



Mwamba v Mbae (sued as the legal representative of the estate of Silas Judah Mbae (deceased) & another; Mwamba & another (Applicant) (Environment & Land Case 21 of 2019) [2022] KEELC 15359 (KLR) (14 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15359 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 21 OF 2019
CK NZILI, J
DECEMBER 14, 2022

BETWEEN

STEPHEN MWAMBA PLAINTIFF

AND

ZAVERIO KIAMBI MWAMBA 1ST DEFENDANT

KENNON MWITI MBAE (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SILAS JUDAH MBAE (DECEASED)) 2ND DEFENDANT

AND

CONSOLATA KANUNGO MWAMBA APPLICANT

GREGORY KIMATHI MWAMBA APPLICANT

RULING

1. The court by an application dated June 10, 2022 is asked to:- review its previous orders and to strike out the application dated July 7, 2020 instead of dismissing; that leave be granted to substitute the deceased plaintiff; allow the revival of the suit out of time and lastly the applicants be made parties to the suit. The application is supported by an affidavit of Gregory Kimathi Mwamba sworn on June 10, 2022.
2. The reasons given are that the application dated July 7, 2020 was deficient in some procedural aspects which did not go to the core of the subject matter; a dismissal order was final in nature; the delay was out of the covid 19 pandemic; parties should be heard on merits and it is in the interest of justice the application be allowed.
3. Order 45 of the *Civil Procedure Rules* as read together with section 80 of the *Civil Procedure Act* provides that, if a party on discovery of new and vital evidence or where there is error apparent or



mistake on the face record and for some sufficient reason, may apply for review or the setting aside or an order or decree which has not been appealed against.

4. While addressing the jurisdiction of the court under these provisions, in *Mbaya Nzulwa v KPLC* (2018) cite it was held that the court has to administer justice devoid of any technicalities. In *Republic v Advocates Disciplinary Tribunal (ex parte) Apollo Mboya* (2019) eKLR, it was held that an erroneous decision could be corrected in the guise of the exercise of power of review and that in considering an application for review the court must confine itself to the material which was available at the time of the initial decision and not the happening of some subsequent event or developments. Further, the court held that a mistake or an error apparent on the face meant a mistake or an error which was prima facie visible and which did not require any detailed examination.
5. In this application the applicants have averred that the court should have struck out the application and not dismissed it otherwise substantive justice would be served by allowing the extension of time, the substitution of the deceased party and the hearing the matter on its merits.
6. In *Lucy Bosire v Kehancha Div Land Dispute Tribunal and 2 others* (2013) eKLR, the court cited with approval *Branco Arabe Espanol v Bank of Uganda* (1999)2 EA 22, where it was held that the administration of justice should normally require the substance of all disputes be investigated on merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights unless a lack of adherence to rules rendered the appeal process difficult and or inoperative. The court said the main purpose of litigation was fostering the hearing and determination than through hindering it. Further the court in *Lucy Bosire case* (supra) held that mistakes of advocates should not be visited upon innocent clients when the same could be remedied by way of costs.
7. In *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* (2015) eKLR the court held that the appeal was incompetent and defective for failing the requirements of the law, hence it could not exercise its adjudicatory powers as conferred by the law. In *Ngoni Matengo Cooperative Marketing Union Ltd v Alimohamed Osman* (1959) EA, 577 the court held that when an appeal was not properly constituted the court had to strike it out rather than dismiss it. The court went on to say that on whether to strike out or dismiss, the substance of the matter must be looked at rather than the words used.
8. In *NBK Ltd v Njau* (1995-1998) 2 EA 249, the court said that review, was not applicable where the court was alleged to have proceeded on an incorrect exposition of the law or reached an erroneous conclusion of the law. In *Samuel Mathenge Ndiritu v Martha Wangare Wanjira & another* (2017) eKLR, an appeal had been filed without a proper record of appeal. The court took the view that the omission went to the substance of the matter because the court sitting on appeal lacked jurisdiction to entertain and determine an appeal without a proper record of appeal. The applicant had filed an application for review and for the setting aside of the dismissed appeal on *inter-alia* grounds, that the court should have struck out the appeal and instead of dismissing it.
9. The court guided by *Republic v PPA ex parte Syner Chenie Ltd* (2016) eKLR, *Richard Ncharpi Leiyagu v IEBC & 2 others* (2013) eKLR, *Ngoni Matengo* (supra) and *NBK v Njau* (supra) held that by invoking the inherent jurisdiction of the court could not come to the aid of the applicant since the same this could not cure the ills bedeviling the appeal. The court held that the remedy of the applicant lay elsewhere but not through an application for review.
10. Applying the foregoing case law, the court in the ruling dated December 15, 2021 addressed itself on the issues of extension of time, revival of the suit and the substitution of the deceased, party. All these issues were considered on merits, based on the material before the court at the time. The applicant was all along seized of the information pertaining to the suit but failed to disclose it to the court especially on the need to consolidate this suit with another pending case.



11. My finding is that the grounds and reasons for this application do not fall within the limited court's jurisdiction under order 45 of the *Civil Procedure Act*. The remedy for the applicant would be more appropriate in another forum as opposed to an application for review. See *Kivanga Estate Ltd v NBK Ltd* (2017) eKLR.

12. In sum I find the application lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS

THIS 14TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

No appearance

HON. C.K. NZILI

ELC JUDGE

