C Dorman Ltd v Kenya Railways Corporation (Environment & Land Case 1069 of 2015) [2024] KEELC 652 (KLR) (13 February 2024) (Ruling)

Neutral citation: [2024] KEELC 652 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1069 OF 2015

JA MOGENI, J

FEBRUARY 13, 2024

BETWEEN

C DORMAN LTD ..... PLAINTIFF

AND

KENYA RAILWAYS CORPORATION ..... DEFENDANT

RULING

1. Before this Court for determination is the Defendant/Applicant's Application dated 15/08/2023 filed under Section 3A, 4 & 80 of the *Civil Procedure Act*, Order 45 (1) of the *Civil Procedure Rules* 2010 and all enabling provisions of the Law. The Defendant/Applicant is seeking for the following Orders:

    a. This Honourable Court be pleased to review, vary and set aside the order issued by Justice Aburili on the 12/10/2015 transferring the file to the Environment and Land Court at Nairobi and in its place strike out and/or dismiss the Plaint dated 4/04/2013.

    b. Costs of this application and of the suit be awarded to the Defendant/Applicant.

2. The motion is premised on the grounds set out on its face together with the Supporting Affidavit of Brian Ochieng, the advocate representing the Defendant/Applicant herein sworn on 15/08/2023.

3. It is the Applicant deponed as follows; that the Plaintiff initiated this matter in the High Court as HCCC No. 109 of 2013 on 4/04/2013, seeking a permanent injunction restraining the Defendant from evicting them from property L.R. No. 209/4248. This matter falls under the exclusive jurisdiction of the Environment and Land Court, as per Articles 162 and 165 of *the Constitution* and Section 13 of the *Environment and Land Court Act* 2011. Consequently, the High Court lacked the jurisdiction to entertain or issue any orders in this case, as established by the Supreme Court in the case of *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* [2019] eKLR. Despite its jurisdictional limitations, the High Court without jurisdiction transferred the case to the Environment and Land Court on 12/10/2015 subsequent to which it was assigned case number ELC Case No. 1069

of 2015. Given the lack of jurisdiction, the High Court ought to have struck out the suit, as jurisdiction is fundamental and provides court with the authority and legitimacy to issue any orders in a matter. Lastly, as a result of the above, the orders transferring the case to the Environment and Land Court, without jurisdiction, are null and void *ab-initio*, rendering the suit before this Honourable Court a nullity. In the circumstances, it is only just, fair and in the interests of justice that the orders sought are granted and the suit struck out and/or dismissed with costs of the suit awarded to the Defendant.

4. The Application is opposed by way of Grounds of Opposition dated 22/01/2024. The Plaintiff/ Respondent opposes the present Application on the following grounds:

    1. The Application is incompetent, bad in law, fatally defective and an abuse of this Honourable Court's process.

    2. The Main Suit herein was initially filed at the High Court on 4/04/2013 as High Court Civil Suit No. 109 of 2013: C. Dormans Limited -v - Kenya Railways Corporation. At that time, the Environment & Land Court was yet to be fully operationalized.

    3. On 12/10/2015 the Honorable Lady Justice Roselyne Aburili, as she then was, ordered for the transfer of the matter to the Environment & Land Court whereinafter the case was registered as ELC Case No. 1069 of 2015: C. Dormans Limited -v - Kenya Railways Corporation.

    4. Hon. Aburili, LJ's order was predicated upon Section 30 of the Environment & Land Court Act [No. 19 of 2011] [hereinafter "the Act"] which provided for the manner in which matters relating to environment and land, which had been filed in other courts, would transition to the Environment & Land Court after it was fully operational.

    5. The Honourable Judge's order was further based on the Hon. Chief Justice Willy Mutunga's Practice Directions on Proceedings in the Environment & Land Courts, and on Proceedings Relating to the Environment and the Use of Occupation of, and Title to Land and Proceedings in other Courts, published vide Gazette Notice No. 5178 on 25/07/2014 (hereinafter "the Practice Directions"].

    6. The Practice Directions required, at Paragraph 5, that: "all cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge."

    7. The Hon. Aburili, LJ's order of 12/10/2015 was, therefore, in compliance with Section 30 of the Act as well as Paragraph 5 of the Practice Directions.

    8. Without prejudice to the foregoing, the Applicant herein has failed to demonstrate that it now has a new and important matter of evidence which was not in its knowledge when the Judge made the order to transfer the Suit - and is, therefore, not entitled to a review of the said orders).

    9. The Applicant has equally failed to demonstrate any mistake or error on the face of the record, or any other sufficient reason that would warrant a review of the Hon. Aburili, LJ.'s order.

    10. In any event, the Application has been brought after an inexcusable and inordinate delay - noting that the impugned order was issued on 12/10/2015, over eight (8] years prior to the fling of the Application.

    11. The Application is an afterthought aimed at delaying the hearing of this matter on its merit, and to its ultimate conclusion - noting that this Suit had, prior to being referred to mediation, already slated for hearing.

12. For the above reasons, the instant Application should be dismissed with costs to the Plaintiff/ Respondent.

5. On 23/01/2024, directions were given on filing of written submissions to the application. A ruling date was reserved. By the time of writing this Ruling, none of the parties had duly submitted.

6. I have considered the motion and the grounds of opposition by the Plaintiff. I have also considered the relevant law. I in turn have had time to analyze the emerging issues therein and this court is of the considered view that the germane issue falling for consideration are whether the Court can review the order issued by Hon. Lady Justice Aburili on the 12/10/2015.

Analysis and Determination

Whether the Court can review the order by Justice Aburili issued on 12/10/2015

7. The main desire of the Applicant is to review, vary and/or set aside the order issued on 12/10/2015 transferring this case from the High Court to the ELC Court. It is common ground that the High Court has a power of review, but such power must be exercised within the framework of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.

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

> " 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."

9. Further, Order 45 Rule 1 of the Civil Procedure Rules provides the conditions under which the Court can allow an application for review. They are as follows: -

> " 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."

10. The Honourable court is vested with the power and discretion to issue review orders on its judgments or rulings. In addition, the Court of Appeal held that "...the court has unfettered discretion to review its own decrees or orders for any sufficient reason." Sufficient reasons have been explained not to be analogous to the grounds in the Rule since that would fetter the discretion of the Court [see *Wangechi Kimita & Another v Mutahi Wakabiru* CA No. 80 of 1985 (unreported)]. However, while the Court has such wide discretion, that discretion must be exercised judiciously.

11. The conditions to be satisfied are derived from the said Order 45 Rule 1 (1). They are basically three limbs which are discernible from part (b) above and which must be looked at jointly with the fourth one, as summarized below;

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. d) Application must be made without unreasonable delay.

12. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* gives the Court the power to make orders for review, Order 45 sets out the conditions to be met in a review. The pertinent issue for determination herein therefore, is whether the applicant has brought itself within any of the above conditions and their relationship as explained.

13. In the present application, according to the Defendant/Applicant, the present suit falls under the jurisdiction of the ELC Court. The Plaintiff had filed this matter in the High Court vide Plaint dated 4/04/2013. That despite the High Court's lack of jurisdiction to entertain or issue any orders in this case, the High Court without jurisdiction transferred the case to the Environment and Land Court on 12/10/2015. The Applicant further averred that given the lack of jurisdiction, the High Court ought to have struck out the suit, as jurisdiction is fundamental and provides court with the authority and legitimacy to issue any orders in a matter.

14. The Plaintiff opposed the Application stating that it is true that the main suit was initially filed at the High Court as at the time, the ELC Court was yet to be fully operationalized. That on 12/10/2015, Hon. Lady Justice Aburili ordered for the transfer of the matter to the ELC Court which order was predicated upon Section 30 of the *Environment & Land Court Act* and further based on the Hon. Chief Justice Willy Mutunga's Practice Directions on Proceedings in the Environment & Land Courts, and on Proceedings Relating to the Environment and the Use of Occupation of, and Title to Land and Proceedings in other Courts, published vide Gazette Notice No. 5178 on 25/07/2014; paragraph 5 of the Practice Directions in particular. This Court concurs with the Plaintiff's sentiments.

15. The power to review is a creature of statute. It must be conferred by law either specifically or by necessary implication. Review is not an appeal in disguise. It cannot be denied that justice is a virtue which transcends all barriers and the rules of procedures or technicalities of the law cannot stand in the way of administration of justice. Law has to bend before justice. If the Court finds that the error pointed out in the review was under mistake and the earlier judgment or decision would not have been passed but for erroneous assumption which in fact did not exist and its perpetration had resulted in miscarriage of justice, nothing would preclude the Court from rectifying the error. The power to review can be exercised for the correction of a mistake and not to substitute a view. Once a review is dismissed no further review can be entertained.

16. The rectification of an order stems from the fundamental principle that justice is above all since the power of review is exercised to remove an error and not for disturbing finality. If reasoning in the decision is at variance with the clear and simple language in a statute or it suffers from manifest error of the law or if there is an error apparent on the face of the record which is liable to be rectified the powers of review can be exercised. The review Court cannot sit as an appellate Court. It is beyond the purview of the executing Court to scan or review the reasoning provided by the Court in decreeing the suit. The execution Court is a creature of a decree. It cannot be allowed to be above it. A wrong decision can be subject to appeal to a higher forum, but the review is not permissible on the ground that the Court proceeded on wrong proposition of the law. There is a clear distinction between an erroneous decision and an error apparent on the face of the record. While the first can be corrected by a higher forum, the later can only be corrected by exercise of the review jurisdiction.

17. When a review is sought on the ground of discovery of new evidence, the evidence must be relevant and of such a character that if it had been given in the suit it might possibly have altered the judgment. In the case of *Brown v Dean* (1910) AC 373, Lord Loreburn stated that the new evidence must at

least be such as is presumably to be believed, and if believed would be conclusive. Before a review is allowed on grounds of a discovery of new evidence, it must be established that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge. Where a review is sought on the ground of discovery of new evidence but was found that the applicant had not acted with due diligence, it is not open to the Court to admit evidence on ground of sufficient cause. It is not to be supposed that the discovery of new evidence is by itself sufficient to entitle a party to a review of judgement. The provision relating to review contemplates grounds which would alter or cancel the decree.

18. A review can be done based on an error apparent on the face of record. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review. An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent from its very nature. It must be left to be determined judicially on the facts of each case. Error contemplated by the Order 45 must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The line of demarcation between an error simpliciter and an error apparent on the face of the record may sometimes be thin. It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident, and does not require an elaborate argument to be established. See the case of *West Bengal v Kamal Sengupta* AIR 2009 SC 476.

19. In the case of *Muyodi v Industrial and Commercial Development Corporation and Another* EALR (2006) EA 243, the Court of Appeal while dealing with an issue of review and describing an error apparent on the face of record, held as follows:

> " In Nyamogo & Nyamogo -v- 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 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 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 or 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."

20. Thus, an error apparent on the face of record must be one that is obvious to the eye, and it must be one which when looked at does not yield two results. It shows itself to the read ordinary reader of the record and not the one looking for something hidden or obscure: yeah, "...an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions." (See *Chandrakhant Joshibhai Patel v R* [2004] TLR, 218).

21. The third ground for review is for any other sufficient reason. The expression means a reason sufficiently analogous to those specified in the rule though cannot be held limited to the first two reasons.

22. Turning back to the application at hand, it is clearly manifest that the Applicant has neither shown to the satisfaction of the Court that there is a new and important matter of evidence that has been discovered, an error apparent on the face of the record of the Court's directions, and/or there is ground

for review for any other sufficient reasons. Having analyzed the application in depth, it would appear to the Court that it is a disguised appeal. The law is clear that if the applicant is aggrieved by the decision of the Honourable Court it is open for him to proffer an appeal. Otherwise this Court is now functus officio. Lastly, this application was filed on 14/11/2023 which is 8 years and some months since Hon. Lady Justice Aburili gave her order on 12/10/2015. It cannot be said that the application was brought without inordinate delay.

23. To this end, the upshot is that the Defendant/Applicant has not demonstrated any errors apparent on the face of record to warrant the review and or setting aside of the orders given on 12/10/2015.

24. By reasons of the foregoing, it is my finding that the Applicant has failed to satisfy the conditions upon which an order for review can issue. In the circumstances, the Defendant's Application dated 15/08/2023 is hereby found to be without merit and is dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of :-

Mr. Mitto for the Appellant/Applicant

Mr. Kimotho holding brief for Senior Counsel Mumma for the Defendant

Ms. C. Sagina: Court Assistant

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MOGENI J

JUDGE