Olago & another (Suing on their behalf and on behalf of 26 other-persons) v Njau & 3 others; National Environmental Management Authority (Interested Party) (Environment & Land Case E224 of 2022) [2022] KEELC 13726 (KLR) (21 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13726 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E224 OF 2022

JO MBOYA, J

OCTOBER 21, 2022

BETWEEN

SAMUEL OTIENO OLAGO ..... 1ST PLAINTIFF

TAMARA EVGENIEVNA OLAGO ..... 2ND PLAINTIFF

SUING ON THEIR BEHALF AND ON BEHALF OF 26 OTHER-PERSONS

AND

PAUL MUNGAI NJAU ..... 1ST DEFENDANT

AMERICAN TOWER-CORPORATION-KENYA-LIMITED .... 2ND DEFENDANT

AIRTEL KENYA LIMITED ..... 3RD DEFENDANT

NAIROBI METROPOLITAN SERVICES (NMS) ..... 4TH DEFENDANT

AND

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY ..... INTERESTED PARTY

RULING

Background and Introduction

1. The Ruling herein relates to two (2) Applications, namely, the Application dated the July 28, 2022 and the Application dated the September 27, 2022, respectively.

2. For clarity, the Application dated the July 28, 2022, has been filed by the 2nd Defendant and same seeks the following Reliefs;

    a. (spent).

b. That This Honourable Court be pleased to order a Stay of the execution of the Ruling and the Consequential Orders delivered on July 21, 2022 pending the hearing and determination of this Application Inter Parties'.

c. That the Honourable Court does Review/Set aside/Vacate the Court orders issued on the on the July 21, 2022 to the effect that a Temporary Injunction do issue directed to the Defendants herein either by themselves, their workers, employees ,agents ,servants or whomsoever ,restraining and/or stopping them from any development, construction ,commissioning operating and maintain a Telecommunication Mast /Tower on the 1st Defendant's Property known as Nairobi/Block 110/516 In Thome Estate, pending the hearing and disposal of the Main suit.

d. That this Honorable Court be pleased to grant any orders it may deem fit and appropriate in the circumstances.

e. That the Costs be in the Cause.

3. The subject Application is premised on the grounds which are contained in the body thereof and same is further supported by the affidavit of Lee Gachari, sworn on the July 28, 2022. For clarity, the deponent has attached various annextures including the Ruling of the court rendered on the July 21, 2022.

4. For completeness, the Application under reference has been opposed vide Replying affidavit sworn by Samuel Otieno Olago, who is the 1st Plaintiff/Respondent herein.

5. The Second Application, namely, the Application dated the September 27, 2022, has been filed by and on behalf of the 3rd Defendants and same seeks the following Reliefs;

i. (spent)

ii. Thatthe Honourable Court be pleased to stay any Further Proceedings between, the Plaintiff and the 3rd Defendant pending the hearing and determination of this, Application Inter Parties.

iii. Thatthe Honourable Court be pleased to strike out the Plaintiff's suit as against, the 3rd Defendant on account of Misjoinder, for want of cause of action against the 3rd Defendant and/or in the alternative for being fatally Defective.

iv. Thatthe Costs of this Application and the Suit be awarded the 3rd Defendant.

6. Similarly, the subject application is predicated on the various grounds contained in the body thereof and same is supported by the affidavit of Lilian Mugo, sworn on even date. For clarity, the supporting affidavit contains one bundle of annexture, relating to an extract from the Law Society of Kenya relating to whether one Kimani Antony Ndegwa, Advocate, had taken out or renewed his Practising Certificate for year 2022 and whether, same could administer Oath as a Commissioner of Oaths.

7. It is imperative to note that the Application herein has similarly been opposed by the Plaintiffs/ Respondents vide Replying affidavit sworn on the October 5, 2022.

8. Suffice it to point out that the two Applications were directed to be canvased and disposed of together. In this regard, the two application were heard vide Oral submissions on the October 6, 2022.

Submissions by the Parties:

a. 2nd Defendants Submissions:

9. The 2nd Defendant herein made extensive submissions pertaining to and concerning the Application dated the July 28, 2022, relating to the review of the ruling and orders of the Honourable court rendered on the July 21, 2022.

10. Learned Counsel for the 2nd Defendant submitted that the 2nd Defendant has since discovered the existence of the Environmental Impact Assessment license, which was issued to and in favor of the 2nd Defendant/Applicant on the July 21, 2022.

11. On the other hand, counsel for the 2nd Defendant has further submitted that the 2ND Defendant has also discovered other Documents, which are relevant and material in respect of the Subject matter. In this regard, Counsel submitted that the 2ND Defendant has discovered the Questionnaires which were disseminated to and filled by the Various Respondents, essentially, the neighbors and persons resident in the vicinity of the suit property where the project was to be carried out and undertaken.

12. Additionally, Learned Counsel for the 2nd Defendant has submitted that the impugned documents were never availed to the court at the time when the application for Temporary Injunction was listed for hearing and was heard before the honourable Court.

13. Further, learned counsel for the 2nd Defendant has also added that the impugned documents have since been availed vide the affidavit in support of the subject application. Consequently, counsel invited the Honourable court to take cognizance of the documents and to find and hold that same are material and essential to determination of the subject matter.

14. At any rate, counsel for the 2nd Defendant has also submitted that same did not avail and supply to the Honourable court copies of the impugned documents, including the Environmental Impact Assessment License, because same was of the opinion that the court was going to hear and deal with the Preliminary objection beforehand.

15. Other than the foregoing, Learned Counsel has added that the impugned documents which have since been availed and supplied to the court are critical and if same had been availed to the court, the Honourable court would no doubt, have arrived at and reached a contrary decision and holding.

16. Premised on the foregoing, counsel for the 2nd Defendant has implored the court to find and hold that the subject application meets the requisite threshold established vide the provisions of Order 45 Rule 1 of the *Civil Procedure Rules 2010.*

b. 3rd Defendant's Submissions:

17. Learned counsel for the 3rd Defendant made submissions as pertains to and in respect of the Application dated the September 27, 2022 and same contended that the suit herein was commenced vide Plaint dated the June 29, 2022, and which Plaint was verified by an affidavit commissioned by one Kimani Antony Ndegwa.

18. However, counsel for the 3rd Defendant submitted that by the time Antony Kimani Ndegwa, Advocate, commissioned the impugned affidavit attached to the initial Plaint same had not taken out his practicing certificate for the year 2022.

19. Premised on the contention that Kimani Antony Ndegwa, Advocate, had not taken out his Practicing Certificate for the year 2022, Learned Counsel for the 3rd Defendant contended that the impugned Verifying affidavit was therefore invalid and void.

20. At any rate, Learned Counsel further added that to the extent that the impugned verifying affidavit was invalid and thus void, the original Plaint was therefore neither duly nor suitably verified in accordance with the requirement of Order 4 Rule 1 (2) of The Civil Procedure Rules 2010.

21. In this regard, counsel therefore invited the court to find and hold that the Plaint was invalid and thus ought to be struck out.

22. Secondly, Learned Counsel further submitted that the amended Plaint was not verified by any affidavit and hence the only Verifying affidavit is the one that was filed with and in respect of the original Plaint, which was contended to be invalid and void.

23. To the extent that the amended Plaint was not duly verified, by any Verifying Affidavit, Learned Counsel also sought to have the amended Plaint to be struck out.

24. Thirdly, Learned Counsel for the 3RD Defendant contended that though the plaintiff has impleaded the 3rd Defendant in the subject suit, the Plaintiff herein has not availed and or exhibited any basis or nexus between the Plaintiff and the 3rd Defendant. In this regard, counsel for the 3rd Defendant contended that in the absence of any claim/reliefs against the 3rd Defendant the subject suit was bad for Misjoinder.

25. Further, counsel for the 3rd Defendant added that the only issues that have been alluded to in the amended Plaint , is that the 3rd Defendant also carried out the impugned project or has connived with the 2nd Defendant to carry out the impugned Project.

26. Nevertheless, Learned Counsel further submitted that the 2nd Defendant has acknowledged and conceded that the impugned project is being taken by same. In this regard, counsel for the 3rd Defendant has submitted that on the basis of the acknowledgment by the 2nd Defendant, the suit as against the 3rd Defendant therefore ought to be struck out.

27. In support of the foregoing submissions, Learned Counsel for the 3rd Defendant invited the Honourable Court to take cognizance of the decision in the case of *Flyster Limited versus Delphis Bank Limited (2015)eKLR*. For clarity, counsel invited the court to take cognizance paragraphs 21, 22 and 26 thereof.

28. On the other hand, Counsel also invited the Court to rely on the decision in the case of *Miriam Wanje versus Hemma Wangechi (2016)eKLR* and therefore to find and hold that an Advocate who was not holding the requisite practicing certificate was neither authorized nor Competent to administer oath or at all.

c. Plaintiff's Submissions:

29. Learned counsel for the Plaintiff responded to the two application and relied on the Replying affidavits sworn by the 1st Plaintiff and which were sworn on the October 5, 2022.

30. For coherence, counsel for the Plaintiff submitted that the two Application filed by the 2nd and 3rd Defendants, amounted to abuse of the Due process of the Honourable court. In this regard, counsel invited the court to find and hold that the two application ought to be dismissed.

31. Secondly, counsel has submitted that the impugned license, which is now being relied upon by the 2nd Defendant to procure and obtain review was obtained on the July 21, 2022, long after the activities complained of had been commenced and undertaken.

32. In this regard, counsel submitted that the impugned license cannot now be relied upon to validate or to legalize the offensive activities that were carried out and undertaken long before the impugned license was procured.

33. Thirdly, Learned counsel for the Plaintiff has also submitted that the purported Questionnaires which have been attached and alluded to by the 2nd Defendant were in any event undated and therefore it is not possible to discern, if at all, when same were prepared or made.

34. Nevertheless, counsel has added that if the impugned questionnaire were indeed available as at the time of the hearing of the application, then same were within the custody of the 2ND Defendants and hence same ought to have been placed before the Honourable court.

35. Finally, counsel for the Plaintiff has submitted that the issue as to the competence of the verifying affidavit and more particularly, that same was commission by an advocate who had not taken out practicing certificate for the year 2022 was a technical and procedural issue which does not go to the root of the said Verifying affidavit.

36. Nevertheless, counsel added that the issue as to the competence of the verifying affidavit was an issue that could be addressed or redressed by seeking Leave of the court to file a Complaint Verifying affidavit.

37. In any event, Learned Counsel also added that the issue pertaining to the competence of an advocate administering oath prior to and before taking out practicing certificate was akin to an advocate executing a charge before taking out a Practicing certificate, which has since been found not to be fatal.

38. Be that as it may, Learned Counsel submitted that the defect relating to the competence of a commissioner of oaths to administer oath is an issue that is curable and in any event, subject to the Discretion of the Honourable Court.

39. In this regard, Learned Counsel invited the Honourable court to adopt and apply the reasoning of the Supreme Court of Kenya, in the case of *National Bank Of Kenya Ltd versus Anaj Warehouse (2015)eKLR*.

d. Submissions By The 1st, 4th and Ineterested Parties:

40. For completeness, it is imperative to point out that the 1st and 4th Defendants and the Interested Parties did not make any submissions in respect of the two Applications.

41. Suffice it to point out that Learned Counsel for the 1st Defendant informed the Court that same would leave the issue for the determination of the court. Similar position was adopted by Counsel for the 1st Interested Party.

Issues for Determination:

42. Having reviewed the two Applications which were filed by the 2nd and 3rd Defendants, together with the Supporting affidavits and having reviewed the Replying affidavits filed in opposition thereto; and having evaluated the oral submissions that were made by and on behalf of the Parties, the following issues do arise and are thus pertinent for consideration;

i. Whether the Application dated the July 28, 2022 meets and satisfies the established threshold for Review on the basis of Discovery of New and Important Evidence.

ii. Whether the subject Application is calculated to Invite the Court to sit on Appeal in respect of own Decision.

iii. Whether the Plaintiff's suit ought to be struck out on account of Misjoinder of the 3rd Defendant.

iv. Whether the Verifying Affidavit that accompanied the Original Plaint was invalid and whether the said Verifying affidavit remains relevant despite the amendment of the Plaint.

Analysis and Determination:

Issue Number 1: Whether the Application dated the July 28, 2022 meets and satisfies the established threshold for Review on the basis of Discovery of New and Important Evidence.

43. The 2nd Defendant's Application for Review is premised and anchored on the basis that the 2nd Defendant has since discovered and established the existence of new and important evidence, which the 2nd Defendant was not able to place before the court at the time of the delivery of the impugned ruling.

44. Further, the 2nd Defendant has gone ahead to state that the new and important evidence which same was unable to place before the court, includes, the Questionnaires which were sent out and issued to various Respondents and which Questionnaires culminated into the Issuance of the Environment Impact Assessment Licence.

45. On the hand, the 2nd Defendant has also contended that the other new and important Document which has since been discovered relates to The Environmental Impact Assessment License, which was issued on the July 21, 2022.

46. Premised on the foregoing, it is now appropriate to interrogate whether indeed the two sets of documents, which have been alluded to are indeed new and important documents and if so, whether the 2nd Defendant could not have discovered their existence prior to or at the time of the delivery of the impugned ruling.

47. To start with, the Questionnaires, which the 2nd Defendant has propagated as new and important documents, which could not have been availed to the court at the time of the delivery of the impugned ruling, were Documents which were under the custody of the said 2ND Defendant at all material times. Consequently, if the 2ND Defendant deemed same to be relevant and important, then same could have been availed to Court without much sweat.

48. In any event, the impugned Documents, if at all same were available, were documents that were related to the subject dispute before the court and therefore it behooved the 2nd Defendant to avail same to the court at the earliest.

49. To the extent that the said documents were within the custody of the 2nd Defendant, but same were never availed before the court, it was therefore incumbent upon the 2nd Defendant to tender some credible evidence/ explanation as to why, the said documents were never placed before the court.

50. Sadly, the 2nd Defendant has not found it useful or important to place before the Honourable court any evidence or any explanation as to why, if at all, the impugned questionnaires were neither availed nor placed before the Honourable court.

51. On the other hand, it is also worth noting that the impugned questionnaires, are not dated and hence it is not possible to discern when, if at all, same were originated or procured. In this regard, it is difficult to ascertain whether same were in existence earlier or whether same were tailor-made for purposes of the subject Application.

52. Other than the foregoing, there is also the question as to the genuineness of the impugned Questionnaire. However, the genuineness aside, what matters is why the impugned Documents were not placed before the Honourable court.

53. To my mind, for an Applicant to succeed in an Application for Review premised on the grounds of Discovery of New and Important Evidence, the claimant must show that same exercised Due diligence, but that despite the exercise of such diligence, same was still not able to produce or make available the impugned Document, which is now sought to be relied on.

54. In respect of the subject matter, the 2nd Defendant has not shown or exhibited any efforts or attempts, if any, that were taken to avail the impugned Questionnaires to the court, assuming for one minute, that the impugned Questionnaires were available and not otherwise.

55. Nevertheless, it must not be lost on the court that these are documents which were deemed to be under the custody and care of the 2nd Defendant. Consequently, the 2nd Defendant knew that same would be important in respect of the matter, insofar as the Dispute beforehand touched on and concerned, whether the requisite Licence, had been procured and obtained.

56. So, why were the documents not availed. To my mind, the answer to this question probably rests on the fact that the impugned Questionnaire were non-existent at the material point in time and that same have since been procured ex-post-facto with a view to propagating the subject application.

57. If that is not the reason, then why are the impugned questionnaires not dated, yet same are critical documents that must ordinarily precede the issuance of The Environmental Impact Assessment License report.

58. As concerns The Environmental Impact Assessment License, there is no gainsaying that same was procured on the July 21, 2022, same being the same date when the impugned Ruling was rendered or delivered.

59. In this respect, the question then is, was it a document or evidence that the 2nd Defendant would have availed or placed before the Honourable court before the delivery of the Ruling, but failed to do so despite exercise of Due Diligence.

60. To my mind, the document was not available with the 2nd Defendant prior to and at the time of the delivery of the Impugned Ruling and hence same could not be one of the documents that could have been placed before the court, by exercise of due diligence before the rendition of the impugned ruling.

61. Certainly, what becomes apparent is that the 2nd Defendant has since indulged in the procurement of certain documents ex-post-facto and thereafter same is keen to attract an order of Review to affect an order of Temporary Injunction which effectively relates to the events that occurred long before the impugned Environmental Impact Assessment License was (sic) issued.

62. In my considered view, a claimant who seeks to procure an order of review on the basis of discovery of new and important evidence has an obligation to establish certain important ingredients. Unfortunately, in respect of the subject matter, the 2nd Defendant imagined that such orders are granted or availed at the beckon of the claimant, without much ado.

63. I am afraid, that in the absence of proof that the impugned documents were actually in the custody of the 2nd Defendant and that same could not be availed to court despite exercise of Due diligence, the prayer of Review premised on the impleaded grounds cannot arise and ensue.

64. To buttress the foregoing analysis and observations, I adopt and endorse the holding of the Court in the case of *Republic versus Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR*, where the Court observed as hereunder;

> 30. The principles which can be culled out from the above noted authorities are:-
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> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
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> ii. The expression any other sufficient reason' appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
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> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
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> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
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> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
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> viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
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> ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
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> x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1. (underlining supplied)

65. Additionally, the parameters that govern an Application for Review, particularly premised on the ground of Discovery of New and Important evidence was also dealt with in the case of *Stephen Gathua Kimani versus Nancy Wanjira Waruingi T/a Providence Auctioneers (2019)eKLR*, where the Court of Appeal observed as hereunder;

> ' At the risk of being repetitive, an order for review is restricted to parameters set out by the law. The appellant may have had a genuine grievance but this did not fall within the ambit of a review application. To this extent, we cannot fault Mativo, J when he found:
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> 'The reason offered by the applicant is that there were orders issued in the various cases he referred to. This is not new evidence. The applicant has not satisfied that the orders in question were not within his knowledge. In fact he says he was an interested party in one of the cases. Alternatively, he has not demonstrated when he came to know about the said court decisions or that he could not obtain them despite due diligence. There is no allegation that there is an error apparent on the face of the record. It has not been shown that there is a sufficient reason to warrant the review'.

In the end, the learned judge stated:

> ' In the present case, guided by the facts of this case, the authorities cited herein and the relevant provisions of the law, I humbly find that the applicant has not demonstrated that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time nor has he shown that there is some mistake or error apparent on the face of the record nor has he proved that there as already stated the application for review was not made without unreasonable delay. The upshot is that my answers to number one is in the negative.'

We too are of a similar view and it is in view of this that we find, albeit with sympathy, that this appeal has no merit. It is hereby dismissed with costs to the respondent.'

66. In a nutshell, it is not enough for the 2nd Defendant to contend that same has since discovered new and important evidence and that on such kind of belief, same is automatically entitled to an Order of Review.

67. In short, the position ventilated by the 2nd Defendant, does not accord with the dictates with the provisions of Order 45 Rule 1 of the Civil Procedure Rules. In this regard, I am afraid that the application herein cannot succeed.

Issue Number 2 Whether the subject Application is calculated to invite the Honourable court to sit on Appeal in respect of own Decision.

68. It is important to recall that the Plaintiffs' suit and the application for temporary injunction was premised and anchored on the contention that the impugned tower was being erected without the procurement and issuance of the requisite Environmental Impact Assessment License.

69. Secondly, there is also no gainsaying that the impugned erection/ construction was stated to have commenced on or about the June 2022, insofar as the subject suit was filed on the June 29, 2022.

70. Premised on the contention that the erection of the impugned project, was being undertaken without prior issuance of the Environmental Impact Assessment License, the court was implored to find and hold that the impugned erection was being carried out contrary to and in contravention of the law.

71. Indeed, after hearing the submissions by the respective Parties, the court was persuaded that the impugned project was being undertaken prior to and before the issuance of the Environmental Impact Assessment License and therefore the court was obliged to and found that the Application for temporary injunction was proven.

72. Premised on the foregoing, the court proceeded to and issued an order of Temporary injunction, which was informed by obvious facts that no Environmental Impact Assessment Licence had been issued by National Management Authority.

73. Now, the 2nd Defendant is seeking to attract a Review based on a license that is said to have been procured and obtained on the July 21, 2022, same being the date when the Ruling was delivered.

74. The question beforehand, is whether this Honourable court having made a conscious and deliberate finding that the impugned project was being undertaken without the requisite license, same can now have a second bite and review such a deliberate finding and holding, either in the manner sought or at all.

75. To my mind, the findings and holdings which color the impugned ruling were deliberate exposition of the law, founded on and informed by the actual and obtaining sets of facts at the Material point in time. For clarity, at the time of the hearing of the Application and the delivery of the Ruling, the 2ND Defendant had not procured the Licence in Question.

76. Consequently, if any one, the 2nd Defendant not excepted was aggrieved and dissatisfied, then the only recourse that is available is to file an Appeal and not an Application for review.

77. To my mind, the current application for review is a disguised invitation to this court to sit on appeal on own decision, contrary to and in violation of the established rule which prohibits a Court of Law from siting on appeal in respect own decision.

78. Respectfully, the invitation by the 2nd Defendant must be deprecated and frowned upon.

79. To buttress the foregoing observation, it is apt to refer to and adopt the succinct holding of the Court of Appeal vide the decision in the case of *National Bank of Kenya Ltd versus Ndungu Njau (1997)eKLR*, where the court held as hereunder;

> 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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review
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> In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

Issue Number 3 Whether the Plaintiffs suit out to be struck out on account of Misjoinder of the 3rd Defendant.

80. Counsel for the 3rd Defendant argued and contended that the Plaintiffs' suit had not generated or disclosed any iota of claim as against the 3rd Defendant.

81. In any event, counsel added that what was contained in the body of the amended Plaint was an allegation that the 3rd Defendant was also involved in the erection of the impugned tower which was the basis of the complaint by the Plaintiffs herein.

82. However, counsel for the 3rd Defendant contended that the issue of construction or erection of the impugned tower had been conceded and acknowledged by the 2nd Defendant that the tower was being erected them.

83. Premised on the acknowledgement and admission by the 2nd Defendant, essentially that the tower was being erected by same, counsel for the 3rd Defendant submitted that the claim as against the 3rd Defendant was therefore mislaid and misconceived.

84. At any rate, counsel for the 3rd Defendant further contended that it was not enough for the Plaintiffs to throw in an allegation in the body of the amended Plaint alleging that the 3rd Defendant was also responsible for the impugned project, without more.

85. Essentially, Learned counsel for the 3rd Defendant therefore contended that the mere allegation that the 3rd Defendant was also involved in the construction and erection of the impugned erection, cannot constitute and or found a Reasonable cause of action against the 3rd Defendant.

86. Premised on the foregoing, counsel for the 3rd Defendant therefore invited the court to find and hold that the 3rd Defendant has been mis-joined into the subject proceedings; and similarly, that the Plaintiffs' suit did not disclose a reasonable cause of action as against the 3RD Defendant.

87. In respect of the application to strike out the name of the 3rd Defendant on the basis of misjoinder, it is common ground that the determination of whether or not there has been a misjoinder or otherwise, has an inkling of Evidence and facts.

88. Essentially, in respect of the subject matter the court shall be called upon to interrogate the factual allegations contained in the body of the amended Plaint and thereafter discern whether indeed the 3rd Defendant is associated or connected with the impugned project and if so, in what manner.

89. Clearly, the determination, analysis and evaluation of such evidence and facts, does not lie within the Jurisdiction of this Honourable court on the basis of an Interlocutory Application.

90. To my mind, such analysis shall have to await production of evidence and consequential examination before a conclusive determination can be reached or arrived at. In any event, such analysis can only be carried out and undertaken by the Trial Court during the plenary Hearing.

91. Notwithstanding the foregoing, it is also important to take cognizance of the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010.

92. For convenience, same are reproduced as hereunder;

> 9. Misjoinder and non-joinder [Order 1, rule 9.] No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the Parties actually before it.

93. My reading of the foregoing provisions, (supra), vindicates the position that no suit ought to be terminated on account of Misjoinder and more so, where the basis of the Application beforehand, touches on issues of Facts, which can only be addressed at the Plenary Hearing.

94. Guided by the foregoing provisions, I must decline the invitation by Learned counsel for the 3rd Defendant to terminate the Plaintiffs' suit as against the 3rd Defendant on account on (sic) misjoinder.

95. Other than the question of misjoinder, counsel for the 3rd Defendant also invited the court to find and hold that the Plaintiffs' suit did not disclose a reasonable cause of action as against the 3rd Defendant.

96. Without belaboring the point, I beg to point out that while considering the disclosure of a reasonable cause of action or otherwise, the Honourable court is called upon and enjoined to look at the pleadings filed and discern whether same discloses a semblance of a cause of action.

97. It is also imperative to note that in determining whether or not a cause of action has been disclosed, the court is not obliged to carryout minute examination of the factual issues and documents, if any, attached to the pleadings.

98. In this respect, I beg to reiterate the holding of the Court of Appeal in the case of Industrial and *Commercial Development Corporation v Daber Enterprises Limited [2000] eKLR*, where the Honourable Court of Appeal observed as hereunder;

> ' Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his right to have his case tried by a proper trial where, if necessary, there has been discovery and oral evidence subject to cross-examination - see the case of Wenlock v Moloney and Others , [1965] 1 WLR 1238. The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. And where the defendant's only suggested defence is a point of law and the court can see at once that the point is misconceived or, if arguable, can be shown shortly to be plainly unsustainable, the plaintiff will be entitled to judgment.
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> The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable - see the cases of Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd. (In Liquidation) , [1990] 1 WLR 153, 158 and Balli Trading v Afalona Shipping, The Coral, [1993 1 Lloyd's Rep 1, CA A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition - see the case of Jacobs v Booth's Distillery Co, (1901) LT 262 HL.

99. Be that as it may, where a suit shows a semblance of a cause of action, it behooves the court to sustain the suit other than to terminate it. For clarity, a Court of Law is called upon to as much as possible to endeavor to facilitate the hearing of suits on merits, unless the suit is clearly, hopeless and irredeemable.

100. To this end, the Decision in the case of *DT Dobie Ltd versus Muchina (1982)eKLR*, is spot-on, apt and succinct. For coherence, the court observed as hereunder;

> ' It cannot be doubted that the court has an inherent Jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult

to believe could be proved'. per Lord Herschell in Lawrence v. Lord Norreys, 15 AC 210 at p 219.

'The summary remedy which has been applied to this action is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of the process of the court.' per Danckwerts, LJ in Nagle v Fielden (1966) 2 QBD 633 at p 646.

'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable. Accordingly it is necessary to consider whether or not this plaintiff has an arguable case. That is the only question that arises on this appeal.' per Salmon, LJ, ibi at p 651.

Issue Number 4 Whether the Verifying Affidavit that accompanied the Original Plaint was invalid and whether the said verifying affidavit remains relevant despite the amendment of the Plaint.

101. Learned counsel for the 3rd Defendant attacked the verifying affidavit that was sworn on the June 29, 2022 and contended that same had been commissioned by an unqualified person, who had not taken out the requisite practicing certificate for the year 2022.

102. In this respect, learned counsel for the 3rd Defendant proceeded to and extracted information form the Law society of Kenya that one Kimani Antony Ndegwa had not taken out the requisite practicing certificate, for the year 2022.

103. Based on the fact that the said commissioner of oaths was stated not to have extracted the relevant practicing certificate, counsel for the 3rd Defendant contended that same was therefore not authorized to administer oath or to Commission any affidavit, either in the manner that same did or at all.

104. To the extent that the Verifying affidavit, was said have been commissioned by an advocate who had not taken out the requisite practicing certificate, counsel therefore sought to have the verifying affidavit invalidated and nullified.

105. Counsel further submitted that in the absence of a valid verifying affidavit, the original Plaint would become unverified and hence, same shall similarly, be void and invalid.

106. On the other hand, learned counsel for the 3rd Defendant also contended that to the extent that the amended Plaint was not verified by an affidavit, same also ought to be struck out.

107. First and foremost, it is appropriate to point out that a Commissioner of oaths subscribe to a Commission which is administered by the Chief Justice upon confirmation of certain requirement, which are prescribed vide the *Oaths and Statutory Declarations Act* Cap 15 Laws of Kenya.

108. Secondly, it is also common knowledge that every commissioner of oaths is obliged to renew the Commission on annual basis, by making the requisite payments directly to the Registrar of the High court, who upon receipt of the requisite fees shall proceed to issue the requisite acknowledgment.

109. Thereafter, the office of the Registrar of the High court in liaison with the office of the Chief Justice would then issue the requisite license to the designated Commissioner of oaths.

110. Thirdly, it is imperative to underscore the fact that the custodian of the Commission and the Records pertaining to the authorized Commissioner of oaths is the office of the Registrar of the High court.

111. Consequently, any person, Learned Counsel for the 3rd Defendant not excepted, who desire to ascertain the details of authorized commissioner for oaths, are called upon to seek the relevant information from the Registrar of the High court and not otherwise.

112. To my mind, the Law Society of Kenya though important in the vetting process leading to the issuance of a commission by Chief Justice, to deserving candidates, who are not doubt Advocates, does not hold the records pertaining to the authorized Commissioners of oaths.

113. Suffice it to point out that the law society hold records pertaining to and concerning the duly licensed Advocates. However, the administration of Oaths, like the one beforehand, is not done by Advocates, but by Commissioners of Oaths.

114. Consequently, if one is inclined to ascertain who are the licensed advocates, authorized to practice law during a given point in time, obviously, the port of call is the Law Society of Kenya.

115. Contrarily, if one is keen to ascertain the details of the commissioners of oaths who are mandated and authorized to administer oath, in accordance with the provisions of the *Oaths and Statutory declarations Act* Cap 15 Laws of Kenya, the Custodian of such information is the office of the Registrar of the High court.

116. Having made the foregoing observation, I must point out that no information was procured from the office of the Registrar of the High court to show that one Kimani Antony Ndegwa advocate, had not renewed his commission for purposes of the year 2022.

117. In the absence of such information, I am unable to find and hold that the verifying affidavit was commissioned by unqualified person, in the manner contended by the Learned Counsel for the 3RD Defendant herein.

118. Notwithstanding the foregoing, it is also appropriate to state that even if the Commissioner of oaths who administered the oath was neither licensed nor authorized (which has not been proven), the other material issue would be; whether the verifying affidavit attached to the original Plaint is still relevant after the amendment of the Plaint.

119. To my mind, the amendment of the Plaint supersedes the original Plaint and the latter is rendered extinct and redundant. Never again are proceedings to be taken on the basis of the Original Plaint, which effectively ceases to exist in eye of the law. For clarity, the verifying affidavit, if any, that was attached thereto also ceases to exist and can never be relied on for purposes of vindicating (sic) an amended Plaint ex post facto.

120. In my humble view, the invitation by counsel for the 3rd Defendant to invalidate and thereafter nullify the verifying affidavit sworn on the June 29, 2022, amounts to flogging a dead Horse.

121. Other than the foregoing, my attention has also been drawn to the decision in the case of National Bank of Kenya Ltd versus Anaj Warehouse Ltd (2015)eKLR, where the Supreme Court of Kenya had occasion to consider the import, effect and tenor of a document prepared and attested by an advocate who had not taken out or renewed his/ her Practicing certificate.

122. For coherence, the Supreme Court observed as hereunder;

> (66) The Court's obligation coincides with the constitutional guarantee of access to justice (*Constitution of Kenya, 2010*, Article 48), and in that regard, requires the fulfillment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in Article 159(2)(d) of the *Constitution*: 'justice shall be administered without undue regard to procedural technicalities'.

(67) To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person's property of any description), 20 (3) (a) and (b) (interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same.

(68) The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1)(a) of the *Advocates Act*, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

123. Without belaboring the point, the Supreme Court of Kenya found and held that the fact of non-extraction of a Practicing certificate does not ipso-facto invalidate the legal instrument or document attested by such an advocate.

124. By parity of reasoning, I would import and apply the holding of the Supreme Court to and in respect of the impugned verifying affidavit, that is assuming, that same remained alive despite the amendment.

125. Simply put, I would find and hold that the mere fact that the Commissioner of oath, had not (sic) taken out the practicing certificate for the impugned year would not by itself invalidate the Verifying affidavit.

126. Nevertheless, I have found, held and stated that upon the amendment of the Plaint, the original Plaint as well as the verifying affidavit attached thereto to, would stand extinguished and become redundant.

127. Finally, counsel for the 3rd Defendant invited the court to strike out the amended Plaint on the basis that same was not accompanied by the requisite verifying affidavit, in line with the provision of Order 4 Rule 1(2) of the Civil Procedure Rules 2010.

128. However, in this respect I beg to state that in instances where an amended Plaint is neither accompanied nor verified by an affidavit, the Honourable court has a discretion on whether to strike out the impugned suit or to grant latitude to the defaulting Party to file the requisite verifying affidavit.

129. To my mind, where a Court of law is imbued with discretion, like in the case where no verifying affidavit has been attached to an amended Plaint, then the court must be reluctant to apply the draconian process of striking out a suit merely on account of the nominal infraction or defect, as the one alluded to herein.

130. In this regard, I would be inclined to afford latitude to the Plaintiffs to file the requisite application for consideration and due attention of the court, particularly, taking into account that the issues at the foot of the instant suit touch on and concern the Right to Clean and Healthy Environment as prescribed vide Article 42 of the *Constitution* 2010.

131. To buttress the observation that this Court has a discretion in suits or case where no verifying affidavit was filed, it is sufficient to recall the holding of the Court of Appeal in the case of *Research International East Africa Ltd vJulius Arisi & 213 others[2007] eKLR*, where the court stated as hereunder;

In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them

in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the Grace Ndegwa's case (supra) and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-plaintiffs with their authority in writing.

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.

Final Disposition;

132. Having analyzed the pertinent issues that were isolated, highlighted and amplified in the body of the Ruling herein, it is apparent that the two applications under reference are certainly not Meritorious.

133. In any event, it is appropriate to underscore that it is not every breach or infraction of the law, no mater how nominal same is, that should culminate or lead to the invocation and application of the Summary/ striking out Procedure.

134. In a nutshell, I come to the conclusion that the Notice of Motion Applications dated the July 28, 2022 and the September 27, 2022, respectively, are devoid of merits.

135. Consequently and in the premises, same be and are hereby Dismissed with costs to the Plaintiffs. For clarity, No costs are awarded to the rest of the Defendants.

136. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. A S Kuloba for the Plaintiff

Mr. Gichachi for the 1st Defendant

Mr.Ndolo Felix Onyango for the 2nd Defendant

Mr. Valentine Ataka for the 3rd Defendant

Ms. Majune for the 1{{^st} Interested Party