded to by way of a Preliminary Objection and that the court delivered a Ruling on 2nd December, 2021 in which it found the Respondent's Trustees guilty of contempt and ordered the contemnors, its' Trustees, to appear in court on 15th December, 2021 for mitigation and sentencing.
 5. According to the Deponent, the reason that warranted the finding of contempt of court was the Respondents' failure to respond to the contempt application; that the failure aforesaid was occasioned by the counsel who chose to file a Notice of Preliminary Objection instead of a Replying Affidavit thus denying the Respondent an opportunity to present factual evidence and that the filing of the Notice of Preliminary Objection was guided by the belief that the same would be determined before the contempt application.
 6. It is the Respondent's case that it has engaged a new counsel to take over the conduct of the matter; that the Respondent is fully compliant with the court orders of 17th September, 2021 and has ceased all the works on the suit property and that new material has been placed before this court which was not before the court in the contempt application which this court should take into consideration.
 7. According to the Respondent's Trustee, it is trite that when a contemnor comes down and purges the contempt, either out of his own freewill or at the prompt of the court, the court will accept the purge of the contempt and at its discretion grant them another chance and that sufficient and reasonable grounds have been adduced to warrant the grant of the orders sought.
 8. The Petitioner, through its Director opposed the application vide a Replying Affidavit in which she deponed that the prayer for stay of contempt of court proceedings is incompetent and has been overtaken by events in light of the court order finding the Respondent's Trustees liable for contempt.
 9. It was deponed that the alleged new information has always been within the Respondents' knowledge which information they failed to adduce in response to the application for contempt and that in any event, the basis of the contempt application was the Respondent's continued works on the 22nd, 23rd, 24th, 25th and 28th September 2021 as well as on 2nd and 4th October 2021, which facts were neither denied nor rebutted.
 10. It was deponed by the Petitioner's Director that the Respondent only ceased the impugned works on 4th October, 2021; that there is no evidence illustrating that the Respondents' contractor complied with the Court Orders on the said 22nd September, 2021 or that the Respondent took all reasonable steps to ensure that works stopped on 17th September, 2021;
 11. According to the Petitioner, there is no evidence of acknowledgment of the contractors' letter and report by the Respondent and the same is an afterthought; that none of the Respondent's Trustees, some of whom are Advocates, responded to the contempt application and that the allegation that the Respondent and its previous counsel were under the presumption that the preliminary objection will be heard first was not true because it is was a response to the application for contempt.



12. Counsel submitted that it is trite law that a party who chooses to file a Preliminary Objection without an Affidavit admits the facts as pleaded and objects only on points of law.
13. According to the deponent, the Respondent was duly served with the requisite hearing notices and orders for hearing of the Petitioner's applications dated 13th September 2021 and 29th September, 2021 and was thus well notified at all material times and that no prejudice or irreparable damage will be suffered by the Respondent or its management in purging the contempt.
14. It was deponed that despite having been served with the contempt application, the Respondent committed further contemptuous acts on the 2nd and 4th October, 2021 prompting the Petitioner to file a further Affidavit dated 4th October, 2021 and that in the circumstances, there are no sufficient reasons to warrant a review of the court orders and the application should be dismissed.

Submissions

15. The Respondent's counsel submitted that the Respondent has demonstrated compliance with the court orders of 17th September, 2021 and as such this Honorable Court should take no interest in punishing them. Reliance in this regard was placed on the cases of *Directline Assurance Company Limited vs Jamii Bora Bank Limited & 5 Others* [2015] eKLR and *Kenya Human Rights Commission vs Attorney General & Another* [2018] eKLR.
16. It was submitted that as espoused by the Court of Appeal in *Woburn Estate Limited vs Margaret Bashford* [2016] eKLR, contempt proceedings are quasi-criminal in nature and the liberty of an alleged contemnor is at risk and that that this Court ought to grant an order for stay of any further contempt of court proceedings with the aim of allowing the Respondent's Trustee exercise their right to be heard.
17. Counsel cited the case of *Akber Abdullah Kassam Esmail vs Equip Agencies Ltd & 4 Others* [2014] eKLR where the Court of Appeal reiterated that a contemnor is entitled to be heard for purposes of showing cause why he should not be committed for contempt. Counsel also cited the cases of *Construction Engineers Ltd vs Naomi Chepkorir Langat* [2019] eKLR and *Nation Media Group vs Child Welfare Society of Kenya* [2021] eKLR.
18. According to the Respondent's counsel, the Respondent has adduced important and factual material that was not available at the time the orders were made and has hence purged the contempt and that blunders by an Advocate should not be visited upon clients as expressed by the Court of Appeal in *Philip Keipto Chemwolo & Another vs Augustine Kubende* [1986] eKLR and *Patriotic Guards Ltd vs James Kipchirchir Sambu* [2018] eKLR.
19. The Petitioner's counsel submitted that whereas as held by the court in *UAP Insurance vs John Mwaita Mwendandu; Edward Kibiko Waguru (Interested Party)* [2021] eKLR this court has discretion to stay proceedings, no sufficient cause has been demonstrated warranting such a stay.
20. It was submitted that the elements of contempt were adequately demonstrated as against the Respondent, which fact has not, even vide the present application, been disputed and that the Respondent continued the contemptuous act even after the filing of the contempt application.
21. Counsel for the Petitioner submitted that the Respondent is deemed to have adequately instructed its counsel on all issues relating to this case; that the instant piece of evidence was at all material times in the knowledge and within reach of the Respondent and its previous counsel and that as observed in the case of *Peter O Nyakundi & 68 Others vs Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & Another* [2016] eKLR, failure to file a Replying Affidavit means that the facts alleged in a sworn affidavit are not controverted.



22. Counsel submitted that the Respondent's application is a carefully crafted attempt at installment litigation under the guise that its Advocate acted negligently; that as observed by the court in *Marangu Rucha & Another vs Bernadette Muthina Nzioki & Others* (2015) eKLR, it is not the law that every mistake or error committed by an Advocate ought to be excused or forgiven when his client puts all the blame on the Advocate and that the mistake must be an excusable mistake for it to inure to the benefit of the Applicant. Reliance was also placed on the cases of *Josephat Nyingi Peter vs African Banking Corporation Limited* [2021] eKLR, *Julius Mbaabu Marete vs Tom Ayora & 3 others* (2018) eKLR and *Auto Selection (Kenya) Limited vs Ann Cherono Cheruiyot & 2 others* [2019]eKLR.
23. It was submitted that as espoused by the Court *in re Estate of Kwasi Lubaro (Deceased)* [2020] eKLR, in an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a decision has been rendered from procuring new evidence so as to strengthen or change the complexion of the case.
24. Counsel for the Petitioner submitted that the piecemeal and purported new evidence does not in any way assist the Respondent in as long as there was no rebuttal of the claimed works on 23rd September 2021 to 4th October 2021; that the purported new evidence is of no relevance as it is internal correspondence between the Respondent and its contractor and that the photographic evidence in the application herein is in any event not supported by a certificate as required by section 106A of the *Evidence Act* hence incompetent and inadmissible.

Analysis & Determination

25. Having considered the Motion, the Affidavits and the submissions in support and in opposition to the application, the only issue that arises for determination is whether the Respondent has made a case warranting the grant of orders for review of the court orders of 2nd December, 2021.
26. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the *Civil Procedure Rules*, 2010. Section 80 of the Act 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 judgment to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
27. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-
 - (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 judgment to the court which passed the decree or made the order without unreasonable delay.”

28. A reading of the above provisions makes it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 of the Civil Procedure Rules sets out the jurisdiction and scope of review by limiting it to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

29. This position was restated by the Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR where the court observed that;

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.”

30. By way of a brief background, the Petitioner instituted the present Petition on 13th September, 2021 claiming violations of its rights to a clean and healthy environment and seeking, inter-alia, for declaratory and conservatory orders against the Respondent. Filed contemporaneously with the Petition was a Notice of Motion application seeking temporary conservatory orders restraining the Respondent from engaging in any further activities on the Petitioners’ property being L.R No 13065 (Original No 6939/1 and 5830/9)(hereinafter suit property) pending determination of the Petition.

31. On 16th September, 2021, the Petitioner filed another application seeking temporary conservatory orders restraining the Respondent or anyone under its authority from carrying out any works on the suit property pending the determination of the applications dated 13th and 16th September, 2021. The aforesaid orders were granted on 17th September, 2021 and were to subsist until 30th September, 2021 when the two applications were to be heard inter partes.

32. Vide an application dated 29th September, 2021, the Petitioner sought to have the Respondent’s Trustees cited for contempt of the court orders of 17th September, 2021. In response, the Respondent filed a Notice of Preliminary Objection in which it argued that the certificates provided by the Petitioner did not satisfy the statutory requirement of Section 106B of the *Evidence Act*, Cap 80. The court found this objection to be unmerited and found the Respondent to have been in contempt of the orders of 17th September, 2021. It is this Ruling that the Respondent seeks to have reviewed.

33. Having regard to the instant application, it is apparent that the same is premised on the ground of “discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Respondent’s knowledge or could not be produced by the Respondent at the time when the decree was passed or the order made.”

34. It is trite that where an Applicant in an application for review seeks to rely on the ground that “there is discovery of new and important evidence,” the same has to strictly proven. This was affirmed by the Court of Appeal in *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) vs Kariuki Marega & Another* [2018] eKLR where the court held as follows:

“We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation.”



35. In discussing the scope of review based on the ground of discovery of new and important evidence, the Court of Appeal in *Rose Kaiza vs Angelo Mpanju Kaiza* [2009] eKLR cited with approval, the following passage by Mulla on the Indian Civil Procedure Code (15th Ed.) at P. 2726:

“...Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

36. It is apparent from the foregoing that the expression “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,” refers to a discovery made after the order sought to be reviewed was passed and which could not with due diligence have been discovered before the order sought to be reviewed was made.

37. Further, the court in an application under this head will be keen to prevent a scenario where a litigant seeks through the avenue of review to re-open and re-litigate its case. As articulated by the Court of Appeal in *D.J. Lowe & Company Ltd vs Banque Indosuez* [1998] eKLR;

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

38. The Respondent asserts that there is new information which was not availed at the hearing of the application for contempt. The new information that the Respondent seeks to rely on is a letter dated 20th September, 2021 from the Respondent’s Company Secretary to the contractor informing it of the court order and advising it to cease construction and/or road works on the suit property and a letter dated 22nd September, 2021 from the contractor acknowledging receipt and confirming to the Respondent that it has ceased construction works as instructed as well as a progress report of the same date showing the status of the project.

39. According to the Respondent, its failure to adduce the aforementioned evidence during the hearing of the contempt application is that its Advocates decided to respond to the contempt application by way of a Preliminary Objection as opposed to a Replying Affidavit thereby denying it an opportunity to adduce the evidence. It was urged that mistake of counsel ought not to be visited upon the Respondent.

40. It is trite that where the court decides to determine a Preliminary Objection first, directions are usually issued in that regard. The record shows that on 5th October, 2021, when the matter came up for directions on the contempt application, the Respondent’s advocate sought for leave to respond to the application. The court granted them seven days to file a Replying Affidavit and issued directions on filing of submissions.

41. On 10th December, 2021, the Respondent confirmed having filed submissions both in support of its objection and in opposition to the contempt application. In view of the foregoing, the Court is not



- convinced that the failure to file an appropriate response was occasioned by any mistake of counsel. The fact of the matter is that the Respondent did not file any Replying Affidavit despite having been given an opportunity to do so. The issue of the Preliminary Objection being had first never arose.
42. As was held by the court in *Alvin Mbae & 2 others vs Edwin Nyaga Mukatha & 2 others* [2022] eKLR, the underlying object of this provision relating to review is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.
43. The above position was aptly captured by the Court of Appeal in *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR as follows;
- “Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence.”
44. The letters that the Respondent seeks to adduce were always in its possession. That being the case, and the court having directed the Respondent to file a response to the Petitioner’s application which it failed to do, it is this court’s finding that the Respondent has not established the discovery of any new or important evidence which was not within its knowledge or could not with due diligence be produced at the hearing of the application.
45. Having not argued and/or submitted nor established any other sufficient reason as contemplated under Order 45 Rule 1(1), of the Civil Procedure Rules, it follows that the Respondent has not established any grounds warranting the orders of review sought.
46. Both parties extensively submitted on the question of stay of proceedings. The general principles which guide the courts whenever they are invited to exercise jurisdiction to stay proceedings are best summarized in Halsbury’s Law of England, 4th Edition, Vol 37 at pages 330 and 332 as follows:
- “The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”
47. In discussing the concept of stay of proceedings, the court in *Ferdinand Ndung’u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2013] eKLR persuasively stated thus;
- “A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black’s Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court’s discretion.”
48. The stay of further contempt proceedings herein was sought pending the determination of this application and is subsequently moot. In any event, having found that the threshold for the review of



the court orders has not been met, and there being no Appeal against the aforesaid orders, it follows that there is no basis upon which to stay these proceedings as the same cannot issue in vacuum.

49. Having declined to review and/or set aside the orders as sought, there is no basis upon which the court can enter into an independent interrogation as to whether the contempt has been purged as that is not the question before the court. That is an issue that can be taken either in a separate application or in mitigation.
50. The upshot of the foregoing is that the application dated 9th December, 2021 is unmerited and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 26TH DAY OF MAY, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Litoro for the petitioner

Mr. Otieno for the Respondent

No appearance for the Interested Party

Court Assistant – June Nafula

