Paradise Safari Park Limited v General & another (Civil Case 1203 of 2015) [2022] KEELC 3451 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3451 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL CASE 1203 OF 2015

OA ANGOTE, J

JUNE 2, 2022

BETWEEN

PARADISE SAFARI PARK LIMITED ..... PLAINTIFF

AND

THE ATTORNEY GENERAL ..... 1ST DEFENDANT

SINOHYDRO CORPORATION LIMITED ..... 2ND DEFENDANT

RULING

Background

1. Before this court for determination is the Plaintiff/Applicant's Notice of Motion application dated September 24, 2021 seeking for the following orders:

    a) The Order of the court dated May 14, 2020be reviewed.

    b) In the alternative, it be recorded that the Plaintiff has satisfied the requirements of the Order of the Court dated the May 14, 2020.

    c) The Plaintiff be granted leave to amend the Plaint as shown in the Draft Amended Plaint annexed hereto.

    d) The Plaintiff be granted leave to file a further Bundle of Documents as annexed hereto.

    e) The costs of the Application be provided for.

2. The Application is based on the grounds on the face of the Motion and supported by the Affidavit of the Legal Affairs Manager of the Plaintiff who deponed that the 1st Defendant vide an application of November 21, 2018 required the Plaintiff to give discovery by way of production of various documents in the Plaintiff's possession relating to approval of canalization of a portion of River Kigwa.

3. According to the Plaintiff's Legal Affairs Manager, River Kigwa passes through the Plaintiff's property; that there is a car park over that portion of River Kagwa and that vide its Ruling of May 14, 2020, the court accepted that the required documents had been destroyed by a fire and required the Plaintiff to do discovery of the documents by obtaining them from NEMA, Water Resources Management Authority and Nairobi City Council.

4. It was deponed that neither NEMA nor the Water Management Resources Authority were in existence when the canalization of River Kigwa occurred or when the car park was constructed some time prior to June, 1988; that the applicable law relating to water at the material time was the *Water Act*, 1952 and that an application for any permit would have been made to the Water Apportionment Board which could, pursuant to Section 26, delegate its duties to any authority, board or committee appointed by the Minister.

5. According to the Plaintiff's Legal Affairs Manager, the Water Apportionment Board was repealed by the *Water Act*, 2002 and due to the passage of time, it is impossible to identify the body which would have given the permit and/or locate the relevant documents; that several inquiries at the Nairobi Metropolitan Services revealed that documents with respect to the suit property prior to 1990 were not available and that the only document available is the plan approved on the 13th July, 1988.

6. It is the Plaintiff's case that the present application has been filed without delay after it became clear that all attempts to comply with the orders of May 14, 2020had been exhausted; that the Plaintiff filed a Notice of Appeal against the Order of 14th May, 2020 but has been unable to file the substantive appeal as proceedings are yet to be received and that it is necessary to amend the Plaint to reflect the correct plot numbers for the hotel and to produce further documents in support of the quantum claimed.

7. In response to the application, the 1st Defendant filed Grounds of Opposition and averred that the application offends the mandatory provisions for review set out under Section 80(1)(a) of the *Civil Procedure Act* and order 45 rule 1 (a) of the *Civil Procedure Rules* and that having opted to Appeal and having filed a Notice of Appeal, the present review application is irregular.

8. The 1st Defendant averred that the application is an attempt to avoid compliance with the orders of May 14, 2020 which orders are essential as the documents sought will aid the court reach a fair determination on the matter; that the Plaintiff pursuant to the *Evidence Act* has the onus of adducing such evidence and that the Plaintiff has never been keen on prosecuting the matter.

9. The 1st Defendant finally averred that at the time of the construction of the car park, the relevant legislation regarding water was the *Water Act*, 1952; that Section 36 of the said *Water Act* provided that a permit was required for any proposed diversion, abstraction, construction, storage of use of water from a body water which permit was to be issued by the Water Apportionment Board and that as a result, the Plaintiff should avail the aforesaid permit.

Submissions

10. The Plaintiff through its counsel submitted that an Appeal is deemed as filed when the Memorandum of Appeal is filed as expressed by the court in *Noradhco Kenya Limited vs Loria Michele*[1988]eKLR; that it is only for purposes of stay pending Appeal that an Appeal is deemed to have been filed when the Notice of Appeal is filed and that the court having accepted that the documents were not in the Plaintiffs' possession, the orders for discovery and orders directing the Plaintiff to go and look for copies constitute an error on the face of the record.

11. It was submitted that the above notwithstanding, the Plaintiff has attempted to comply with court orders of May 14, 2020by carrying out an extensive search for the documents; that the only document

which has been found is the approved plan for the subsequent works which were approved on 6th June, 1988; and that the Plaintiff has equally asked the 1st Defendant for assistance in procuring the documents which has not been forthcoming.

12. The 1st Defendant submitted that the mandatory provisions for review are set out under Section 80 of the *Civil Procedure Act*, and order 45 rule (1) (a) of the *Civil Procedure Rules;* that as espoused by the Court of Appeal in *National Bank of Kenya Ltd vs Ndungu Njau* (Civil Appeal No 211 of 1996), where a review is sought on the basis of an error on the face of the record, the error or omission must be self-evident and should not require an elaborate argument to be established.

13. It was submitted that Section 80 of the Act makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party and that as the Plaintiff had opted to appeal the court's decisions by filing a Notice of Appeal, the application for review by the Plaintiff is irregular and an abuse of the court process.

14. It was submitted that the Plaintiff has only partly complied with the court orders of 14th May, 2020 by providing plans related to a different development on the suit property which was approved by the Nairobi City Council on 13th July 1988 and that pursuant to Sections 107 and 108 of the *Evidence Act* and as affirmed by the Court in *Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua* [2015] eKLR, whoever lays a claim before the court against another has the burden to prove it.

Analysis and Determination

15. Having considered the pleadings and oral the submissions by counsel, the issues that arise for determination are;

    i. Whether the review application is competent?

    ii. Whether the Plaintiff/Applicant has made a case warranting the grant of orders for review?

16. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and order 45, rule 1(1) of the *Civil Procedure Rules.* Section 80 of the Act provides as follows;

> " 80. 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."

17. Order 45 Rule 1 of the *Civil Procedure Rules,* 2010 provides as follows;

> " Rule 1 (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
>
> (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 review of judgment to the court which passed the decree or made the order without unreasonable delay."

18. It is clear from the foregoing that the avenue of review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot concurrently exercise the right of appeal and review. This position was affirmed by the Court of Appeal in *Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR which observed that:

> "It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal."

19. According to the Defendant, the review application herein goes against the express provisions of Section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules* for the reasons that the same has been proffered after the filing of an Appeal. The Applicant on the other had contends that what he has filed, being merely a Notice of Appeal does not constitute an Appeal for purposes of a review.

20. The question that lends itself from the foregoing is what constitutes an Appeal for purposes of review proceedings? In the case of *Kisya Investments Ltd vs Attorney General & another* [1996] eKLR the Court held that;

> "The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review...A review application is incompetent after appeal is preferred."

21. In *Yani Haryanto vs E. D. & F. Man. (Sugar) Limited* Civil Appeal No. 122 of 1992, the Court of Appeal held as follows:

> "...A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal".

22. More recently, the Court of Appeal in M*ultichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others* (supra), delving into an in-depth discussion of when an Appeal is deemed to be filed for purposes of entertaining an application for review stated thus;

> "To construe the provisions of Order 45 and to answer the question, whether a notice of appeal is an appeal, the court has to do so with reference to all the relevant provisions.
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> This brings me to the crux of the first limb of this appeal, at which point it is apposite to state that as far my reading of the authorities in this field goes, there has never been any major inconsistencies in interpretation of Order 45, both by the High Court and this Court. Save for the case of Kisya Investments Ltd, (supra), all the rest of the decisions cited to us by both sides are actually in agreement, as I will shortly illustrate by the review of sampled decisions, including those cited in the appeal; that the court has jurisdiction to entertain an application for review where only the notice of appeal has been lodged.
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> ...While it cannot be denied that Kisya Investments (supra) case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position."

23. Whereas there appear to be differing positions by the Court of Appeal as demonstrated hereinabove, this court will follow the above decision because it is the most recent decision and the same was decided upon by a bench of five Judges.

24. I will now consider the merits of the application. The Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR considered the what an application for review entails:

> "In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review".

25. A reading of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* makes it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by limiting review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

26. Briefly, the background to this matter is that the Plaintiff instituted this suit against the Defendants seeking, inter-alia, for damages for loss occasioned to its property by the flooding of River Kigwa. It is the Plaintiff's case that the flooding was as a direct result of the works undertaken by the 2nd Defendant at the behest of the 1st Defendant in improving Thika Road which works included altering the course of River Kigwa aforesaid.

27. Vide a Motion on 21st November, 2019, the 2nd Defendant sought for discovery of documents from the Plaintiff relating to the canalization of River Kigwa. The Plaintiff asserted that the aforesaid documents were unavailable as they had been razed down in a fire which had gutted its premises on 18th March, 2017. In its Ruling of 14th May, 2020, the Court while asserting that it had no doubts that the

documents had indeed been razed down by the fire, directed the Plaintiff to procure the documents somewhere else. The court held as follows:

> "I have no doubt that this may be the case because the Respondent has produced a Police Abstract and a document from the Nairobi City County. However, this does not prevent the Respondent from availing certified copies of the same from the authorities which granted it licences to divert the course of River Kigwa and construct an underground tunnel. If NEMA gave a license, there should be no problem in getting a copy from them. This is the case with Water Resources Management Authority and Nairobi City County. I therefore find that the issue of discovery is necessary."

28. The Ruling aforesaid by the court is the subject of the review application herein. The application is predicated on the grounds that there is an error apparent on the face of the record. In discussing this concept, the Court of Appeal in *Kenya Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs)* [2019] eKLR referred to its various decisions as follows;

> "This Court in Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243 described an error on the face of the record as follows:
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> "*In Nyamogo and Nyamogo v 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 the 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 a 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 apparent on the face of the record even though another view was also possible. Mere 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."

29. This position was also stated by the Ugandan Court of Appeal in the case of *Apollo Waswa Basude & 2 others (As administrators to the Estate of the late Sepiriya Rosiko) vs Nsabwa Ham*, Civil Appeal No 288 of 2016, where the court at para 310 stated thus;

> "...an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no court of law exercising its judicial power would allow it to remain on the court record. This error may be either of fact or of law..."

30. From the foregoing, it is apparent that an error which has to be established by a long-drawn process of reasoning on points of law or facts where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

31. So what is the error herein? According to the Plaintiff, the application leading to the impugned Ruling sought for documents which were in the Plaintiff's possession; that the court having accepted the Plaintiff's account that the documents were destroyed by the fire, the orders of discovery constitutes a clear error on the face of the record and that the above notwithstanding, the Plaintiff has made attempts

to comply with the orders of the court and that in the alternative, it should be recorded that it has complied with the said orders.

32. The Plaintiff's argument as this court understands it is that the court, having accepted that the documents sought were destroyed by the fire and therefore did not exist, had no basis to make the order for discovery. It is apparent that in the circumstances, the court may as well have been entitled to find that discovery was impossible and decline to issue the orders sought.

33. Clearly, what is being called into question is the merit of the court's determination, a question that falls squarely within the purview of an Appeal. As aptly stated by the Court of Appeal in Nyamongo vs Nyamongo(supra):

> " ... Mere error or wrong view is certainly no ground for a review although it may be for an appeal.."

34. The Plaintiffs Application for review therefore fails.

35. As an alternative prayer, the Plaintiff seeks to be deemed to have complied with the orders of the court made on May 14, 2020with respect to the discovery of the documents. The purpose of discovery was discussed by the court in *Oracle Productions Ltd vs Decapture Limited & 3 others* [2014] eKLR in which it was held that:-

> " The true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at the trial. This is aptly captured in Halsbury's Laws of England Vol 13 paragraph 1:
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> "The function of the discovery of documents is to provide the parties with the relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases, and thus to provide the basis for the fair disposal of the proceedings before or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary material to support or rebut the case made by or against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation".

36. The Plaintiff asserts that despite all efforts, it has been unable to find copies of the documents sought. The 1st Defendant asserts that this is a ploy to avoid obeying the court orders. The documents sought vide the application for discovery included inter alia, design documents and approvals for the candling and construction of a car park over River Kigwa including EIA Reports, NEMA & WARMA licenses and all other documents referred to by the Plaintiff in its witness statements.

37. The Plaintiff states, which contention is undisputed, that the documents sought relate to the canalization of River Kigwa prior to June, 1988 during which period neither NEMA nor WARMA was in existence. Considering the age of the documents sought and based on the evidence presented, the court is prepared to make a finding that the Plaintiff has indeed been unable to procure the documents sought in discovery.

38. As stated by the Court in the Oracle case(supra), the purpose of discovery is among others to expedite a hearing. Where it has been demonstrated that the documents sought to be discovered are unavailable as herein, attempts to force a party to "find" the documents constitute a waste of judicial time.

39. The above notwithstanding, while the court appreciates the reasons why the Plaintiff is unable to procure the documents, this cannot translate into an order that they have complied but merely excuse

them from compliance. Of course, how the Plaintiff will prove its case in the absence of the said documents is an issue that the trial court will deal with at the appropriate time.

40. With respect to amendment of pleadings, order 8 rule 3(1), (2) and (5) of the *Civil Procedure Rules,*2010 provide as follows;

> " (3) (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3,4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
>
> (3) (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
>
> "3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

41. Whereas Order 8 Rule 5(1) provides;

> " For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

42. The principles upon which a court acts in an application to amend pleadings is as stated in *Bullen and Leake & Jacob's Precedents of Pleadings* – 12th Edition and captured in the Court of Appeal decision in *Joseph Ochieng & 2 others vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 thus:

> " The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."

43. Having regard to the draft annexed Plaint, the court notes that the amendments sought are with respect to the Advocates address and the plot numbers for the suit properties while the further documents to be introduced are a valuation report and fee note from the assessors and the discharge voucher.

44. In the court's opinion, the amendment sought will not be prejudicial to any party. Indeed, no such allegation has been made by the Defendants. Noting that the matter has yet to proceed to trial, the Defendants will have an opportunity to test the veracity of the documents at trial.

45. In conclusion, the Plaintiff's Application dated September 24, 2021partly succeeds as follows:

    i. The prayer for review of the orders of this court of 14th May, 2020 is declined.

    ii. The Plaintiff be and is allowed to adduce in evidence the documents in its possession notwithstanding the order of 14th May, 2020.

    iii. Leave be and is hereby granted to the Plaintiff to file the Amended Plaint and a further bundle of documents within 21 days.

    iv. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF JUNE, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Freizer for the Plaintiff

Mr. Njagi for Eredi for the Defendants

Court Assistant- Nechesah