Kaura & 3 others v Kaura & 3 others (Environment & Land Case 68 of 2017) [2022] KEELC 14922 (KLR) (22 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14922 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE 68 OF 2017

CG MBOGO, J

NOVEMBER 22, 2022

BETWEEN

TILAL KAURA ..... 1ST APPLICANT

JAMES NAIRUKO ..... 2ND APPLICANT

TUMPES DAPASH ..... 3RD APPLICANT

MBARTAN GROUP RANCH ..... 4TH APPLICANT

AND

BARTAN KAURA ..... 1ST DEFENDANT

PAUL MUNTET ..... 2ND DEFENDANT

DANIEL SURURU ..... 3RD DEFENDANT

BARKITABU GROUP RANCH ..... 4TH DEFENDANT

RULING

1. Before this court for determination is an undated notice of motion application filed on May 10, 2022 expressed to be brought under section 1A, 1B, 3, 3A, 63 (e) and 80 of the *Civil Procedure Act* and order 45 rule 1 and order 51 rule 1 of the *Civil Procedure Rules* seeking the following orders: -

    1. Spent

    2. That the *ex parte* orders made on the July 14, 2021 pursuant to the ex-parte proceedings thereof together with all other consequential and subsequent orders, notices and other process arising therefrom be reviewed with a view to being set aside and the application dated the May 26, 2021 reinstated and fixed for inter parties hearing and determination on merits.

    3. Spent

4. Spent

5. That the orders issued herein be served upon the OCPD, Narok West Police Division as well as the OCS, Mulot Police Station to ensure compliance by all the parties concerned.

6. That the honourable court be pleased to make such other or further orders that it may deem fit and just in the interest of justice.

7. That costs of this application be provided.

2. The application is supported by the affidavit of Daniel Sururu, the 3rd applicant herein sworn on May 5, 2022.The 3rd applicant deposed that a perusal of the court record indicated that the matter had been fixed on mention on July 4, 2021 and that on July 14, 2021 owing to their absence at the time the matter was mentioned for taking directions, the court issued ex parte orders in terms of the prayers sought on the application dated May 26, 2021.The 3rd applicant further deposed that the orders issued on July 14, 2021 reviewed the orders that were issued on March 18, 2021 which could not have been reviewed without a substantive hearing of the application dated May 26, 2021.Further, that the purpose of the mention on July 14, 2021 was to confirm service of the application dated May 26, 2021 when the same would be fixed for hearing and directions on how the same would be disposed off and it was irregular for the court to issue substantive orders on a mention date without hearing the application and or allowing the applicants to serve file their response.

3. The 3rd applicant further deposed that as a result of the ex-parte orders issued the respondents have gone ahead and commenced developments thereon and it would be in the interest of justice that the orders issued on July 7, 2021 be reviewed with a view to setting aside and the application dated May 26, 2021 heard on merits. Further, that the situation on the ground is volatile and there is likelihood of bloodshed which necessitates the need for police enforcement to ensure compliance.

4. The application was opposed by the replying affidavit of the 1st respondent sworn on June 26, 2022. The 1st respondent deposed that the court is functus officio, and the allegations made by the applicants are unfounded, scandalous and unsupported since the counsel for the applicants' was aware of the date of the application having acknowledged service by receiving the application and mention date under protest. Further, that there no sufficient reasons to warrant setting aside of the regular orders and that non-attendance by the applicant's counsel cannot be sufficient grounds to set aside regular orders especially where the counsel ignored and neglected to attend court. As such, the negligence of the counsel cannot be termed as a mistake and cannot be sparingly forgiven without giving due regard to the circumstances. The 1st respondent further deposed that the counsel cannot fault the court for conducting its business expeditiously and that a close scrutiny of the application shows that it borders an appeal against the ruling of the court and this court does not have the jurisdiction to sit as an appellate court. Further that if dissatisfied with the orders of the court, the applicants have an avenue of appeal. In addition, the 1st respondent deposed that a trial is the responsibility of the parties and they cannot wholly abandon responsibility for its prosecution at the foot of advocates.

5. The application was disposed off by way of written submissions. The applicants did not file written submissions despite being granted the chance to do so on three occasions. Be that as it may, the respondents filed written submissions dated July 18, 2022.The respondents raised four issues for determination as follows: -

    i. Whether the plaintiffs/respondents served and/or notified the defendants/ applicants with mention date for the notice of motion dated May 26, 2021.

ii. Whether the plaintiffs/respondents satisfy the requirements of a stay of execution of the orders issued on July 14, 2021 and whether there are two conflicting orders in existence as issued on July 14, 2021 and May 18, 2021.

iii. Whether the orders issued on July 14, 2021 can be reviewed/set aside and/or varied.

iv. Costs of the application.

6. On the first issue, the respondents submitted that the application herein was received under protest as evidenced in the affidavit of service; the same application and notice was served via electronic mail in compliance with order 5 rule 22 C of the *Civil Procedure Rules*. The respondents submitted that procedure has often been said to be the handmaiden of justice and thus the rules of procedure do exist to provide a formal mechanism where justice can be attained expeditiously, fairly and without delay. They relied on the case of *Oyunge Barnabus & 3 others (Suing as Administrators of the estate of Mathayo Ratemo Mayaka (deceased) v Charles Oteki Rioba* [2021] eKLR.

7. On the second issue, the respondents submitted that the applicants herein being aggrieved by the ex-parte orders issued on July 14, 2021, filed the instant application which in this case a stay of execution in Civil Procedure ought to meet conditions prior to issuance of stay orders. The respondents relied on the case of *Joseph Odide Walome v David Mbadi Akello* [2022] eKLR and submitted that the applicants have not met the conditions to warrant stay of execution. The respondents further submitted that the application has been filed out of time as the judgment delivered herein and the orders issued were well within the knowledge of the counsel who cannot feign lack of knowledge and subject the respondents to further adjudication. Reliance was placed in the case of *Equity Bank Limited v Taiga Adams Company Limited* [2006] eKLR.

8. On the third issue, the respondents submitted that in considering whether or not to set aside judgment or ruling, the court has to consider the matter in light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to do so if necessary upon terms to be imposed and that the aim of the overriding objectives is to facilitate the just, expeditious, proportionate and affordable resolution to civil disputes whilst avoiding unnecessary delays and repetitive litigious pleadings. The respondents relied on the cases of *Rahman v Rahman* (1999) LTL 26/11/9 and *Dubai Bank Kenya Limited v Ukamba Agricultural Institute* [2017] eKLR. The respondents submitted that the applicants have not satisfied the granting of stay of execution and neither have they satisfied the requirements of setting aside the orders.

9. I have analysed and considered the application, replying affidavit and the written submissions filed by the respondents and the issue for determination is whether the instant application has merit.

10. The applicants in this case are seeking a review of the orders issued on July 14, 2021 on the grounds that the said orders were issued in their absence and notably, when the matter was scheduled for mention. I have perused the record in this file and I note that judgment was delivered in this matter on December 20, 2018. It followed thereafter that a ruling was delivered on March 18, 2021 which was allowed as prayed. The respondents filed an application dated May 26, 2021 and directions given for compliance with the same and a mention date was slated on July 14, 2021.On July 14, 2021, the applicants' counsel was not present and the court being satisfied with the mode of service, this court allowed the application in terms of prayers No 2, 3, and 4 of the application. It is against this backdrop that the applicants seek a review of the orders granted on July 14, 2021.

11. Section 80 of the *Civil Procedure Act* provides that: -

> " Any person who considers himself aggrieved-
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> a) by a decree or order in which an appeal allowed by this Act, but from which no appeal has been preferred; or
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> 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."

12. The provisions of order 45 rule 1 of the *Civil Procedure Rules* provide for the review of a decree or order as follows: -

> " (1) Any person considering himself aggrieved: -
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> a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred or
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> b) by a decree or order from which no appeal is hereby allowed, and from whom 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."

13. There are three aspects which are discernible from part (b) above

a) Discovery of new and important matter or evidence.

b) Mistake or error apparent on the face of the record.

c) Any other sufficient reason.

14. In *Republic v Public Procurement Administrative Review Board & 2 others Exparte Kenya Power & Lighting Company* [2019] eKLR, the court held that: -

> " Section 80 gives the power of review and order 45 sets out rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review. Muyodi vs. Industrial and Commercial and Development Corporation &Another [2006] 1 EA 243, where the Court of Appeal described an error apparent on the face of the record as follows:
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> > "In Nyamogo & Nyamogo v Kogo (2001) EA 174 the Court said that an error apparent on the face of the record cannot be defined precisely and 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 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 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

15. In the instant application, the applicants' assertions that the procedure adopted by the court during the course of a mention is in my humble view not sufficient to grant setting aside of the orders. I find that although the applicants have couched their application as one that seeks review orders, in actual sense, they seem not to be necessarily aggrieved by the ruling but in real sense being aware that the window for filing an appeal has lapsed, intend to have the matter go round in endless circles in these corridors.

16. In addition, the Court of Appeal in *Afapack Enterprises Limited v Punita Jayant Acharya (Suing as the Administrator of the Estate of the late Suchila Anatrai Raval)* [2018] eKLR made the following observation:

> " It is also an important requirement that the application for review should be made without unreasonable delay. Although the appellant attributed his predicament to mistake of his counsel, what militated, against the exercise of discretion by the Judge in the appellant's favour was clearly the appellant's own conduct. The Judge found that the appellant "has not been diligent enough in pursuing its rights;" and that the appellant was guilty of inordinate delay in making the application for review. In the words of the Judge:
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> > "An application for review ought to be made without unreasonable delay. Here the delay is spanning a period of nine months. Ordinarily nine months delay in an application for review, if no reasonable explanation is offered is inordinate." (Emphasis mine)

17. While I place reliance on the above cited authority, I further note that the application has been filed nine months after the said orders were issued which can be termed as inordinate delay with no reasonable explanation advanced towards the said delay and in the circumstances, I find that the instant application for orders of review must fail since no sufficient reasons were furnished to the court to explain the delay in filing of the same, contrary to the requirement of order 45 rule 1(b) of the *Civil Procedure Rules*, that requires applications for orders of review to be filed without unreasonable delay.

18. Arising from the above, the undated notice of motion application filed under a certificate of urgency dated May 5, 2022 is hereby dismissed with costs to the respondents. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 22ND DAY OF NOVEMBER, 2022.

MBOGO C.G.

JUDGE

22/11/2022

In the presence of:

CA:Chuma