



Watamu Hospital Limited v ATC Kenya Operations Limited; National Environment Management Authority (Interested Party) (Environment & Land Case 28 of 2022) [2023] KEELC 21603 (KLR) (14 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21603 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 28 OF 2022
MAO ODENY, J
NOVEMBER 14, 2023**

BETWEEN

WATAMU HOSPITAL LIMITED PLAINTIFF

AND

ATC KENYA OPERATIONS LIMITED DEFENDANT

AND

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY INTERESTED PARTY

RULING

1. This ruling is in respect of a Notice of Motion dated 8th February 2023 by the Defendant/ Applicant seeking the following orders;
 - a. Spent
 - b. That upon inter partes hearing the Honourable court be pleased to set aside, review, vary and/ or vacate the ruling and/or orders of the Honourable Justice M.A Odeny dated the 7th day of February 2023.
 - c. That upon hearing and determination of this application, the Honourable court be pleased to reconsider the Preliminary Objection dated the 24th day of May 2022 after perusing the Applicant's submissions on record dated the 16th October 2022 and filed 24th November 2022.
 - d. That this Honourable court be pleased to issue any other orders it deems fit in the interest of justice.
 - e. That cost of this application be provided for.



2. The application is based on the grounds set out on the face of the application and the supporting affidavit of Ndolo Felix Onyango the Defendant/Applicant's Advocate who deponed that upon perusal of the pleadings he noticed that the substratum of the Plaintiffs cause had been handled in a different matter and as such advised the Defendant that the best way to proceed would be by way of a Preliminary Objection.
3. Counsel deponed that he filed a Notice of Preliminary Objection dated 24th May 2022 challenging the jurisdiction of this Honourable court to hear and determine the suit filed by the Plaintiff and the same was canvassed by way of written submissions.
4. It was counsel's submission that in the ruling in respect of the Preliminary Objection, the court did not consider submissions made on behalf of the Defendant thus the ruling is not reflective of the Defendant's right to be heard on merit, which is an error apparent on the face of the record.
5. The Plaintiff filed a Replying Affidavit sworn by Margaret Mose Kombe advocate for the Plaintiff who deponed that the Defendant filed a Preliminary Objection, which was canvassed by way of written submissions. That the Defendant failed to attend court and failed to ensure that his submissions were filed and on record, thus the instant application is bad in law as there is no apparent error on the face of record.
6. This application was canvassed by way of written submissions, which were duly filed.

Defendant's Submissions

7. Counsel relied on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules and submitted that Section 80 gives the power to review while Order 45 sets out the rules.
8. Counsel also cited the cases of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR, Ajit Kumar Rath Vs State of Orisa & Others on the parameters within which a party can seek for orders of review.
9. Mr. Ndolo further submitted that the Applicant has established sufficient reason to enable the court review its ruling as the court did not have the benefit of considering its submissions hence there is an error apparent of the face of the record.

Plaintiff's Submissions

10. Counsel submitted that the Applicant's submission were never properly on record for the court's consideration because of the laxity of the Applicant to prosecute their Preliminary Objection.
11. Counsel therefore submitted that there was no error apparent on the face of the record but rather an omission that emanated the failure of the Applicant to ensure that the submissions were filed according to the timelines.
12. Counsel relied on the case of Bridget Elsie Davies v National Land Commission & 4 others [2020] eKLR where it was held that an application for review will only be allowed on very strong grounds particularly if its effect will amount to reopening the application or case afresh.

Analysis And Determination

13. The issue for determination is whether this Application meets the threshold for grant of review orders. The principles for grant of a review order are governed by Order 45 rule (1) of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. Order 45 rule (1) sets the rules.



14. Order 45, Rule 1 provides as follows:

“(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 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.”

15. Further Section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya gives the power for review as follows:

“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

16. For an Applicant to succeed in an application for review of orders granted by the court, such Applicant must have discovered a new and important matter which after the exercise of due diligence, was not within his/her knowledge at the time the decree was passed or the order was made; or that there was a mistake or error apparent on the face of the record; or that there are sufficient reasons and the application must be made without sue delay.

17. The Applicant has based its application on the ground that there was an error apparent of the face of the record as the court did not consider the applicant’s submissions and that this is sufficient reason for the court to grant an order for review.

18. In the case of *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

“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 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”.

19. The Applicant filed a Notice of a Preliminary Objection dated 24th May 2022 whereby the court gave directions on the hearing of the Preliminary Objection. Parties agreed to canvas the Preliminary Objection by way of written submissions.
20. On 20th July 2022 Mr. Ndolo counsel for the Applicant indicated to the court that he would file his submissions within 2 days. The court gave the parties 14 days within which to file submissions with a mention date on 25th October 2022.
21. On 25th October 2022 when the matter came up for mention, counsel for the Defendant was absent and counsel for the Plaintiff Ms Kombe informed the court that she had filed her submissions but had not been served with any submissions by the Defendant/Applicant. The court proceeded to give a ruling date without the submissions of the Defendant/ Applicant as the same had neither been filed nor served on the Plaintiff.
22. In the ruling, the court indicated that it is only the Plaintiff who complied with the direction of filing submissions. This shows that the court cannot be blamed for not considering submissions, which were not in the court file at the time of writing the ruling.
23. Be as it may, even if the submissions were in the court file the court would still have come to the same conclusion on the jurisdiction to hear and determine this matter. The reasons advanced by the Applicant do not meet the threshold for grant of an order of review.
24. If the Applicant was dissatisfied with the ruling, it should have filed an appeal. The upshot is that the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 14TH DAY OF NOVEMBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

