Gichuru v Inspector General of Police & 5 others (Petition E004 of 2021) [2023] KEELC 689 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 689 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

PETITION E004 OF 2021

BM EBOSO, J

FEBRUARY 1, 2023

BETWEEN

MISHECK KARIUKI GICHURU ..... PETITIONER

AND

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT

DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 2ND RESPONDENT

SUB COUNTY CRIMINAL INVESTIGATION OFFICER, RUIRU SUB-COUNTY ..... 3RD RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 4TH RESPONDENT

DISTRICT LAND REGISTRAR, THIKA ..... 5TH RESPONDENT

ATTORNEY GENERAL ..... 6TH RESPONDENT

RULING

1. This court rendered a ruling in this petition on February 16, 2022. Through the ruling, the court struck out this petition on the ground that this court is not the proper forum where to ventilate the grievances raised in this petition. The court rendered itself thus:

> "For the above reasons, it is my finding that this court is not the proper forum where to ventilate the grievances raised in this petition. Further, it is my finding that this petition is an abuse of the process of the court. The result is that the petition is struck out. The donor will be at liberty to move the trial court appropriately for orders compelling the relevant parties to produce to the trial court documents the donor wants produced in the trial court. Because of the nature of the issues raised in the petition, there will be no order as to costs."

2. About 35 days subsequent to the delivery of the above ruling, the petitioner, through M/s C G Waithima & Co Advocates, brought a notice of motion dated March 21, 2022, inviting this court to review its ruling under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*. The said application is the subject of this ruling.

3. The application was premised on the grounds set out in the application and on the supporting affidavit sworn on March 21, 2022 by Meshack Kariuki. His case is that at the time of filing the petition, the hearing in Ruiru SPMC E & L Case No 103 of 2019 had not commenced but the cause was subsequently determined on December 2, 2021 during the pendency of this court's ruling on the preliminary objection contesting the jurisdiction of this court, dated July 9, 2021. He contends that because the suit in the trial court has been determined, the trial court has become functus officio. Secondly, he contends that this court applied wrong facts in its ruling of February 16, 2022 in that it did not appreciate crucial evidence before it.

4. The petitioners canvassed the application through written submissions dated June 20, 2022. Both the Attorney General and the Director of Public Prosecutions did not respond to the application. Similarly, they did not tender submissions on the application.

5. I have considered the application together with the written submissions tendered in support of the application. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the key question that falls for determination in the application. The single question falling for determination the application is whether the application meets athe criteria upon which a trial court exercises jurisdiction to review its judgment or ruling.

6. The ruling which triggered the present application was rendered in a petition brought under articles 35, 40, 48, 50, (2k), 50(3), 244(b), 244(a), 258, 259 and 260 of the *Constitution*. Both the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 are silent on how review jurisdiction relating to a ruling by a trial court is to be exercised. In the circumstances, our courts apply the principles set out in section 80 of the *Civil Procedure Act* and order 45(1) of the *Civil Procedure Rules*.

7. 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
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> (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."

8. Order 45 rule 1 of the *Civil Procedure Rules* provides as follows:

> (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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.

(2) A party who is not appealing from a decree or order may apply for a 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 the review.

9. Our superior court and courts in the Commonwealth have, in a myriad of decisions, given guidelines on how the above jurisdiction is exercised. The Court of Appeal in *Daniel Macharia Karagacha v Monicah Watithi Mwangi, Civil Appeal No 159 of 2000* rendered itself on the criteria upon which review jurisdiction is exercised in the following words:

> " Review is only available where there is an error of law apparent on the face of the record or there is a discovery of new and important matter of evidence which the applicant could not by exercise of due diligence have placed in his pleadings or before the Judge when he heard the earlier application."

10. The Supreme Court of India in the case of *Afit Kumar Rath v State of Orisa & others (a Supreme Court case)596 at page 608* rendered itself on how this jurisdiction is exercised in the following words:

> " The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law which is stated in the face without any elaborate argument being needed for stabling it. It may be painted out that the expression "any other sufficient reason" used in order 47 rule 1 means a reason sufficiently analogous to those specified in the rule."

11. In the present application, the applicant contends that the trial court heard the suit that was before it; rendered a determination in the suit on December 2, 2021; and became functus officio, hence this court should review its ruling of February 16, 2022. He further contends that this court applied wrong facts in its ruling of February 16, 2022, hence it should review the ruling.

12. I have considered the above contentions. First, the applicant did not exhibit a copy of the determination by the trial court. Secondly, the impugned ruling was rendered by this court on February 16, 2022. At the time of rendering the ruling, the applicant did not bring any motion to arrest the ruling on the ground that it had been overtaken by events. He similarly did not disclose to the court that the suit in the trial court had been heard and determined by the trial court. He kept quiet and sought to mislead the court into undertaking an exercise that was going to be in futility. His main plea in the petition in relation to the trial in the subordinate court was for an order compelling the 3rd respondent to produce the original investigation file or reconstructed file relating to Ruiru/Ruiru East Block 1/1407 to enable him fully ventilate his case in the trial court. All the other prayers were declaratory reliefs

that fell outside the jurisdiction of this court. As observed in the impugned ruling, the trial court had jurisdiction to issue appropriate orders for production of any records that the petitioner desired to be produced. For the other reliefs which the petitioner sought, this court found that the proper court to consider them was the High Court.

13. Can the trial and determination of the dispute by the subordinate court properly qualify to be described as new and important matter or evidence which the petitioner discovered after this court delivered the impugned ruling? In my view, the trial and determination of the dispute by the trial court was a matter that was within the knowledge of the petitioner at the time this court rendered the impugned ruling. Indeed, in the petitioner's own words, the trial court made a determination of the dispute on December 2, 2021. The impugned ruling was subsequently rendered on February 16, 2022. It cannot therefore be said that the trial and determination of the trial court is a new matter or evidence.

14. The second ground upon which the petitioner seeks a review of the impugned ruling is that this court applied wrong facts in the impugned ruling. If indeed this court made factual errors in the impugned ruling, that is a matter for appeal to the appellate court as provided under our legal system. By inviting this court to review its ruling on the above ground, the petitioner is, in essence, inviting this court to exercise appellate jurisdiction over its own ruling. This court cannot do that.

15. For the above reasons, my finding on the single question in the application dated March 21, 2022 is that the application has not satisfied the criteria upon which a trial court exercises jurisdiction to review its decision. Consequently, the application dated March 21, 2022 is rejected for lack of merit. Because the respondents did not respond to the application, there will be no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF FEBRUARY 2023

B M EBOSO

JUDGE

In the Presence of: -

Mr Kinyua for the petitioner

Court Assistant: Osodo