



REPUBLIC OF KENYA



KENYA LAW
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Mitai (As A Personal Attorney Of John S Ole Mitai) v Saitieu (Environment & Land Case E006 of 2021) [2022] KEELC 3432 (KLR) (7 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E006 OF 2021**

CG MBOGO, J

JUNE 7, 2022

BETWEEN

EMMANUEL KOTOINE MAITAI PLAINTIFF

AS A PERSONAL ATTORNEY OF JOHN S OLE MAITAI

AND

KOITAAT OLE SAITIEU DEFENDANT

RULING

1. What is before this court for determination is a notice of motion dated February 18, 2022 filed by the applicant and brought pursuant to order 45 rule 1 and 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act seeking the following orders: -
 1. That this matter be certified urgent and prayer 2 herein below be heard ex-parte.
 2. That pending the hearing and determination of this application interpartes, this honourable court be pleased to stay its orders of February 17, 2022.
 3. That this honourable court be pleased to review and set aside its orders of February 17, 2022.
 4. That costs of this application be borne by the defendant/respondent.
2. The application is premised on the grounds that there was an error apparent on the record which error directed this court to making the orders that are sought to be reviewed and whereas the court found no valid orders in existence, then it would not have proceeded into the merits/demerits of the case and the issue raised in the application can be dealt with without necessarily filing an appeal.
3. The application is supported by the affidavit of the applicant sworn on February 18, 2022. The applicant deposes that he was granted orders on July 6, 2021 which were served on the respondent on July 9, 2021 and this rule could not apply to service of this order since the same had been granted



interpartes when the respondent was served but could not attend hence it was not an ex-parte order. The applicant further deposes that the provisions of the law refer to service of an order given ex-parte and even if the court could go by the timelines of 3 days, the same was still served within the timelines provided by law. It is his belief that orders given interpartes cannot lapse until the purpose for which they are given is achieved.

4. The application is opposed by a replying affidavit sworn on April 19, 2022 by the respondent. The respondent deposes that the application does not meet the threshold as provided under section 80 of the [Civil Procedure Act](#) and order 45 of the [Civil Procedure Rules](#) for the reason that the applicant has not discovered any new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced at the time when the order was made, the applicant has not established any error or mistake on the face of the record and that he has not exhibited sufficient reasons to warrant grant of review.
5. The applicant filed written submissions dated April 4, 2022. The applicant has raised one issue for determination which is, “whether there are compelling reasons to review its orders and set aside the subject order and give further directions”. The applicant submits that this court did not effectively determine his application dated July 23, 2021 and instead it should either have decided that there were orders capable of being obeyed or disobeyed or not get into the merits and demerits of the application.
6. The applicant further submits that the said ruling is neither a ruling on the application for contempt or a ruling on the validity of the subject orders which is an error on this court’s part. The applicant further submits that the orders being the subject of this application is not bound by order 40 rule 4 (3) of the [Civil Procedure Rules](#) because the orders were not granted ex-parte but in the absence of the respondent who despite service of the application was not present in court.
7. The respondent filed written submissions dated April 25, 2022. The respondent submits that the application is totally misconceived, lacks merit and does not disclose any reasonable cause of action. The respondent relies on the provisions of section 80 of the [Civil Procedure Act](#) and Order 45 rule 1 of the [Civil Procedure Rules](#). The respondent also relies on the case of *Edison Kanyabwera versus Pastori Tumwebase* (2005) 2 EA 86 and *Muyodi versus Industrial and Commercial Development* (2006) 1 EA 243 and submit that based on the above cited authorities, a review will be considered when it is necessary to correct an apparent error or omission on the part of the court and the error must be self-evident and should not require an elaborate argument to be established.
8. The respondent further submits that there is no discovery of new or important matter of evidence that the applicant could not have placed before the court during the hearing of the case before the ruling was delivered on February 17, 2022 and that the provisions of order 40 rule 4(3) of the [Civil Procedure Rules](#) are clear and express and the term “error apparent” signifies an error which is evident per se from the record of the case.
9. I have carefully analysed the application, the replying affidavit and the written submissions filed by both parties and the issue for determination is whether this court can or ought to set aside its own orders issued vide the ruling dated [17th February, 2022](#).
10. Order 45 rule 1(1) of the [Civil Procedure Rules](#) provides that: -
 - “ 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.” (Emphasis added).

11. While order 45 rule 1(1) of the *Civil Procedure Rules* sets out the rules for review, section 80 of the *Civil Procedure Act* provides for the power of review. It is, therefore, clear from the above that the court’s jurisdiction in an application for review is circumscribed by the following: -
1. Discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced at the time the decree or order was made.
 2. On account of some mistake or error apparent on the face of the record.
 3. For any other sufficient reason.
 4. The application must be filed without un – reasonable delay.
12. The application at hand is subject of a ruling this court delivered in respect of contempt proceedings application dated July 23, 2021 wherein the court determined that the same could not stand for the reason that the orders obtained exparte on July 7, 2021 and served upon the respondent on July 12, 2021 had lapsed by virtue of the provisions of order 40 rule 4 (3) of the *Civil Procedure Rules*. For the instant application to survive, the applicant has to demonstrate error apparent on the record, discovery of new or important matter which he could not produce at the time when the order was made or any other sufficient reason.
13. In my view, what the applicant has done is to inform this court how it would have gone about in reaching its decision as opposed to making that finding in the ruling. I would want to point out that this court is a custodian of the principles of law and as such, it would not depart from the same. In any case, it sees the law way ahead of the applicant. Even if this court would go back, based on the material placed so far before it, it would still arrive at the same decision. There is no discovery of new or important material, or sufficient reason advanced by the applicant for this court to consider otherwise.
14. As such, I find no merit in the notice of motion application dated February 18, 2022, the same is dismissed with costs to the respondent. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT ON 7TH JUNE, 2022.

MBOGO C.G

JUDGE

7/6/2022

In the presence of: -

CA: Timothy Chuma

Plaintiff/applicant

Defendant/respondent



Ms Mogere for the defendant/respondent

