Desiderio Nyaga Nyamu t/a Nyamu Nyaga & Co. Advocates v Meru University of Science and Technology (Environment and Land Miscellaneous.(Reference) Application E009 of 2023) [2024] KEELC 5136 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5136 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND MISCELLANEOUS.
(REFERENCE) APPLICATION E009 OF 2023

CK YANO, J

JULY 11, 2024

BETWEEN

DESIDERIO NYAGA NYAMU T/A NYAMU NYAGA & CO. ADVOCATES ..... APPLICANT

AND

MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... RESPONDENT

RULING

1. By a notice of motion dated 22nd January, 2024, the respondent /applicant seeks for the following orders:

    1) That this application be certified urgent and service thereof be dispensed with in the first instance.

    2) That pending the hearing and determination of this application this Honourable court be pleased to issue an order to stay the taxation scheduled for 25th January, 2024 and thereafter.

    3) That this Honourable court be pleased to review the ruling dated 2nd November 2023, the attendant order therefrom dated 5th December 2023 and all other consequential order therefrom in the interest of justice.

    4) That costs of this application be provided for.

    5) That the Honourable court be pleased to issue any other orders in the interest of justice.

2. The application is based on the grounds set out on the face of the motion and is supported by the affidavit dated 22nd January, 2024 and a supplementary affidavit dated 19th February, 2024 both sworn by Prof. Romanus Odhiambo. The applicant states inter alia, that it has since obtained a valuation

report of the subject matter as at 2009 valuing the subject matter at Kshs. 88,000,000/= which is a new and important evidence that was not with the respondent/applicant at the time of taxation. That the valuation of the subject matter in 2013 at the time of instruction of the applicant/respondent cannot possibly have escalated to Kshs. 2,200,000,000. That if the sum of Kshs. 2,200,000,000 is applied as the value of the subject matter, the respondent/applicant will be unfairly taxed and suffer irreparable damage that cannot be compensated by way of damages. That a government valuer can be requested to give the correct valuation of the subject matter as at 2013 when the applicant/respondent was instructed.

3. In the affidavits in support of the application, Prof. Romanus Odhiambo who is the vice chancellor of Meru University of Science and Technology, the respondent/applicant herein, avers that the University is strenuously opposing the bill of costs by the applicant/respondent. That by a letter dated 24th July, 2013, the applicant/respondent was appointed by the respondent/applicant to render legal services and act for it and that the applicant/respondent would be paid legal fees as negotiated by the parties and as per the provisions of the advocates Remuneration Order, which negotiation was to be done before commencement of the brief. A copy of the said letter marked "RO1" has been annexed.

4. That the applicant/respondent via letter dated 22nd December, 2013 accepted the said offer and confirmed their willingness to offer diligent services to the respondent/applicant, and sent a letter accompanied by a fee note dated 6th December, 2013. The said letter and fee note Marked "RO 2" and "RO – 3" have been annexed. That on 27th March, 2013 the said fee note of Kshs. 746,000/= was settled which the applicant has conveniently omitted in the bill of costs. A copy of the payment voucher marked "RO – 4" has been annexed.

5. It is stated that the applicant/respondent then went on to prepare a memorandum of appearance, replying affidavit and other documents as agreed and proceeded with the matter until 28th May, 2020 when the petition was dismissed for lack of merit. That on 7th October, 2020, the applicant/respondent issued an amended fee note totaling to Kshs. 78,358,792/02 upon the respondent/applicant amending an earlier fee note of Kshs. 43,555,912/60 dated 18th September, 2020. That upon receipt of the amended fee note, the respondent and the applicant had a meeting on 3rd November, 2020 to deliberate on the said fee-note. That on 3rd November, 2020, the respondent/applicant wrote to the applicant/respondent requesting for a correctly scaled fee note based on the earlier meeting and citing the reasons in the letter for amendment of the fee note to the correct scale as advised by the office of the Attorney General. A copy of the said letter marked "RO – 5" has been annexed.

6. That the advocates/client's costs taxed on 3rd February, 2023 in Meru Environment And Land Court Misc. Application No. E017 OF 2022 were taxed at Kshs. 21,738,651 with instruction fee taxed at Kshs. 10,000,000. That the applicant/respondent filed a notice of objection to the said taxation and requested the court to set aside and upon setting aside the said taxation, order that the amended bill of costs dated 17th October, 2022 be remitted back to a different taxing officer with directions to reconsider the said terms by applying the sum of Kshs. 2,200,000,000 as the value of the subject matter. That though the applicant's/respondent's prayers were granted, the respondent/applicant has since obtained a valuation report of the subject matter as at 2009 valuing the subject matter at Kshs. 88,000,000 which is a new and important evidence that was not within the respondent/applicant at the time of taxation. A copy of the letter marked "RO – 6" has been annexed.

7. In the supplementary affidavit, the deponent states inter alia, that the respondent/applicant obtained the valuation report from archived documents from 2009 after the orders given on 2nd November, 2023 to the reference. That it is not correct for the claimant to allege that the valuation that was the subject matter of Meru ELC petition no. 22 of 2013 was done in 2016. That the respondent/applicant does

indeed have a 2024 valuation which the claimant is purporting to be a 2016 valuation. The deponent further avers that they did not dispute the valuation filed by the petitioner in Meru ELC no. 22 of 2013 because their instructions were to seek dismissal of the petition which was dismissed. The respondent/applicant vehemently denies that the land at the year 2016 was valued at Kshs. 2,200,000,000 as alleged by the claimant. A copy of a current valuation marked "RO – 1" has been annexed.

8. In opposing the application, the applicant/respondent filed a replying affidavit dated 2nd February, 2024 and a supplementary affidavit dated 29th February, 2024. It is the applicant/respondent's contention that the application is incompetent, frivolous, an afterthought, bad in law and an abuse of the court process. That the orders sought in the application herein are incapable of being granted by this court. That the grounds on the face of the motion and in the supporting affidavit do not support the prayers sought in the application.

9. The applicant/respondent further contends that the court orders granted on 2nd November, 2023 were properly made after the court considered the issues raised in the reference filed by the applicant/respondent which was never opposed by the respondent/applicant. That the allegation by the respondent/applicant that it has since obtained a valuation report of the subject matter as at 2009, valuing the subject matter at Kshs. 88,000,000/= cannot amount to a new and important evidence that was not within the respondent/applicant's knowledge as at the time of taxation of the applicant/respondent's amended bill of costs dated 17th October, 2022 by the taxing officer. That the alleged valuation of 2009 was not a subject matter in Meru ELC Petition No. 22 of 2013 and neither was it a subject matter before the taxing officer when she taxed the applicant/respondent's amended bill of costs. That the valuation which is the subject matter in Meru ELC Petition No. 22 of 2013 was done in 2016 and that when the petitioner filed the said valuation, the respondent/applicant did not dispute it and did not prepare a contrary valuation to contradict the petitioner's valuation on the value of the subject matter of the petition No. 22 of 2013. That the respondent/applicant cannot seek to introduce additional or new evidence in the reference which is already concluded without seeking leave since the reference to this court under Rule 11 of the Advocates (Remuneration) Order is an appeal from the decision of the taxing officer. That the request that a government valuer be requested to give the correct valuation of the subject matter as at 2013 has been made too late in the day and cannot amount to a ground for seeking stay of taxation of the amended Bill of costs or a ground for review, and has not been sought in the prayers in the application herein. That it is trite law that a court cannot grant what is not pleaded and prayed for. That the issue of interim fees of Ksh. 746,000/= was responded to by the respondent/applicant and addressed to by the taxing officer in her ruling delivered on 3rd February, 2023 which the respondent/applicant never objected to, and cannot be reopened herein as it is res-judicata. He annexed copies of a replying affidavit sworn by Sharon Kosgei on 22nd July, 2023 and the taxing officer's ruling.

10. It is the applicant/respondent's contention that the application does not meet the threshold required for seeking orders for review and that stay and the respondent/applicant was served with all necessary documents, including the reference and notices, but opted not to appear in court and raise any issues if it had any at all. That the application is therefore an afterthought, has no merit and is intended to delay the conclusion of this matter. That if the respondent/applicant was dissatisfied with the court's ruling delivered on 2nd November, 2023, it ought to have filed an appeal to the Court of Appeal to challenge the same. The applicant/respondent urged the court to dismiss the application with costs.

11. The application was canvassed by way of written submissions. The respondent/applicant filed their submissions dated 23rd February, 2024 through Sharon Koskei Advocate while the applicant/respondent filed theirs dated 1st March, 2024 through the firm of M/s Nyamu Nyaga & Co. Advocates. I have read and considered the said submissions and I need not reproduce the same in this ruling.

12. I have considered the application, the response and rival submissions. I have also taken into account the authorities relied on by the advocate for the parties. The issues that I find call for determination are-;

    i. Whether an order for review should be granted

    ii. whether a Government valuer should be called upon to ascertain the value of the property as at 2013.

    iii. Who bears the costs.

whether an order of review should be granted

13. The respondent/applicant herein seeks orders for review of the ruling of this court dated 2nd November, 2023. The said ruling was in respect of a reference dated 6th March, 2023 which sought to set aside the taxing officer's decision dated 3rd February 2023 with respect to item No. 4 on instruction fees. The court allowed the reference, set aside the said taxing officer's decision and remitted the amended bill of costs dated 17th October, 2022 for re-taxation before a different taxing officer with directions to reconsider the said items while applying the sum of Kshs. 2,200,000.000/= as the value of the subject matter. The respondent/applicant avers that it has since obtained a valuation report of the subject matter valuing the same at Kshs. 88,000,000/= as at 2009. It is the applicant's submissions that this is a new and important evidence that was not within its knowledge as at the time of taxation. That the said valuation report was obtained from the archives only after the orders on the reference were given on 2nd November, 2023.

14. Section 80 of the *Civil Procedure Act* provides as follows-;

> " Any person who considers himself aggrieved
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> (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. In addition, Order 45 Rule 1 of the Civil Procedure Rules provides as follows;

> " 1(1) any person considering himself aggrieved-
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> (a) by 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 an 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.
>
> (2) any party who is not appealing from a decree or order may apply for review of judgment notwithstanding the pendency of an appeal by some other party

except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for review."

16. It is clear from the above provisions of the law that a court can review its own judgment or order if there is 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 where there is a mistake or error apparent on the face of the record, or for any other sufficient reasons. It is also a requirement that the application has to be made without unreasonable delay. It has also been held that the expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

17. In Republic Vs Public Procurement Administrative Review Board & 2 others [2018] eKLR it was held-;

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or: (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

18. In Republic V Advocates Disciplinary Tribunal Ex parte Appolo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 it was held as follows-;

> " For material to qualify to be new and important evidence or matter it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court...
>
> The principles which can be called out from the above noted authorities are-;
>
> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
>
> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
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> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
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> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
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> v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger bench of the tribunal or of a superior court.
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> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development

cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in section 80 mean subject to such conditions and limitation as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

19. In the present case, the bone of contention is the issue of the valuation of the subject matter. In the application in support of the reference, the applicant/respondent herein exhibited copies of the pleadings, affidavits and annextures thereto, judgment, submissions and ruling both in Meru ELC Petition No.22 of 2013 and Meru Misc. Application No. E017 of 2022. Among the documents the petitioner annexed in Meru ELC Petition No. 22 of 2013 was a valuation report annexed to a supplementary affidavit in support of the amended petition showing the value of the subject matter as Kshs. 2,200,000,000/=. The applicant herein duly replied to the petitioner's averments and did not make any reference to an existing valuation report made in 2009 or at all. Moreover, the applicant herein did not respond to the reference at all despite being duly served. The reference was therefore unopposed. In my view therefore, the applicant cannot be heard alleging the discovery of new or important matter or evidence. I say so because if such valuation report indeed existed, it must have been within the applicant's knowledge, and ought to have been brought to the attention of the courts which dealt with Meru Petition No. 22 of 2013 or Meru Misc. Application No. E017 of 2022, or even this court at the time of the reference. In any case, what the applicant seeks is to be allowed to adduce additional evidence in the reference, which in essence is an appeal, and therefore leave ought to be sought and granted by the court. In this case, no leave has been sought by the applicant. For that reason, the application must fail.

20. In Otieno Ragot & Company Advocates vs National Bank of Kenya Limited (2020) eKLR Asike Makhandia JA observed-;

> "It is common ground that a reference is an appeal from the decision of the taxing officer. Therefore, for a party to adduce additional evidence on appeal, leave ought to be granted by the said court. In the present appeal the respondent did not seek leave to adduce additional evidence. It filed an application for review on which it purported to introduce new evidence. No additional evidence could be produced before the learned Judge unless they formed part

of the record before the taxing officer as correctly submitted by the appellant. Admission of documents in taxation proceedings is a preserve of the taxing officer under Rule 13A of the Advocates Remuneration Order and on reference, the judge only deals with what was on record before the taxing officer. In the case of Wanga & Co Advocates (supra), the court stated that allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law. The two courts below were not given an opportunity through the proper channels to strike a fair balance. By allowing the new evidence on account of inadvertent mistake, the learned judge opened a door to litigants to introduce all sorts of material which should have been properly placed and considered by the taxing officer and not before the first appellate court. Having discussed elsewhere in this judgment and concluded that the application for review was not merited, I find that the learned judge erred in allowing the said evidence."

21. In the case of Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) Vs Kariuki Marega & another [2018] eKLR, it was stated categorically that where an applicant in an application for review sought to rely on the ground that there was discovery of new and important evidence, one had to strictly prove the same. The Court of Appeal stated as follows-;

> " We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegations."

22. As already stated, the main issue between the parties herein was the value of the subject matter. In my view, the matter that the applicant now seeks to raise is not new and was within its knowledge from the onset. I am therefore not satisfied of the allegation by the respondent/applicant that they discovered new and important matter or evidence. The allegation clearly has no basis and is an afterthought as submitted by the applicant/respondent. It is my finding that the respondent/applicant has not met the requirements of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Act*. I find no sufficient cause that has been presented to justify a review of the order made herein on 2nd November, 2023.

23. Regarding the issue as to whether a government valuer should be called upon to ascertain the value of the suit property as at 2013, I am of the opinion that that is an issue that ought to have been raised at the courts that dealt with the primary suits, that is petition No. 22 of 2013 or Misc. Application No. E 017 of 2022 and not this court. Moreover, there is no specific prayer for the said order to issue. It is a well established principle that a court will not grant a remedy which has not been applied for. The court would be out of character where it to grant an order that has not been sought in the application. I therefore decline the applicant's invitation to have the court make an order for the Government Valuer to prepare a valuation report.

24. By reason of the above, it is my finding that the notice of motion dated 22nd January, 2024 is devoid of merit and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF JULY, 2024

IN THE PRESENCE OF

Court assistant- Tupet

Nyamu Nyaga for applicant

C.K YANO

JUDGE