



Head Note

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REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
MISC. APPLICATION NO.39 OF 1997

**MBURU
MUTHOKA.....**
.....
APPLICANT

VERSUS

**CHAIRMAN KINANGOP
LAND CONTROL**

BOARD.....
.....)

**SECRETARY CENTRAL
LAND CONTROL**

BOARD.....
.....)

**ATTORNEY
GENERAL.....**
.....)

**NJUNGE
NJENGA.....**

RULING

The applicant has filed an application for review of the orders made on 23rd July, 2002. By this application, the applicant is asking that the said orders be set aside, so that the application dated 16th January, 1997 is reinstated.

A further prayer by the applicant is that the pleadings and all documents filed by K.W Philip and Associates Advocates be struck out, and all their submissions be expunged from the court record.

The application has been brought pursuant to the provisions of Sections 3A, 63(e) and 80 of the Civil Procedure Act, as read together with O.XLIV rules 1 and 2 of the Civil Procedure Rules.

The applicant advanced the submission that there was an error apparent on the face of the record, as he was not given a chance to canvass his application, when his application for an adjournment was disallowed by the court on 23rd July, 2002. In this regard, it is said that when the court had disallowed the application for an adjournment, it did not request the applicant to proceed with his application. Instead of doing so, the Judge wrote one Ruling, in which he not only refused the adjournment, but also dismissed the substantive application. The applicant says in his affidavit, sworn on 20th August, 2002, that when the court rejected his application for an adjournment, he was ready to proceed to personally argue his substantive application. He says that he raised his hand to attract the Judge's attention, but he was told by the clerk that he should wait. He was therefore surprised when the Judge delivered his Ruling, in which the substantive application was dismissed, before the applicant was given an opportunity to canvass it.

These averments are challenged by the respondent. The Respondent says that the applicant was asked by the Judge if he was ready to proceed and the answer was in the negative. Thereafter, in the Ruling, the Judge also noted that the applicant was not ready to proceed.

In these circumstances, I must now ask myself whether the said set of facts constitute an error apparent on the face of the record.

In the case of Nyamogo & Nyamogo Advocates V. Kago [2001] 1 EA 173, the Court of Appeal had the following to say regarding the meaning of the phrase "error apparent on the face of the record;"

"An error apparent on the face of the record cannot be defined precisely or 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 two 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 review although it may be for an appeal”.

In my view, if the Judge had failed to ask the applicant to proceed with the substantive application, after his plea for adjournment was refused, the dismissal of the application would have constituted an error on the face of the record. But in view of the two competing affidavits, which are stating diametrically opposed “truths”, I am unable to decide, where the truth lies. In order to ascertain whether or not the Judge did ask the applicant to proceed with the substantive application, it may become necessary to expose to cross - examination the deponents of the 2 affidavits, and possibly the court clerk, the advocates then in attendance, as well as the presiding Judge. Therefore, as I am not able to ascertain the facts from the material already before the court, the inescapable conclusion is that the alleged error is not apparent on the face of the record.

I say so notwithstanding the applicant’s criticism of the Judge, that he wrote only one Ruling. I hold the view that there was no need for the Judge to write two Rulings when he could and did deal with all the issues in the one Ruling.

The 2nd ground for the present application was that the pleadings and documents filed by the Interested Party, through the law firm of K.W. Philips & Associates Advocates were null and void, on account of the fact that the proprietor of that law firm did not hold a valid practicing certificate at the material time. Evidence has been placed before the court, showing that the said firm was run by Mr. Karanja Wachira Philip.

It is not disputed that Mr. Karanja Wachira Philip did not hold a valid practicing certificate at the material time. The applicant therefore invokes the provisions of Sections 31 and 34 of the Advocates Act (Cap 16) to declare that the said gentleman had no capacity to practice as an advocate.

Section 31 (1) stipulates as follows;

“Subject to Section 83, no unqualified person shall act as
an advocate, or as such cause any summons or other process
to issue, or institute, carry on or defend any suit or other proceedings
in the name of any other person in any court of civil or criminal jurisdiction”.

For the sake of completeness, I will also set out herein the provisions of Section 83. It provides as follows;

“Nothing in this Act or any rules made thereunder shall affect the
provisions of any other written law empowering any unqualified person
to conduct, defend or otherwise act in relation to any legal proceedings”.

As far as this case is concerned, Mr. Karanja Wachira Philip did not fall within the category of persons envisaged by Section 83. He was actually purporting to draw up documents for use by the Interested Party in the court proceedings. He was also purporting to make submissions for and on behalf of the Interested Party during proceedings before the court. All these, he was doing at a time when he did not hold a valid practicing certificate. He therefore failed to meet one of the requirements that would enable him qualify to act as an advocate. The requirements are set out in Section 9 of the Advocates Act, in the following words;

“Subject to this Act, no person shall be qualified to act as advocate unless –

- (a) he has been admitted as an advocate, and
- (b) his name is for the time being on the Roll, and
- (c) he has in force a practicing certificate”.

In the light of the foregoing, there is no doubt whatsoever that Mr. Karanja Wachira Philip was an unqualified person, at the material time. Any documents which he filed ought therefore to be struck out from the record. Similarly, all the submissions which he made ought to be struck out from the record.

The applicant invites me to, not only strike out the documents and the submissions, but to also find that the orders made on 27th July 2003 are so intertwined with the material that is being struck out that the most logical consequential order would be for the review of the said orders. Mr. Gicigi, Advocate for the applicant has submitted that this is a sufficient reason for me to order a review of the orders made on 27th July, 2003, and thus set it aside.

However, Mr. Muiruri, advocate for the respondent says that the unqualified person only acted for the Interested Party. He did not act for the respondent, and therefore the respondent’s documents and submissions ought not to be affected. As far as the respondent is concerned, he was represented lawfully, by a qualified advocate, whose presentations should not be expunged from record. The respondent has invited me to place a divide between the submissions of the respondent and those of the Interested Party. The respondent has also submitted that the applicant has not adduced evidence of any sufficient reason to warrant review. It has been said that such reason would have to be analogous to those set out in O.XLIV rule 1(1).

In response to these submissions, the applicant has said that the reasons advanced by an applicant seeking review would be good enough if it was sufficient in itself. He says that the reason need not be analogous to the reasons in O.XLIV rule 1(1). The said provision reads:

“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 judgment to the court which passed the decree or made the order without unreasonable delay”.

When examining the scope of phrase “any other sufficient reason”, as stipulated in O.XLIV rule 1(1), it is most important to bear in mind the fact that Section 80 of the Civil Procedure Act gives express authority to a party who considers himself aggrieved, to apply for review of judgment or order. That section does not impose any qualifications to the party’s right to apply for review. Clearly therefore the section confers an unfettered right to apply for review. I do therefore hold that this court has an unfettered discretion to consider “any other sufficient reason” as may be adequate to warrant the review of previous

orders.

Having so concluded, I now must consider whether the reasons given are sufficient to warrant review. In that regard, the applicant has drawn the court's attention to the fact that in the Ruling, the Judge awarded costs to the Respondent and the interested parties. He therefore contends that the interested parties did participate fully in the proceedings; and that their submissions and involvement are inseparable from the rest of the record. On the other hand, the respondent contends that this court can clearly put a divide between the interested parties and the respondent.

Upon perusal of the record of the proceedings on 23rd July 2002, I noted that Mr. Karanja appeared for the interested party, Mrs. Wambugu appeared for the applicant and Mr. Okello appeared for the respondent. The record shows that the applicant did notify the court that he had withdrawn instructions from his lawyers. He therefore sought an adjournment, to enable him get time to engage another lawyer. Mr. Okello responded by opposing the application for adjournment. Thereafter, Mr. Karanja also opposed the application for adjournment. His submissions were then followed by the applicant; in a brief reply. All these culminated in the Ruling which is the subject matter of the application before me. I have asked myself if it is possible for me to expunge from the record only the portions relating to the interested party. I note that the court did grant costs to both the respondent and the interested party. I do therefore believe that the court, by so doing, was indirectly stating that the order for costs was deserved. That would, of necessity, imply that the submissions of the parties who were awarded costs, had been deemed by the court to be meritorious. Or to put it in another way, the court's decision to refuse the application must have been influenced, in same way, by the interested parties submissions. To what degree the court may have been so influenced, is impossible for anybody else to say. I therefore hold that the proceedings are so intertwined that this court cannot surgically intervene to separate the submissions of the two parties. Consequently, as I have already held that the submissions of the interested parties are to be expunged from record, I must also review the entire Ruling, which was influenced, to some degree, by the said submissions. Accordingly, I grant the orders 1 and 1A of the Amended Notice of Motion dated 10th June, 2003.

I therefore review the orders of 22nd July 2002, and set aside the dismissal of the application dated 16th January 1997. The said application is thus reinstated.

However, whilst the application is successful, I note that the said success is largely attributable to the faults of the "advocate" previously acting for the interested parties. I do not therefore think that it would be just to be burden the respondent

or the interested party with the costs of this application. The order that commends itself to me, is that each party will bear its own costs.

It is so ordered.

DATED at Nairobi this 11th day of March, 2004.

FRED A. OCHIENG

Ag. JUDGE