**Republic v The Chairman Cherangany Land Disputes Tribunal & 2 others (Environment and Land Judicial Review Appeal 5 of 2018) [2022] KEELC 3587 (KLR) (17 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3587 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT AND LAND JUDICIAL REVIEW APPEAL 5 OF 2018**

**FO NYAGAKA, J**

**MAY 17, 2022**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**THE CHAIRMAN CHERANGANY LAND DISPUTES TRIBUNAL .... 1ST RESPONDENT**

**BOAZ KAINO ..... 2ND RESPONDENT**

**RICHARD CHEPKONGA ..... 3RD RESPONDENT**

**RULING**

1. By a Notice of Motion dated November 29,2021 filed on December 2, 2021, the 2nd respondent/ applicant, one Boaz Kaino, moved this court under articles 48, 50 and 159 of the *Constitution* of Kenya, sections 1A, 1B, 3, 3A, 63(e), and 80 of the *Civil Procedure Act*, order 42 rule 6, order 45 and 51 rule 1 of the *Civil Procedure Rules* and (what he termed as) all other enabling provisions of law. He sought the following specific orders:

   (1) ...spent

   (2) ...spent

   (3) ...spent

   (4) ...spent

   (5) This honourable court be pleased to review its ruling of February 26, 2021

   (6) This honourable court be pleased to issue orders that the *ex parte* applicant's costs be borne by the 1st respondent and the 2nd respondent/applicant.

(6) Costs of this application be provided for.

2. The Application was based on a number of grounds and supported by the affidavit sworn by Boaz Kaino on November 27, 2021. It reiterated the grounds which were on the face of the Application. In brief, the Applicant contended that on February 26, 2021 this Court rendered a Ruling, which he annexed to the supporting affidavit and marked as BK 2, in relation to an *ex-parte* Judgment delivered on November 19, 2018, a copy of which he annexed to the Supporting Affidavit and marked it as BK 1. By the *ex parte* Judgment, the Court had issued an order of *certiorari* to bring to this Court and quash the decision of the 1st Respondent Tribunal dated April 26, 2010. The Court also awarded the costs of the Application to the *Ex-Parte* Applicant.

3. Subsequent to the dismissal, the 2nd Respondent filed an Application dated December 08, 2020. By it he sought to set aside the judgment and leave to respond to the Judicial Review Application. The Application was dismissed on February 26, 2021. Thereafter the *Ex Parte* Applicant commenced execution proceedings and proclaimed the household items and properties of the 2nd Respondent/ Applicant. He annexed to the supporting Affidavit the copies of the Warrants of Attachment and Proclamation and marked them as BK 3 and 4 respectively. He wished his Application for review to be heard before the execution, which he termed as premature, proceeded.

4. As noted from the foregoing, it is the 2nd Respondent who filed this instant Application seeking a review of the orders made on February 26, 2021. His argument was that the amount (I suppose he meant the costs found due and payable) was quite substantial hence he would suffer heavy loss if execution which had been commenced continued. He deponed that the Application would be rendered nugatory if it was not granted, and that it ought to be allowed to prevent the ends of justice being defeated. He relied on the usual principle of natural justice that he had a right to be heard on the prayers for review. He contended that he had never been granted a hearing in the matter and that "the issue of apportionment is a matter this Honourable Court ought to determine" (according to paragraph 13 of his Affidavit). He also said further that the Application was brought in good faith and that the Respondents would not be prejudiced by it if granted.

5. The Application was opposed. The *Ex Parte* Applicant prepared a replying affidavit, swore it and filed on December 16, 2021 and December 20, 2021 respectively. He began by summarizing the history of the Application for Judicial Review and the one made to review the judgment arising therefrom. He then deponed that on September 21, 2021 the Bill of Costs which he annexed to his affidavit and marked as RC 2 was taxed. He then stated that the Application was a delaying tactic, made in bad faith was *res judicata*. He argued that the Application was a reaction of the Bill of Costs dated April 12, 2021 and was a misconception of the law. He prayed that it be dismissed with costs.

**Submissions**

6. The Applicant filed written submissions on March 4, 2022. In them he asked the Court to consider a number of issues. One, whether the Court should grant a stay of execution. He relied on Order 12 Rule 7 of the *Civil Procedure Rules* on setting aside a judgment or ruling. Then he cited the cases of *Patel vs Cargo Handling Service Limited* [1974] EA 95 and *Butt v Rent Restriction Tribunal* [1979] EA (1979) eKLR. On undue delay, he submitted that the application was brought 4 years after the judgment and that was inordinate delay. He relied on the case of *Shah v Mbogo & another* [1967] EA, 116.

7. The second issue was on whether to grant an injunction. While he relied on a number of authorities to support his submission, it is my view that the issue needs no consideration as the prayer was spent: it was sought pending the hearing of the instant Application. The other issue he submitted on was whether the application was *res judicata*. He submitted that a party should not be harassed twice or more by a

multiplicity of proceedings on issues that have been determined. He submitted that stay of execution of the judgment had been sought earlier by the Applicant vide an application dated December 82020 and considered and not granted hence the one sought again was a repeat. I will not address the issue also because the prayer for it was already spent, just as the one on injunction was. The stay of execution sought herein was pending the determination of the instant Application.

8. On whether a review should be granted the Respondent submitted that the requirements of Section 80 of the Act and Order 45 Rule 1(b) of the Rules provide for a review under a wide discretion if there is sufficient reason for review of an order of the Court. They submitted that contrary to that, in the instant application there was no demonstration of an error apparent on record or mistake on the part of the Court. Lastly, on whether the costs should be borne equally between the 1st and 2nd Respondents, he submitted that the Court was right in holding that they be borne by the Respondents and the Applicant had not given a reason why there should be an apportionment.

**Determination**

9. I have carefully considered the application, the affidavits both in support and opposition, the annexures thereto, the Respondent's submissions (since there is none for the Applicant), the law and the case law cited. I find two issues for determination. These are:

   (a) Whether the Court should review and set aside the orders dated February 26, 2021;

   (b) What orders should issue on costs?

10. I start this analysis with a discussion on the relevance of the provisions relied on by the Applicant. The Application was brought under various provisions as summarized in the first paragraph of this Ruling. In my view, there being specific provisions under which the Application should have been brought, it was not necessary to rely on all the provisions cited. This bogs down the Court and is basically a fishing expedition by the Applicant as to which law he should rely on. Worse is when he made placed reliance on the strange "all other enabling provisions of law" which he did not identify. It is not enough to throw to the Court meaningless and unexplained phrases. The relevant provisions were Section 80 of the *Civil Procedure Act*, and Order 45 and 51 Rule 1 of the Civil Procedure Rules. At best 159(2) of the *Constitution* only comes in as the saving provision in errors that might arise due to technicalities. This turns me to the first issue, discussed as hereunder:-

**a. Whether the court should review and set aside the orders dated February 26, 2021**

11. The procedure and process of a review of a court's judgment, decree, ruling or order is provided for by the law. While doing so, the Court is enjoined to exercise discretion. As submitted by the respondent, the discretion is wide. However, this must be exercised judiciously, and exercised within the provisions of law, which are Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules 2010.

    12. Beginning with the Rules, Order 45 Rule 1(1) provides as follows:

        1) any person considering himself aggrieved-

        a) by a decree or order from which an appeal is allowed but which no appeal is preferred; or

        b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

13. Moving to the substantive law, Section 80 of the Act provides as follows:

> " any person who considers 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 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.

14. It is clear from the law, therefore, that Order 45 of the Civil Procedure Rules 2010 is explicit that a court may only review its orders if there exist the following reasons:

a) There must be discovery of a new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge and which could not therefore produce at the time the order was made; or

b) There was a mistake or error apparent on the face of the record; or

c) There were other sufficient reasons

15. Further, an application of this nature must be made without unreasonable delay. It therefore means that a party must move the Court within the shortest time possible upon realizing that there are reasons that warrant the prayers. Thus, this Court is supposed to consider whether or not the Applicant has satisfied these conditions.

16. Regarding whether the application was brought without unreasonable delay, this court notes that it was filed on November 29, 2021 whereas the Ruling sought to be reviewed was delivered on February 26, 2021. That was close to ten (10) months of the delivery of the Ruling. There is no explanation for this delay. Even assuming that it became necessary that the review be made after the taxation had been made, it does not explain why the Applicant had to wait for the taxation to be made. Such are the actions which anyone could conclude as being clear afterthoughts. Immediately the Applicant knew that the costs were not apportioned between those adjudged as condemned to pay them, if that is the only issue he had with the Ruling, he should have moved the Court to make a review on that account. He did not have to wait until the costs were taxed, weighs them and finds them high or low and then move the Court for review once he found them substantial. Even then costs being substantial cannot form the basis of a review of a Ruling on who to pay them. In any event, what is substantial? To a pauper, Kenya Shillings ten (10) is quite substantial. To a millionaire or billionaire Kenya Shillings One million (1,000,000.00) is insignificant or not substantial. Period is short. Thus, the application was brought with extreme undue delay.

17. As to whether there was discovery of new evidence which was not within the knowledge of the applicant, none was contended to have been found. The finding of the Court that costs be borne by the parties condemned to pay them is not new or discovery of any important matter to warrant a review

of its orders. Simply put, the applicant did not demonstrate that she indicated that she has discovered new material that could not, with due diligence being exercised, be found.

18. The million dollar question the Applicant wished the Court to determine was whether there an error apparent on the face of the record? The Applicant seemed to think so. I first give the definition of an error apparent on the face of record as courts have often viewed it to be. In the case of *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> " ....in *Nyamogo & Nyamogo v Kogo (2001) EA 174* this Court said that 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 real distinction between a mere erroneous decision and an error apparent on the face of the 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 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 or wrong view is certainly no ground for a review although it may be for an appeal....."

19. The Applicant's contention was that costs were not apportioned as between the Respondents the court found to have lost the Application which gave rise to the costs. Could this constitute an error on the face of record? Respectfully, I do not think what the Applicant had in mind is one such error. The award of costs is at the discretion of the Court as provided for under Section 27 of the *Civil Procedure Act*. The provision being Subsection 1 stipulates in the relevant part that

> " ...the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid;..."

20. The proviso to the Sub-section is to the effect that costs follow the event unless the Court for good reason thinks that they should not. Clearly, the provisions cited show that the award of costs is at the discretion of the Court. On February 26, 2021 the Court exercised its discretion and dismissed with costs the Application before it. This therefore effectively bound the Applicant herein to the Judgment delivered on November 9, 2018 by which the Applicant and others were to bear the costs of the Judicial Review Application. The Applicant herein moved this Court, through the instant application, to vary that discretion. This is not permitted by law. The Applicant wanted this Court to act as though sitting on appeal of its ruling by setting aside through a review, a discretionary order made by the same Court. It is not possible. It would be unprocedural, illegal and done without jurisdiction. The reason the Applicant gives as a contention is not one contemplated under the provisions granting the Court power to review its ruling or judgment. If the party was aggrieved by the decision of the Court as given February 26, 2021, he should have appealed from it. Short of that, this Court is *functus officio*. Thus, the applicant has not demonstrated that there was any error apparent on the record to warrant this court to review its orders. Again, apportionment of costs is not a sufficient reason to warrant this court to vary the impugned. As I have stated above that was at the discretion of the Court and the same was exercised judiciously. The application is unmeritorious and is hereby dismissed.

**(b) What orders to issue on costs**

21. In regard to costs, it is clear that the Application failed miserably. The Applicants actions precipitated the incurrence of costs herein. He will bear the costs.

**Final Disposition**

22. I therefore dismiss the Application dated November 29, 2021. I vacate the orders that were granted on December 20, 2021.

Orders accordingly.

**RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 17TH DAY OF MAY, 2022**.

**DR.IUR FRED NYAGAKA**

**JUDGE,ELC,KITALE**.