Moko & 2 others v Ngala (Environment and Land Appeal 1 of 2018) [2022] KEELC 3874 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3874 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ENVIRONMENT AND LAND APPEAL 1 OF 2018

TW MURIGI, J

JULY 27, 2022

BETWEEN

KITHAKUMU NGALA MOKO ..... APPELLANT

AND

JOSEPH MUTUA KITETE ..... 1ST APPLICANT

FREDRICK KITETE MUSEMBI ..... 2ND APPLICANT

AND

JONATHAN KITHAKUMU NGALA ..... RESPONDENT

RULING

1. By a notice of motion dated July 5, 2021 brought pursuant to the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act*, order 22 rule 22, order 45 and order 51 of the *Civil Procedure Rules, 2010* the applicants seek the following orders: -

    1) Spent.

    2) That this honourable court do issue a stay of execution of its ruling delivered on May 29, 2020 and all consequential orders thereto pending the hearing and determination of this application.

    3) That this honourable court be pleased to review and set aside its ruling delivered on May 29, 2020 and any consequential orders thereto.

    4) That the costs of this application be provided for.

2. The application is premised on grounds appearing on its face together with the supporting affidavit sworn on July 5, 2021 by Joseph Mutua Kitete. A summary of the grounds and the averments is that by an order dated June 27, 2007, this court issued a temporary stay of execution of the judgment of the

Eastern Provisional Dispute Appeals Committee Embu Case No 56 of 2006 issued on April 12, 2007 which was adopted as a judgment in Makueni SRM Court in LDTC 17 of 2006 on June 6, 2007.

3. That the appellant/respondent filed an application dated September 19, 2019 seeking for several reliefs with respect to Embu Case No 56 of 2006.

4. That the applicant herein in an application dated October 17, 2016 had sought to substitute Johnathan Kithakumu Ngala as the administrator of the estate of the deceased appellant. He went on to state that the appellant herein died on October 17, 2015 and that vide a ruling dated January 22, 2019, the court marked the appeal as having abated. That *vide* an application dated January 30, 2019 the court declined to issue a further stay of execution of the judgment dated June 7, 2007.

5. The applicant argued that this appeal abated more than three years ago and that notwithstanding, this court delivered a ruling on June 29, 2020 substituting the appellant three years on and reinstating case thereby effectively stopping the applicants from enjoying the fruits of their judgment.

6. Opposing the application, the respondent filed grounds of opposition dated October 13, 2021 and set out the following grounds: -

    1) The application is misconceived, bad in law and the orders sought are not capable of being granted.

    2) The honourable court cannot sit on appeal over its own orders.

    3) Orders of review sought by the applicant are not capable of being granted.

    4) The application is incompetent and an abuse of the court process.

    5) The application has no basis in law and should be dismissed with costs.

7. The application was canvassed by way of written submissions.

Applicants' Submissions

8. In the applicants' submissions dated January 31, 2022, counsel submitted that this court has the requisite jurisdiction to handle the application for review under order 45 rule 1 (a) and (b) of the *Civil Procedure Rules*. Two authorities were cited to buttress the submission, but none was annexed. Those authorities have been disregarded. In his submissions, counsel reiterated the grounds and averments of the application. He urged the court to allow the application.

Respondent's Submissions

9. The respondent's submissions were filed on June 6, 2022. Counsel submitted that when this court delivered the ruling, the applicants did not appeal against the order dated June 29, 2020 but have instead opted to file this application for review. Counsel argued that the thrust of the application is that the court misapprehended the applicable law when arriving at the decision sought to be reviewed and for that reason, this court ought not to sit on appeal over the said decision. It was submitted that the application has no legal basis and therefore ought to be dismissed.

Analysis And Determination

10. Having considered the application, affidavits and the rival submissions, I find that the only issue for determination is whether the ruling delivered on the May 29, 2020 should be reviewed.

11. The law that governs applications for review is set out in section 80 of the *Civil Procedure Act* and on order 45 rule 1 of the *Civil Procedure Rules*.

12. 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

13. Order 45 rule 1 of the *Civil Procedure Rules* provides that: -

> 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 a review of the judgment to the court which passed the decree or made the order without unreasonable delay.

14. The provisions of order 45 were restated by the Court of Appeal in the case of *Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited* [2014] eKLR where the Court held 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 ranging 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."

15. Similarly, in *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR the court held that: -

> " Section 80 gives the power of review and order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review."

16. It is apparent from the above provisions that for an applicant to succeed in an application for review he must satisfy the following requirements;

a) Discovery of new and important matter or evidence which after the exercise of due diligence was not with the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.

b) Existence of some mistake or error apparent on the face of the record.

c) Any other sufficient reason.

d) Application be made without unreasonable delay.

17. In the present matter the applicant is seeking to review and set aside the ruling delivered on May 29, 2020. The ruling was pursuant to the application dated September 19, 2019 which was allowed application in the following terms: -

a) That leave be and is hereby granted to substitute out of time the deceased appellant Kithakumu Ngala Moko with one Jonathan Kithakumu Ngala the administrator of his estate and the abated appeal be revived.

b) That in the alternative to (d) above, the temporary order of stay of execution herein be granted by this court on June 27, 2007 be reinstated alongside the application dated June 26, 2007.

c) That this honourable court be pleased to issue an order of stay of execution of the decision of the Eastern Provincial Land Dispute Appeals Committee at Embu Case No 56 of 2006; Joseph Mutua Kitete v Kithakumu Ngala Moko read and/or adopted as a judgment of Makueni SRM Court in LDTC No 17 of 2006; Fredrick Kitete Musembi v Kithakumu Ngala Moko pending the inter partes hearing and determination of the appeal herein.

d) That costs be in the cause.

18. In the present matter, the applicant has not shown that there is discovery of new or important matter of evidence that the applicant could not have placed before the court during the hearing of the application dated September 19, 2019 or before the ruling was delivered on May 29, 2020.

19. As regards the second requirement, the applicant must establish that there is an error apparent on the face of the record. The applicant herein contends that there is an error apparent on the face of the record to review the judgment of this court. Counsel submitted that the court deviated from its previous decisions without any invitation for review or setting aside of the previous delivered decisions. The basis of this argument is that the court did not consider its previous decisions and that it specifically disregarded the following facts: -

i) The appeal had abated hence there was no basis on which the orders of stay could be issued.

ii) There was no basis upon which the court could entertain the application since the Appellant had died on October 17, 2015 and the appeal had abated before the filing of the present application.

iii) The orders of review sought by the appellant are not capable of being granted.

iv) That the Honourable court cannot sit over appeal over its own orders.

20. Counsel for the respondents argued that the applicant was seeking review on the grounds that the court misapplied and/or failed to apply the relevant law in arriving at the orders dated May 29, 2020.

21. In the case of *Nyamogo & Nyamogo v Kogo* (2001) EA 170 the court held as follows;

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must 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 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 a long drawn process of reasoning where there may be 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 possible. Mere error or wrong is certainly no ground for review though it may be one for appeal."

22. Similarly, in the case of *Timber Manufacturers and Dealers v Nairobi Golf Hotels (K)* HCCC No 5220 of 1992, Emukule, J held that;

> " For it to be said that there is 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."

23. The applicants stated that in the application dated September 19, 2019 the court was invited to review its decision. That vide a ruling dated May 29, 2019, the court deviated from its previous decisions without any invitation for review and setting aside of its previous decisions. He went on to state that the respondent did not appeal against the ruling delivered on January 22, 2019 which marked the appeal as abated. The applicants argued that the court did not consider and pronounce itself on the aforesaid issues. In a nutshell, the applicants are of the view that the court did not apply and/or interpret the law correctly. In the case of *Abasi Belinda v Fredrick Kangwanu and another* (1963) EA 557 Bennet, J aptly held as follows;

> " 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."

24. Similarly, the Court of Appeal in *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR observed as follows: -

> " It seems clear to us that the appellant, in basing his review application on the failure by the court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts."

25. The grounds laid by the applicants do not disclose an error apparent on the face of the record but in my view the grounds for an appeal. In the present application, the applicants have not pin pointed the errors that are apparent on the face of the record. As correctly observed by the respondent, a misapprehension of the applicable law should not be a ground for an application for review.

26. The court is also mandated to consider if there are sufficient reasons to review the court's judgment. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of *The Official Receiver and Liquidator v Freight Forwarders Kenya Ltd* [2000] eKLR stated that;

> " These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record."

27. The applicants have not demonstrated any sufficient reason to warrant a review of the court's judgment.

28. Finally, the applicant must demonstrate that the application has been made without unreasonable delay.

29. In the present matter, the ruling sought to be reviewed and set aside was delivered on May 29, 2020. The instant application was filed on July 28, 2021 one and half years later. That duration is far from reasonable and the same has not been explained. In so finding, I am persuaded by the findings in the case of *John Agina v Abdulswamad Sharif Alwi* CA Civil Appeal No 83 of 1992, where the court stated as follows;

> " An unexplained delay of two years in making an application for review under order 44 rule 1 (now order 45 rule 1) is not the type of sufficient reason that will earn sympathy of the court."

30. In the end, I find that the application is devoid of merit and the same is dismissed with costs to the respondent.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF JULY, 2022.

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HON T MURIGI

JUDGE

IN THE PRESENCE OF: --

Court assistant – Mr Kwemboi.

Kwamboka holding brief for Nzei for the applicant.

Munyasia for the respondent.