



**Mbuthi & 2 others (Suing as the Chairman, Secretary and Treasurer of Koinange Micro-Finance Traders CBO) v Director General, National Environment Management Authority & another (Environment and Land Appeal 6 of 2019) [2022] KEELC 15084 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15084 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL 6 OF 2019**

**YM ANGIMA, J**

**NOVEMBER 24, 2022**

**BETWEEN**

**JESSE MBUGUA MBUTHI ..... 1<sup>ST</sup> APPELLANT**

**JOHN MARIRA GICHURE ..... 2<sup>ND</sup> APPELLANT**

**JANE MUMBI KAMAU ..... 3<sup>RD</sup> APPELLANT**

**SUING AS THE CHAIRMAN, SECRETARY AND TREASURER OF KOINANGE  
MICRO-FINANCE TRADERS CBO**

**AND**

**DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**REGISTERED TRUSTEES OF THE NYAHURURU JAMIA  
MOSQUE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. The Appellants' Application**

1. By a notice of motion dated 06.04.2022 expressed to be based upon Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap.21), Order 45 rule 1(1) & (2) and Order 51 rule 1 of the *Civil Procedure Rules*, 2010 (the Rules), and all other enabling provisions of the law, the Appellants sought a review of the judgment dated and delivered on 03.02.2022 and for the matter to be remitted to the National Environment Tribunal (NET) for determination on the merits.
2. The said application was based upon the several grounds set out in the body of the motion and contents of the supporting affidavit sworn by the Appellant's advocate D.W. Mbugua on 06.04.2022. The



gravamen of the application was that there was an error of law apparent on the face of the record in that there was a ‘grave’ misapprehension of the law by this court in dismissing the appeal on 03.02.2022. The Appellant contended that in holding that the Appellant’s case fell within the ambit of Section 129(1) of the *Environmental Management and Co-ordination Act* (EMCA) as opposed to Section 129(2) thereof the court completely misapprehended the law with the consequence that there was a miscarriage of justice which warranted a review of the judgment.

### **B. The Respondents’ Response**

3. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn by Shaaban Hassan Said, Ngojangoja on 25.05.2022 in opposition to the application on several grounds. First, it was contended that there was no demonstration of the existence of an error or mistake apparent on the face of the record. Second, that there was undue delay of about 2 months in filing the application which had not been explained. Third, that the arguments raised by the Appellant in the review application were the same ones which were advanced at the hearing of the appeal hence the court was being called upon to sit on appeal over its own decision. Fourth, that the application was fatally defective as the supporting affidavit was sworn by the advocate on record instead of the Appellants themselves. The court was consequently urged to dismiss the application for lack of merit.

### **C. Directions on Submissions**

4. When the application was listed for inter partes hearing it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellants filed their submissions on 28.04.2022 whereas the 1<sup>st</sup> Respondent filed its submissions on 26.09.2022. The 2<sup>nd</sup> Respondent did not file any submissions or response to the application.

### **D. The Issues for Determination**

5. The court has perused the notice of motion dated 06.04.2022, the replying affidavit in opposition thereto as well as the submissions on record. Although there are several peripheral issues raised by the 1<sup>st</sup> Respondent, the court shall only frame and determine the key issues arising from the application. The court is thus of the opinion that the key issues for determination herein are as follows:
  - a. Whether the Appellant has demonstrated a case for review of the judgment dated 03.02.2022.
  - b. Who shall bear costs of the application.

### **E. Analysis and Determination**

#### **Whether the Appellant has demonstrated a case for review of the judgment dated 03.02.2022**

6. The court has considered the material and submissions on record on this issue. It is evident from the Appellants’ application that they are seeking review on account of an alleged error or mistake of law apparent on the face of the record under Order 45 rule 1(1) of the Rules. The said subrule stipulates as follows:

“ Any person considering himself aggrieved:-

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or



- b. By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter of 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 an 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.”
7. In the case of *National Bank of Kenya Ltd -vs- Ndungu Njau* [1997] eKLR the Court of Appeal made the following pronouncement on what constitutes an error apparent on the face of the record:
- “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 provisions of law cannot be a ground for review.”
8. So, what is the Appellant’s demonstration of the existence of an error apparent on the face of the record in this matter? In their grounds on the face of the motion they contended that there was a ‘grave’ misapprehension of the law on the part of the court in its application of Section 129(1) and 129(2) of EMCA which resulted in a miscarriage of justice. In paragraph 4 of the supporting affidavit, the Appellants’ advocate D.W. Mbugua swore as follows:
- “That, I verily believe that the Honourable Court misapprehended the application of Sections 129(1) and 129(2) of the *Environmental Management and Co-ordination Act* while making its determination upholding the ruling of the Honourable National Environment Tribunal since there was need to interrogate whether the Appellants’ appeal fell under Section 129(1) or 129(2) of the Act.”
9. It is thus clear that the Appellants were aggrieved by what they considered to be an erroneous interpretation and application of the law by the court in its judgment dated 03.02.2022. It was their view that the court erred in law in holding that their case fell within Section 129(1) of EMCA. It was also their view that the correct legal interpretation is that their case fell squarely within Section 129(2) of EMCA. That is the reason why they stated in their application that the court ‘gravely misapprehended’ the law and as a result arrived at an erroneous decision.
10. The court is far from satisfied that the Appellants have demonstrated any grounds for review known to the law. It is apparent from the material on record that the Appellants filed the appeal before this court because they were aggrieved by the decision of NET which held that their appeal was time-barred under Section 129(1) of EMCA. The Appellants were of the view that their appeal fell under Section 129(2) of EMCA hence it was not time barred. This court, sitting as an appellate court, considered the appeal and held that NET was right in holding that a challenge to the grant of a licence was a matter which fell within Section 129(1)(a) of EMCA.



11. In paragraph 18 of the judgment this court held as follows:

“The court is of the opinion that the granting of the impugned licences was a matter which clearly fell within the Section 129(1) of EMCA and not within the general rubric of Section 129(2) of the Act. The court finds no justification for the Appellants’ attempt to bring licensing decisions not within the general provisions of Section 129(2) whereas the Act has specifically provided for such matters in Section 129(1)(a). Accordingly, the court is satisfied that the Tribunal did not err in law in holding that the appeal was filed outside the prescribed limitation period of 60 days from the date of issuance of the impugned licences.”

12. The court concurs with the 2<sup>nd</sup> Respondent that the Appellants are simply rehashing their argument at the appellate stage and that they are simply asking the court to sit on appeal over its own judgment. It is well settled in law that a review cannot be entertained simply because the court misinterpreted, misconstrued or misapprehended the law. It matters not that other judges may have taken a different view on the matter. And a review cannot be granted simply because the aggrieved party has no avenue for a further appeal. In the instant case, the court finds absolutely no merit in the application for review.

### **Who shall bear costs of the application**

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should be deprived of costs of the application. Accordingly, the 2<sup>nd</sup> Respondent shall be awarded costs of the application.

### **F. Conclusion and Disposal Order**

14. The upshot of the foregoing is that the court finds no merit in the Appellants’ application for review. Accordingly, the Appellants’ notice of motion for review dated 06.04.2022 is hereby dismissed with costs to the 2<sup>nd</sup> Respondent only.

It is so ordered.

**RULING DATED AND SIGNED AT NYAHURURU THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

N/A for the Appellant

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

