**Mboroki (Suing on his behalf and as the legal representative of the Estate of Salome Stephen Mboroki (Deceased) v Mboroki (Environment & Land Case 44 of 2019) [2023] KEELC 17364 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17364 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ENVIRONMENT & LAND CASE 44 OF 2019**

**CK NZILI, J**

**MAY 10, 2023**

**BETWEEN**

**JOHN GIKUNDA MBOROKI (SUING ON HIS BEHALF AND AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SALOME STEPHEN MBOROKI (DECEASED) .................................................................................... PLAINTIFF**

**AND**

**ISAAC KIRIMI MBOROKI .................................................................. DEFENDANT**

**RULING**

1. This court by an application dated February 13, 2023 is asked to stay the execution of the judgment delivered on January 25, 2023, review it and reconsider new evidence that was not available to the applicant by the time the matter was heard and determined. The application is based on the grounds on its face and a supporting affidavit sworn on February 13, 2023 by Isaac Kirimi Mboroki in which he has attached a judgment; letter dated February 1, 2023 instructions a consultant and the new evidence contained in a supplementary paginated bundle dated February 14, 2023 as annexures marked IKM "1" to "3" respectively. The application is supported by a further affidavit sworn by the same deponent on March 8, 2023.
2. Joseph Gikunda Mboroki, the respondent is opposed to the notice of motion through a replying affidavit sworn on February 23, 2023, on the basis that parties recorded a consent on September 27, 2021 which was signed and extracted following which a CID forensic report was prepared filed and produced as an exhibit before this court on March 18, 2022. The averred that the report was never contested by the applicant or a request made for a re-examination by a different forensic expert before the case was heard or during the defence testimony. Further, the respondent averred that from February 16, 2022, the applicant knew of the existence of the aforementioned report, he needed to confront it in court through another report but instead opted to merely cross-examine the expert without an alternative expert opinion.

3. The respondent averred that the application was an attempt to seek through the back door an expert opinion and have the court sit on appeal over its own decision, hence the application was spurious. The respondent urged the court to find that the conditions for the stay of execution have not been met since there is no pending appeal for the application to be based on. Lastly, the court was urged to find the application filed by a law firm lacking the capacity to institute it.

4. The applicant in his further affidavit admitted that the CID report by Daniel Gutu was availed to him and at the time he solely relied on his former lawyers on record but his current lawyers advised him to seek another expert opinion which has raised serious issues of corruption which need to be investigated otherwise he stands to be prejudiced given there was a miscarriage of justice. That it is not true he wishes to sneak in new evidence. On the contrary, the 2nd expert opinion casts doubt on the validity and truthfulness of the said report by an officer who has to be held accountable for the validity of the report.

5. As to the competence of his current advocates, the applicant maintained that a consent he annexed as 1KM I had been signed. Further, the applicant averred that he had reported the fraud at Meru Police Station as per an annexure marked LKM "2" and that the respondent had not disputed the new expert opinion report.

6. Following leave of court, parties' field written submissions dated March 8, 2023 and March 2, 2023, respectively.

7. The applicant submitted that under Article 159 2 (d) of the *Constitution*, justice ought to be administered regardless of procedural technicalities and in this case, as held in *Gituma Kaumbi Kioga v KRA & another* [2020] eKLR, the law servers the legitimate interests of a litigant as opposed to individual desires and should serve justice. However, it was submitted that the court has to steer the vessel through the stormy waves of varied facts and circumstances of each case towards reaching the ultimate desire under the *Constitution* on substantive justice to the parties.

8. As regards the right to review under Sections 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* the applicant submitted that the court has wide discretion to review based on the three grounds of review as held in *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR, *Santam Service (E.A) Ltd v Rentokil (K) Ltd and another* [2019] eKLR & *Aphine Fine Foods Ltd vs Horeca (K) Ltd & others* [2021] eKLR.

9. Further, the applicant submitted that the court has the discretion to set aside judgment to avoid injustice or hardship resulting from inadvertence or excusable mistake which discretion is unlimited as held both in *Philip Chemwolo & Another vs Augustine Kubende* [1986] KLR and *Patel v EA Cargo Handling Services Ltd* [1974] EA 75.

10. Concerning whether the advocate is properly on record, the applicant submitted that Order 9 Rule 9 of the *Civil Procedure Rules* sets out the framework to deal with disruptive changes at the time and therefore once THE consent is executed, filed, and a notice of change placed on record, the new law firm legally comes on record. Therefore, it was submitted that the formal adoption of the consent does not in any way prejudice the other parties since a party is at liberty to change advocates. Reliance was placed on *James Bosire Mchogu v John Kipkurui Chepkwony* [2022] eKLR & *David Bundi v Timothy Mwenda Muthee* [2022] eKLR.

11. The respondent submitted that no notice of appeal has been filed or material placed before the court for the applicant to be entitled to stay of execution under Order 42 Rule 6 *Civil of the Procedure Rules*, hence the prayers are superfluous and untenable as held in *Elijah Njuguna Njoki v Elijah Muiruri Njuguna & others* [2020] eKLR, *Jessikay enterprises Ltd v George Kahoto Muriuki* [2022] eKLR.

12. On whether to review the judgment, the respondent submitted that the applicant has completely failed to satisfy the requirements of the law on review, based on an alleged private expert opinion report to contradict the report filed by the DCI which when it was filed and produced, the applicant then failed to call for a second expert report if he felt slighted by it. Relying on Francis Njoroge supra and which cited with approval *Pancreas T Swai vs Kenya Breweries Ltd* [2014] eKLR, *Francis Origo & another v Jacob Kumali Mungialla* CA No 149 of 2001 and *Abasi Belinda v Fredrick Kangwamu & another* [1963] EA 557 on *inter alia* that a good ground of appeal may not be a good ground for review and that or an erroneous view of evidence or law may not be a good ground for appeal.

13. Regarding the fresh forensic examination, the respondent submitted that the same was an afterthought since the applicant knew of the contents of the report and made no application to vacate the consent or seek to have an alternative forensic report. Relying to *Bernard Kabeu Kiriu v Francis Waithaka Kiriu* [2021] eKLR, the respondent urged the court to find that the application herein is an afterthought. Further, the respondent urged the court to find that it should not be invited to sit on appeal of its own decision as held in *Erastus Maina Muraya v Kiplege Zochin Khure* [2016] eKLR.

14. The court has carefully gone through the application, the replying affidavit written submissions, and the law. The issues calling for my determination are:

    a. If the application is filed by a law firm properly on record.

    b. If the applicant is entitled to reopen the case and file additional evidence and rehear the suit.

    c. If the court should stay the execution of the decree.

15. The applicant in this suit was represented by the firm of Anampiu and Co advocates as of January 31, 2023, when the new law firm sought and paid for the certified judgment and proceedings through a letter dated January 31, 2023. No consent had been filed or a notice of change filed to participate in the taxation of the bill of costs. Similarly, no payment for the filing of the consent stamped on February 8, 2023 was available by the time the decree was issued on February 13, 2023. So, by the time the said new law firm filed the instant application, leave to come on record had not been sought or obtained from the court.

16. Order 9 Rule 9 of the *Civil Procedure Rules* is in mandatory terms that such a change shall not be effected without an order of the court, (a) upon an application with notice to all parties and or (b) upon a consent filed between the incoming and the outgoing advocates. In my considered view, reading the law otherwise would lead to absurdity. Either way, the order is looked at as a court order endorsing both scenarios is a condition precedent. If the legislature intended that there was no need for a court's role it would have specifically stated so. The role of the court is to safeguard the interests of the parties. It cannot, therefore, be true to interpret the law to say that the role of the court is cosmetic and or irrelevant. The duty is upon the party who has changed legal representation to bring it to the attention of the court to endorse the change and issue an order to this effect. In the instant case, there was no order made by the court endorsing the consent to pave the way for a notice of change of advocates to be filed by the incoming law firm. Even assuming that there was a change of advocates, how else would the former law firm and the respondents know that the applicant had changed lawyers without notice of the change of advocates? On that score alone, I find the application as filed by a law firm improperly on record.

17. Coming to the issue as to whether the court has jurisdiction to entertain this application, Order 45 of the *Civil Procedure Rules* as read together with Section 80 of the *Civil Procedure Act* provide that

a party who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal has been preferred and who from discovering new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be procured by him at the time when the decree was passed or order or an account of mistake or error apparent on the face or by any sufficient reason, may apply for a review of the judgment to the court which passed the judgment without an unreasonable delay.

18. In this file, there is a notice of appeal dated February 16, 2023 by the law firm of Charles Kariuki and Kiome Associates, that was lodged and endorsed by the Deputy Registrar on February 23, 2023 against the judgment delivered on January 25, 2023. To that extent, once the notice of appeal was filed, this court became *functus officio* as the avenue for review was lost by the operation of the law. Subsequently, the applicant cannot have it both ways; prefer an appeal and return to this court for review, re-opening, rehearing, reconsideration, and or re-admission of additional evidence. This was the position taken in *Otieno Ragot & Company Advocates v National Bank of Kenya Limited* [2020] that if a party chose to proceed by way of an appeal he automatically loses the right to ask for a review of the decision sought to be appealed. Similarly, in *Karani and 47 others v Kijana and 2 others* [1987] KLR 557, as cited with approval in Otieno Ragot (*supra*), the court held that once an appeal was taken, a review was ousted and the matter to be remedied by review has to merge in the appeal.

19. In this application, a notice of appeal is in existence. The applicant must have known of its existence. The two processes cannot run at the same time, otherwise, it will amount to gambling with the law and the judicial process as held in Otieno Ragot *(supra*).

20. On the adduction of new evidence, in *Kibos Sugar & Allied Industries Ltd and others vs Benson Ambuti Adega & 2 Others* CA No 153 of 2019, the court cited with approval the *National Guild of Remover and Storers Ltd v Bee Moved Ltd & others* ([018] EWCA Civ/302 where it was held that in determining whether to admit additional evidence, the court has to give effect to overriding objective of doing justice and strike a balance between the need for determinative settlement of disputes and the desirability that the judicial process should achieve the right results.

21. On the parameters to consider in such a situation, the court in *Hassan Hashi Shirwa vs Swalahudin Mohamed Ahmed* [2011] eKLR, said that re-opening a case was not an impossibility as long as there were cogent reasons but not because a party had spotted a loophole in its case which he wanted to seal. The court further observed that litigants were not in a game of chess, and if allowed litigation would not come to an end. Further, in *Samuel Kiti Lewa v HFCK* [2015] eKLR, the court said that it has the power to reopen a case so long as it would not embarrass or prejudice the opposite party especially if it is done late and with no explanation. Additionally, in *David Kili Sawe v George Kamau Kimani & another* [2020] eKLR, the prayers sought were similar to the instant prayers. The court cited with approval *Kamau James Gitutho & 3 others v Multiple Lcd (K) Ltd and another* [2019] eKLR, that the residual power to re-open a decision must be exercised with caution and only in exceptional cases. The court cited with approval *Daniel Lago Okomo vs Safari Park Ltd and another* [2018] eKLR, that a review of judgment does not arise simply because a losing party was unhappy and despondent.

22. Moreover, in *Fanikiwa Ltd vs Sirikwa Squatters Grip & 95 others* Civil Application 45 of 2017 [2021] KECA 307 (KLR) 17 December [2021] (Ruling), the court cited with approval *Mohamed Abdi Mohamud v Ahmed Abdulla Mohamad & 3 others* [2018] eKLR, on the parameters laid by the Supreme Court of Kenya on adduction of fresh evidence that; the additional evidence must be directly relevant to the matter; it be in the interest of justice; it should be able to influence or impact the result of the verdict; if it could not have been obtained with reasonable diligence for use at the trial; if it removes vagueness or doubt over the case or has a direct bearing on the main issue in the suit; it must be credible; must not be so voluminous; whether a party would reasonably have been aware or procured the further

evidence in the course of the trial; if it discloses a strong prima facie case of willful deception of the court; if it is not utilized for purposes of removing a lacunae and filing gaps in the evidence a party who has lost; must not seek additional evidence to make a fresh case or fill in omissions or patch up the weak points in his case and that the court will consider the proportionality and the prejudice of allowing additional evidence by assessing the balance between the significance of the additional evidence and the need for a swift conduct of litigation, together with the prejudice likely to arise.

23. Applying the foregoing threshold, the delay in acquiring the new evidence by the applicant has not been explained. Secondly, the relevance of the evidence is in question, since it is based on photocopies and not originals. Thirdly the report is dated February 2, 2023 long after the hearing and determination of the suit. Fourthly, the respondent's known signatures were not sought and obtained before the document was prepared. Fifthly, the applicant there is a pending appeal so it will not be in the interest of justice to entertain this application. Lastly, the expert evidence adduced at the trial was considered alongside other evidence. Therefore, the proposed evidence does not in any way remove any vagueness, or lacunae and does not go to the very core of the decision. Even if the court were to find merits in the request the intended evidence was procured late, lacks merits, and fails to amount to new and fresh evidence, which the applicant could not procure with reasonable diligence.

24. The upshot is the application is dismissed for being incompetent, as an abuse of the court process and filed in a court lacking jurisdiction.

25. Costs to the respondent.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**

**ON THIS 10TH DAY OF MAY 2023**

**In presence of**

**C.A John Paul**

**Miss Gikundi for Kiome for applicant**

**Mwirigi Kaburu for respondent**

**HON. C.K. NZILI**

**ELC JUDGE**

| ELC 44 OF 2019 - RULING | 0 |
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