



**Republic v District Commissioner; Obonyo (Interested Party); Okello (Exparte) (Environment and Land Judicial Review Case 3 of 2021) [2022] KEELC 14701 (KLR) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14701 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 3 OF 2021  
AY KOROSS, J  
NOVEMBER 10, 2022  
(ORIGINALLY KISUMU ELC JR CASE NO.E9 OF 2021)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**DISTRICT COMMISSIONER ..... RESPONDENT**

**AND**

**MARTIN OLOO OBONYO ..... INTERESTED PARTY**

**AND**

**WALTER OMBENG OKELLO ..... EXPARTE**

**RULING**

**Ex Parte Applicant's Case**

1. The application that is the subject of this ruling is a notice of motion application dated April 27, 2022 that has been filed by the *ex parte* applicant. The motion has been moved pursuant to the provisions of sections 80 and 63 (e) of the [Civil Procedure Act](#) and orders 45 rule 1 and 51 of the [Civil Procedure Rules](#). He has sought the following reliefs;
  - a. The honourable court be pleased to review the orders issued on January 20, 2022.
  - b. Costs be provided for.
2. The motion is based on the grounds set out on its face and on the supporting affidavit of the *ex parte* applicant Walter Ombeng Okello dated April 27, 2022.



3. The *ex parte* applicant contended that there was an error apparent on the face of the record. He filed an appeal to the Minister within the prescribed period as stipulated by law and not out of time as espoused in the impugned ruling. He also stated that his submissions to the chamber summons application dated May 11, 2021 were filed in good time.

### **The Interested Party's Case**

4. In opposition, the interested party filed a replying affidavit dated July 15, 2022. He stated that the *ex parte* applicant's motion was filed with inordinate delay; it was filed on May 23, 2022 yet the decision he had sought to review was delivered on January 20, 2022. The motion was a mere afterthought.
5. He contended that the interested party should have raised the issue that the court had overlooked his submissions either before or immediately after the court had rendered its decision. He averred that the *ex parte* applicant had obviously failed to comply with the directions of the court by ensuring that his submissions were in the court record.
6. It was his position that since the proceedings in the present matter were finally concluded, the court could not review its decision because it was *functus officio* and essentially, the *ex parte* applicant wanted the court to sit on its own appeal.

### **The Respondent's Case**

7. The respondent never participated in these proceedings.

### **Parties' Written Submissions**

8. The *ex parte* applicant's Counsel Mr Nyanga filed his written submissions dated August 30, 2022. Counsel submitted that pursuant to the provisions of section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#), the court in its exercise of judicial discretion could review its orders on account of mistake, error apparent on the face of the record or for any sufficient reason.
9. Counsel submitted that it was obvious the Minister did not dismiss the appeal because it had been filed timeously and they had proffered evidence to establish so. Further, that he filed his submissions as directed by the court. Counsel relied on the case of Civil Appeal Number 2111 of 1996, [National Bank of Kenya v Ndungu Njau](#) where the Court of Appeal held thus;

“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”.

### **The Interested Party's Submissions**

10. The interested party's Counsel Mr Mwamu filed his written submissions dated September 23, 2022. Counsel submitted that the legal framework for review of court orders was section 80 and order 45 rule 1 of the same Act.
11. Counsel submitted that failure to file submissions was not tantamount to an error apparent on the face of the record and the court could have reached an informed decision regardless of parties' submissions. Counsel contended the motion was filed inordinately.



12. Counsel contended that the *ex parte* applicant had not met the legal threshold of section 80 and order 45 rule 1 and from the decision of *National Bank of Kenya Limited v Ndungu Njau*, it was evident that this court was *functus officio* and the *ex parte* applicant's recourse lay in an appeal.

### **Analysis and Determination**

13. I have carefully considered the motion, its grounds, affidavits and respective parties' submissions and the issues falling for determination are; (i) whether the motion is merited and (ii) what orders ought to be issued. I will deal with the issues consecutively.
14. It is not in doubt and as rightfully submitted by both Counsel, the applicable provisions that govern review of court orders are encapsulated by section 80 of the *Civil Procedure Act* and order 45, rule 1 of the *Civil Procedure Rules*. Section 80 provides as follows;
- “ 80 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”.
15. While order 45 rule 1 stipulates thus:
- “ 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 judgment to the court which passed the decree or made the order without unreasonable delay” Emphasis added.
16. Counsel for the interested party asserted that the motion was filed with unreasonable delay. The impugned ruling was rendered on January 20, 2022 and the motion was filed on May 23, 2022; a period of close to 4 months. Notwithstanding that the *ex parte* applicant never addressed this court on whether there was unreasonable delay, I am of the considered opinion that the period was not inordinate.
17. Though the alleged offending paragraphs of this court's ruling have not been disclosed by the *ex parte* applicant, from the grounds of the motion and supporting affidavit, they can be surmised to be paragraphs 6 and 13 of the impugned ruling.
18. In these two paragraphs; this court stated that the *ex parte* applicant's submissions had not been filed and found that the *ex parte* applicant's appeal was filed out of time. Some of the grounds in support of the of review are a stranger to the impugned ruling and I will not belabour in dealing with them.



19. The main question is whether by interrogating these impugned paragraphs, the *ex parte* applicant brought himself within the ambit of the prerequisite conditions set out in section 80 and order 45, rule 1 of the said Act and Rules.
20. On paragraph 6 of the impugned ruling, the court on November 29, 2021 directed the *ex parte* applicant's Counsel to file his submissions, which he allegedly filed within the course of that day. The court reserved a ruling date and as it was rendering its ruling, the submissions were not in the court file.
21. From the annexures to the motion, it is evident that *ex parte* applicant did comply with the directions of the court but there was a drawback; the case details referenced in the submissions is Kisumu ELC Misc Appl JR Case No E9 of 2021 which was the original file. Worst still, Mr Nyanga's email to the registry dated November 29, 2021 did not reference the Siaya file. It is obvious there was a mishap and the submissions did not find their way into the court record.
22. Was this tantamount to an error apparent on the face of the record? In agreement with Mr Mwamu's argument. My answer is in the negative. Submissions are merely persuasive arguments and the court did consider the parties' pleadings in rendering its ruling. There was no prejudice occasioned to the *ex parte* applicant notwithstanding the absence of submissions.
23. Mr Nyanga has also contended that the *ex parte* applicant's appeal was filed within the statutory timelines. It is obvious to me that indeed that is the position obtaining. There was no way the Minister could admit the appeal without first satisfying himself or herself that the appeal was competent. This obviously points to an error apparent on the face of the record.
24. To compound this, Mr Nyanga has tendered a receipt dated November 27, 2003 evidencing payment for an appeal to the Minister which demonstrated that the *ex parte* applicant lodged an appeal against the decision of the land adjudication officer that was rendered either on diverse dates November 11, 2003 or November 21, 2003. Clearly, the appeal was filed within the statutory timelines of 60 days. This evidence falls within the parameter of new and important evidence.
25. It would be in the interest of justice if the *ex parte* applicant could be granted an opportunity to ventilate his case on merits.
26. The upshot of the above analysis is that, the motion is merited and I allow it. I am accordingly inclined to review paragraph 13 of the ruling delivered by this court on the January 20, 2022 and consequently do set aside the finding in the said ruling that the *ex parte* applicant's appeal to the Minister was filed outside the statutory timelines. Ultimately, I issue the following disposal orders;
  - a. An order be and is hereby issued setting aside the order dismissing the application dated May 11, 2021;
  - b. The *ex parte* applicant is granted leave to apply for judicial review orders of certiorari, mandamus and prohibition against the decision of the Minister issued on appeal number 237 of 2007;
  - c. There be a stay of further proceedings on appeal number 237 of 2007 pending the hearing and determination of the substantive judicial review application; //
  - d. The *ex parte* applicant shall file and serve all parties with the substantive notice of motion together with submissions thereon within 21 days from the date of this ruling;



- e. Upon being served with the said pleadings and submissions, parties shall be at liberty to file and serve their responses to the substantive notice of motion together with written submissions thereon within 21 days from the date of service by the *ex parte* applicant;
- f. The *ex parte* applicant shall be at liberty to file and serve a supplementary affidavit and submissions within 10 days of service by parties;
- g. This matter shall be mentioned for directions on February 1, 2023; and
- h. An affidavit of service shall be filed 3 days prior to the mention date.

**DELIVERED AND DATED AT SIAYA THIS 10<sup>TH</sup> DAY OF NOVEMBER 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**10/11/2022**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform:**

**In the Presence of:**

Mr. Nyanga for ex-parte applicant

Ms Ochaka for 1<sup>st</sup> interested party

Court assistant: Ishmael Orwa

