



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MALINDI**

**ELC CASE NO. 23 OF 2017**

**BHAVASAR ANDANKUMAR T/A SARAX ENTERPRISES.....PETITIONER**

**VERSUS**

- 1. BEILOILCO HOLDINGS LIMITED**
- 2. REGISTRAR OF TITLES MOMBASA**
- 3. THE OCS KILIFI**
- 4. ATTORNEY GENERAL.....RESPONDENTS**

**AND**

**KOCEYO O. TITUS.....AGGRIEVED PERSON/APPLICANT**

**RULING**

1. By this Notice of Motion dated 27<sup>th</sup> September 2019 and filed herein on 1<sup>st</sup> October 2019, Koceyo O. Titus calling himself the Aggrieved Party/Applicant prays for orders: -

- 1. That the Taxation of the Bill of Costs dated 21<sup>st</sup> August 2019 in respect to the Aggrieved Person/Applicant be stayed pending the hearing and determination of this application;***
- 2. That the Amended Court Order herein issued on 28<sup>th</sup> September 2018 be reviewed and set aside in respect to the Aggrieved Person/Applicant;***
- 3. The costs to be provided for.***

2. The application which is supported by an Affidavit sworn by the Applicant is based on the grounds: -

- a) That Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Civil Procedure Act permits the Aggrieved Person to make this application even though he has never been made a party to this suit.***
- b) That the Applicant in this matter is an Advocate of the High Court, who upon instructions from the Petitioner, filed a Notice of Change of Advocates on 1<sup>st</sup> December 2017 to take over the conduct of the matter on behalf of the Petitioner.***
- c) That however, before the Applicant could prosecute the Petition, the Petitioner instructed another Law Firm M/s Kadima & Company Advocates to take over the conduct of the matter. The said Advocate filed their Notice of Appointment on 23<sup>rd</sup> January 2018.***
- d) That upon being served with the Notice of Appointment, the Applicant recused himself from the Petition and had no capacity to participate in the proceedings further.***
- e) That at no time was the Applicant made a party to the proceedings as envisaged under Order 1 Rule 10 of the Civil Procedure Rules on joinder of parties.***

**f) That the 1<sup>st</sup> Respondent had made an application in the matter dated 27<sup>th</sup> November 2017 wherein in the body of the application certain allegations were made against the Applicant in respect of a different matter he once handled in Mombasa HCCC No. 146 of 2015; Gention AG –vs- Beloico Holdings Ltd which is still on-going.**

**g) That apart from making allegations in the said application, the 1<sup>st</sup> Defendant never prayed for nor obtained an order to enjoin the Applicant in this Petition in accordance with the Rules of Procedure.**

**h) That not being enjoined as a party and having been debriefed by his Client, the Aggrieved person had no locus standi to continue participating in the proceedings.**

**i) That unknown to the Applicant, the 1<sup>st</sup> Respondent's application was allowed. The said application had a raft of prayers some of which prayed for orders against the Applicant herein despite not being a party to the suit.**

**j) That the effect of granting the 1<sup>st</sup> Respondent's application is that the Applicant was condemned to pay the costs of this Petition despite the fact that there was no finding of any misconduct on the part of the Applicant in the entire Ruling. There are no reasons adduced in the Ruling on why the Applicant should bear the costs of this Petition.**

**k) That further the Court did not find that by the Applicant filing his Notice of Appointment of Advocates, (he) made the parties to incur unnecessary costs of the Petition.**

**l) That however the 1<sup>st</sup> Respondent unilaterally applied to amend the order on 28<sup>th</sup> September 2018 to come up with an order now requiring the Applicant to bear the costs of the Petition. This application to amend the order was done behind the back of the Applicant and without his knowledge.**

**m) That the Applicant has therefore been condemned unheard against the rules of natural justice. The Applicant has never been a party in the proceedings and mere mentioning of his name in the body of the 1<sup>st</sup> Respondent's application did not make him a party since joinder of parties to a suit after the suit had commenced could only be made via an order of the Court.**

**n) That the Applicant's Constitutional rights to equal protection under the law has been violated whereas the law is clear on how a party can be enjoined in the suit to afford him an opportunity to defend himself, the Applicant has been condemned without following the procedures laid down by the law.**

**o) That the Applicant's Constitutional right to a fair hearing under Article 50 of the Constitution has been violated since he has been condemned unheard.**

**p) That there was an error apparent on the face of the record since the Court granted the 1<sup>st</sup> Respondent's omnibus application upon being misled by Counsel for the 1<sup>st</sup> Respondent without supporting facts on why the Applicant should bear the costs of the Petition without any finding of misconduct on its part nor being made a party to the proceedings.**

**q) That a mere fact that the Applicant once acted in the said Mombasa HCCC No. 146 of 2015 which is still on-going was not a ground to punish the Applicant nor deviate from the legal principle that costs follow the event; and**

**r) That the orders herein for review ought therefore to be granted and the order on costs to be borne by the Applicant set aside as it amounts to a travesty of justice and violation of the Applicant's Constitutional rights.**

3. Beloilco Holdings Ltd- the 1<sup>st</sup> Respondent herein is opposed to the application. In a Replying Affidavit sworn on its behalf by its Advocate on record F. Kinyua Kamundi and filed herein on 15<sup>th</sup> January 2020, he avers that Prayer (h) of the 1<sup>st</sup> Respondent's Notice of Motion dated 27<sup>th</sup> November 2017 specifically urged the Court to dismiss the Petition with costs to be paid jointly and severally by the Petitioner and the Applicant herein. Counsel further asserts that the Supporting Affidavit to that Motion contains the transcript of messages sent by the Applicant showing beyond doubt that he was involved in the fraudulent Petition based on forged documents and on the impersonation of Hon. Richard Moitalel Ole Kenta.

4. The 1<sup>st</sup> Respondent avers that the said Hon. Richard Moitalel Ole Kenta has on 29<sup>th</sup> January 2018 sworn an application filed herein in which he denies knowing or acting for the Petitioner or even drawing the documents relied on in the Petition and it was hence evident that it is the Applicants who were responsible for the drawing, the filing and the presentation of the Petition.

5. The 1<sup>st</sup> Respondent further avers that its application dated 27<sup>th</sup> November 2017 was on 25<sup>th</sup> June 2018 allowed by this Court, with costs. The prayers allowed included Prayer (h) that the costs be paid by Koceyo & Company Advocates, its partners and their client. The 1<sup>st</sup> Respondent avers that the amendments made to the extracted order was only to align it properly with the orders granted by the Court and it is therefore not true that no order for costs was made against the Applicant.

6. The 1<sup>st</sup> Respondent further contends that there are no grounds for review of the Court orders as the Applicant and his Law Firm were aware of the Motion dated 27<sup>th</sup> November 2017 and attended Court to oppose it. Further, the Applicant and his Law Firm had on 7<sup>th</sup> December 2017 in fact filed a Notice of Preliminary Objection challenging the application.

7. The 1<sup>st</sup> Respondent's Counsel further avers that he was engaged in email communication with the Applicant and that contrary to the

Applicant's assertions, he was made aware of his obligations to pay costs herein from as early as 14<sup>th</sup> September 2018 and his application herein is therefore late by one year.

8. I have perused and considered the Aggrieved Person's application as well as the response thereto by the 1<sup>st</sup> Respondent. I have also considered the submissions thereon by Mr. Kinyua Kamundi, Learned Counsel for the 1<sup>st</sup> Respondent. I was unable to find any submissions on the matter from the Applicant.

9. The application before me is brought inter alia under Order 45 Rule 1 of the Civil Procedure Rules and Sections 80 of the Civil Procedure Act. The said Section 80 of the Act provides as follows:

**"80. Review**

**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 orders thereon as it thinks fit."**

10. Order 45 Rule 1 on the other hand sets out the limits for the exercise of the review mandate as follows: -

**"1. (1) 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 the Judgment to the Court which passed the decree or made the order without unreasonable delay.**

11. Accordingly, Order 45 of the Rules is explicit that a Court can only review its orders if the following grounds exists: -

**a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or**

**b) There was a mistake or error apparent on the face of the record; or**

**c) There were other sufficient reasons; and**

**d) The application must have been made without undue delay.**

12. At Grounds nos. 18, 19 and 20 of his 22 grounds in support of the application before me, the Applicant captures the gist of this application for review as follows: -

**18. That there is an error apparent on the face of the record since the Court granted the 1<sup>st</sup> Respondent's omnibus application upon being misled by Counsel for the 1<sup>st</sup> Respondent without supporting facts on why the Aggrieved Party/Applicant should bear the costs of the Petition without any finding of misconduct on its part nor being made a party to the proceedings;**

**19. That a mere fact that the Aggrieved Party/Applicant once acted in Mombasa HCCC No. 146 of 2015; Gention A-G –vs- Beloilco Holdings Ltd which is still on-going is not a ground to punish the Aggrieved Party/Applicant nor deviate from the legal principle that costs follow the event; and**

**20. That the orders herein for review ought therefore to be granted and the order on costs to be borne by the Aggrieved Party/Applicant set aside as it amounts to a travesty of justice and violation of the Aggrieved Party/Applicant's Constitutional rights.**

13. As to what amounts to an error on the face of the record, the Court of Appeal observed as follows in **Muyodi –vs- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243: -**

**".....In Nyamogo & Nyamogo –vs- Kogo (2001) EA 174 this Court said that 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 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 for a wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”*

14. The genesis of this application for review lies in this Court’s Ruling of 28<sup>th</sup> June 2018. That Ruling arose from a Petition filed for the Petitioner herein by the Applicant on 23<sup>rd</sup> November 2017 seeking inter alia, a declaration that the Respondents had violated the Petitioner’s Constitutional rights to property under Article 40 of the Constitution. The Petitioner also sought a permanent injunction to restrain the Respondent from trespassing upon or laying any claim to the suit property described as LR No. 130532, Kilifi.

15. Filed contemporaneously with the Petition was a Notice of Motion dated 22<sup>nd</sup> November 2017 seeking various conservatory orders as well as an interim mandatory order directing the Respondents to restore back the petitioner to the suit property pending the hearing of the application.

16. The said application was based on the grounds that the Petitioner herein had become the registered owner of the suit property upon purchasing the same at a consideration of Kshs 200 million at a public auction conducted on 26<sup>th</sup> September 2016. The Petitioner told the Court that the sale was as a result of a Vesting Order issued in the said **Mombasa HCCC No. 146 of 2015**. Having acquired the Vesting Order from the Court on 6<sup>th</sup> October 2016, the Petitioner took possession of the suit property and was enjoying the rights and privileges associated therewith until 5<sup>th</sup> November 2017 when the 1<sup>st</sup> Respondent herein unlawfully evicted him from the property.

17. When that application was placed before this Court on 23<sup>rd</sup> November 2017 ex-parte, under Certificate of Urgency, the Court proceeded to issue some interim injunctive orders. When the application was served upon the Respondents however, the 1<sup>st</sup> Respondent instituted an application dated 27<sup>th</sup> November 2017 in which it sought to have the interim orders set aside and for the Petitioner to be evicted from the suit premises. At Prayer (h) of the application, the 1<sup>st</sup> Respondent sought an order as follows: -

***(h) (That) this Petition be dismissed with costs to be paid jointly and severally by the Petitioner and Mr. Koceyo O. Titus (the Applicant herein) and Timothy Ilako practicing as Koceyo & Company Advocates.***

18. The 1<sup>st</sup> Respondent’s application was based inter alia on the grounds that the orders of injunction were procured by fraud and were given without jurisdiction as the Petitioner’s claim was based on a Judgment which had been set aside.

19. The 1<sup>st</sup> Respondent proceeded further on 4<sup>th</sup> December 2017 to file a second application seeking inter alia to have the Petitioner and his Advocates named therein as Hon. Richard Moitalel Ole Kenta, Mr. Koceyo O. Titus (the Applicant herein), Mr. Timothy Ilako and Mr. Joe Nzyoki Mwanthi referred to the Directorate of Criminal Investigations as well as the Advocates Disciplinary Committee for investigations and punishment for misconduct and offences allegedly committed during, in the cause of and relating to this Petition.

20. In the course of hearing both sets of applications, it was confirmed by both parties that indeed the Vesting Orders which the Petitioner had relied on to obtain the orders of 23<sup>rd</sup> November 2017 had indeed been set aside and expunged in the said **Mombasa HCCC No. 146 of 2015**. It was also confirmed that the Petitioner herein had participated in the said matter as an Interested Party and was therefore aware of the non-existence of the Vesting Orders before this Petition was filed.

21. Several things then happened including an application by Messrs Moitalel Ole Kenta dated 13<sup>th</sup> February 2018 in which the Law Firm sought to dissociate itself from the Petition that was instituted in its name and an application by the Petitioner seeking to withdraw the Petition. Having considered all the issues herein, I did in my Ruling of 28<sup>th</sup> June 2018 find that the Petition had been fraudulently filed by the Applicant herein in the name of and/or in collusion with the said Kenta Moitalel & Company Advocates.

22. That then was the basis of the order of costs issued against the Applicant. From the record, it was clear to me that the Applicant and his Law Firm were aware of the 1<sup>st</sup> Respondent’s application dated 27<sup>th</sup> November 2017 as they in fact attended this Court to oppose the same. Indeed, on 7<sup>th</sup> December 2017 some two weeks after the Motion was filed, the Applicant and his Law Firm filed a Notice of Preliminary Objection dated 5<sup>th</sup> December 2017 challenging the Motion.

23. In the said Preliminary Objection, the Law Firm describes itself as the Advocates for the Petitioner. I am therefore unable to see how the Applicant can now come to Court and purport that they did not know what was in the application they were challenging. In a situation where an Advocate apparently filed a suit without instructions in the name of another Law Firm and relying on fraudulent documents, I did not think that this Court needed to enjoin the Applicant first as a party before slapping him with an order to pay the costs thereof.

24. At any rate, it was clear that the Applicant is aggrieved by my decision to grant what he describes as an “omnibus application with unsupported prayers”. If indeed the prayers in the 1<sup>st</sup> Respondent’s application were unsupported, that clearly is an issue of appeal and not a ground for review of the said orders. An application that the Court allowed an application without any evidence is certainly in my view not a ground for review.

25. In the premises, I am not persuaded that there is any merit in the Motion dated 27<sup>th</sup> September 2019. The same is misconceived and without basis. It is dismissed once again with costs to the 1<sup>st</sup> Respondent.

**Dated, signed and delivered at Malindi this 19<sup>th</sup> day of February, 2021.**

**J.O. OLOLA**

**JUDGE**