Waswala v Ejilo & another (Environment and Land Appeal 4 of 2021) [2022] KEELC 2740 (KLR) (12 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2740 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT AND LAND APPEAL 4 OF 2021

BN OLAO, J

JULY 12, 2022

BETWEEN

FRED WASWALA ..... APPELLANT

AND

EVERLYNE NASIMIYU EJILO ..... 1ST RESPONDENT

FRED WANYONYI MUCHANGA ..... 2ND RESPONDENT

RULING

(1) On March 23, 2022, this Court delivered a ruling striking out the Notice of Motion dated November 9, 2021. By that application, Fred Waswala(the Applicant) had sought the main order that there be a stay of further proceedings and execution of the decree in Bungoma Chief Magistrate's Court Civil CaseNo 200 of 2015 pending the hearing and determination of Bungoma High Court Civil AppealNo 2 of 2021 (now Bungoma ELC Appeal No 4 of 2021). In striking out that application, this Court found that it was sub – judice and an abuse of the process of the Court since a similar application was pending determination in the Subordinate Court.

[2] I now have for my determination the Applicant's Notice of Motion dated March 28, 2022 and premised under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 (b) of the Civil Procedure Rules. The Applicant seeks the following orders: -

1. Spent
2. Spent
3. That the Honourable Court be pleased to review and/or set aside it's ruling and orders issued on March 23, 2022and in it's place, the Honourable Court do order stay of proceedings and execution of the Decree inBungoma Chief Magistrate's Court Civil Suit No 200 of 2015 pending the hearing and determination of Bungoma ELC Appeal No 4 of 2021.

4. That costs of this application be provided for.

[3] The application is predicated on the grounds set out therein and supported by the Applicant's affidavit also dated 28th March 2022.

[4] The gravamen of the application is that when this Court delivered its ruling on March 23, 2022 dismissing his application dated November 9, 2021, it did not consider his supplementary affidavit which had been duly filed and which showed that he had infact withdrawn a similar application filed in the Subordinate Court. That the mistake of not placing the said supplementary affidavit in the Court file was not his. Therefore, there is an apparent mistake on the face of the Court record which should allow the Court to rectify the ruling by an order of review.

[5] Annexed to the supporting affidavit is the Applicant's supplementary affidavit dated 6th December 2021.

[6] The application is opposed and Everlyne Nasimiyu Ejilo(the 1st Respondent) filed a replying affidavit dated 30th April 2022 in which she deponed, inter alia, that the application is frivolous, vexatious and an abuse of the Court process and should be dismissed for failure to meet the threshold of Order 25 Rule 2(2) and Order 45 of the *Civil Procedure Rules* as well as Section 80 of the *Civil Procedure Act*.

[7] That the application dated November 9, 2021 and which was struck out vide my ruling dated 23rd March 2022 was infact filed when a similar application was pending in the Subordinate Court. That the Applicant has not annexed to his application any order showing that the application filed in the Subordinate Court had been withdrawn. That the Notice of Withdrawal dated November 18, 2021 was never served upon the Respondents' Counsel and neither is there a receipt to confirm the authenticity of the same. This application should therefore be dismissed with costs.

[8] The application has been canvassed by way of written submissions. These were filed by both Mr Wamalwa instructed by the firm of Wamalwa Simiyu & Co Advocatesfor the Applicant and by Mr Bwonchiri instructed by the firm of Omundi Bw'onchiri Advocates for the Respondents.

[9] I have considered the application, the rival affidavits and submissions by Counsel.

[10] Section 80 of the *Civil Procedure Act* provides that: -

> " 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."

[11] Order 45 Rule 1(1) of the Civil Procedure Rules provides: -

> " 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 review of Judgment to the Court which passed the decree or made the order without unreasonable delay." Emphasis mine.

It is clear from the above that while Section 80 of the *Civil Procedure Act* donates the power for review, Order 45 of the Civil Procedure Rules sets out the rules. It is also manifest that the Court's jurisdiction for review is limited on the following grounds: -

1. Discovery of new and important matter or evidence which, even with due diligence, was not within the knowledge of the Applicant nor could it be produced when the decree was passed or the order made.
2. On account of some mistake or error apparent on the face of the record.
3. For any other sufficient reason.
4. Finally, the application must be made without unreasonable delay.

[12] The gist of the Applicant's application is that there is "same mistake or error apparent on the face of the record" to warrant a review of my ruling delivered on March 23, 2022. That is the ground of review which she relies on as is clear from the following paragraph of his supporting affidavit: -

> 4: "That I am informed by my advocate on record which information I believe to be true that the lower Court application had been withdrawn as such there is no application pending in the lower Court."
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> 5: "That I am also informed by my advocate which information I believe to be true that a supplementary affidavit was duly filed which had the annextures showing withdrawal of the lower Court application (see copy of supplementary affidavit annexed and marked FW – 1)."
>
> 6: "That the Honourable Court did not consider the above mentioned supplementary affidavit which was filed by the Applicant on December 8, 2021which affidavit though filed and duly received was not placed in the Court record which affidavit could have made the Honourable Court to rule otherwise."
>
> 7: "That the mistake of not placing the supplementary affidavit in the Honourable Court file was not mine as such the Court should proceed and review it's ruling and factor in the issue that there is no application of similar nature pending at the lower Court to make the dismissed application sub – judice."
>
> 8: "That I am informed by my advocate which information I believe to be true that there is apparent mistake on the face of the Court record which mistake this Court can rectify by reviewing it's own ruling"

[13] Having pleaded as a ground for review the fact there is "some mistake or error apparent on the face of the record ," the Applicant had the duty to prove the same. And in doing so, the Applicant was

required to satisfy what the Court of Appeal stated in the case of *National Bank of Kenya Ltd .v. Ndungu Njau*1997 eKLR, that is: -

> "A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court.The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter." Emphasis mine.

Counsel for the Applicant has correctly cited the above authority and gone on to submit as follows: -

> "You Lordship, it is evident from the supporting affidavit and the annextures annexed thereto that at the time of the ruling herein, there was no application similar to the one subject of the ruling herein pending in the lowerCourt and there was a duly filed supplementary affidavit though missing in the Court file which fact do not need an elaborate argument to be established." Emphasis mine.

To file a document simply means to place it in a particular file or any other designated place for purposes of record. In Black's Law Dictionary 10th Edition, the noun "file" is defined as: -

> "A Court's complete and official record of a case ..... A lawyer's complete record of a case ....."

The verb "file" on the other hand is defined in the same Dictionaryas: -

> "To deliver a legal document to the Court Clerk or record custodian for placement into the official record."

In the Oxford Advanced Learners Dictionary 9th Edition, the verb "file" is defined as follows: -

> "to put and keep documents, etc. in a particular place and in a particular order so that you can find them easily; to put a document into a file."

The Applicant clearly shot himself in the foot when he depones in paragraph six (6) of his affidavit that the "supplementary affidavit which was filed by the applicant on the 8.12.2021 which affidavit though filed and duly received was not placed in the Court record ....." Clearly, if the said affidavit "was not placed in the Court record ," then it was not filed. Conversely, if the said affidavit was filed, then it ought to have been in the Court record for my perusal when I was determining the Notice of Motion dated 9th November 2021. The truth of the matter, as properly conceded by the Applicant, is that the said affidavit was not filed and was not therefore part of the record. That affidavit has only now been annexed to the application under consideration. If indeed the said supplementary affidavit and any other documents were infact received in the registry but, for one reason or another, were not placed in the Court file, a simple letter to the Deputy Registrar would have addressed that lapse. Court registries are manned by human beings. To err is human. However, there is nothing suggesting that the document was received but not filed. It is clear that no affidavit was forwarded to the Court. In the circumstances, it cannot now be argued that there was "some mistake or error apparent on the face of the record " to warrant a review of this Court's ruling delivered on 23rd March 2022. Since the supplementary affidavit was not filed, that cannot be some mistake or error apparent on the face of the record because this Court could not have known of it's existence. That was the mistake or error on the part of Counsel for the Applicant. In *Otieno Ragot & Company Advocates .v. National Bank*

of Kenya Ltd 2020 eKLR, the Court of Appeal while considering such a mistake by Counsel had the following to state: -

> "Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay it's hands on even after the exercise of due diligence."

There is no doubt that both the Applicant and his Counsel could, with due diligence, lay their hands on the said supplementary affidavit.

[14] In any event, even if the said supplementary affidavit, which has now been annexed to the current application, had been annexed to the application dated November 9, 2021, it would not have come to the aid of the Applicant. This is because, such affidavit in itself cannot be proof that the application filed in the Subordinate Court had infact been withdrawn by the time the dismissed application was being filed. As Counsel for the Respondents has rightly pointed out in his submissions, there is no evidence that the pending application in the Subordinate Court was withdrawn. If indeed the pending application in the Subordinate Court had been withdrawn, then the Applicant was required to annexe the relevant order endorsed by that Court as proof that infact that application was no longer pending and had infact been withdrawn. It is not clear why such an order was not annexed to either this application or even the previous application. Further, unless the withdrawal was by consent of the parties, the order ought to have been served upon the Respondents. That, in my view, is the intent of Order 25(1) of the Civil Procedure Rules. Parties and their Counsel must appreciate that it is the Court order marking a suit or application as withdrawn which clothes such withdrawal with any legal effect. The 1st Respondent was therefore plainly correct when she deponed in paragraph six (6) of her replying affidavit that not only was there no endorsement to confirm that the application pending before the Subordinate Court had been withdrawn and further, no such Notice of Withdrawal had been served upon the Respondent's Counsel.

[15] It is instructive to note, further, that no supplementary affidavit was filed to rebut the averments contained in the 1st Respondent's replying affidavit. Those averments therefore remain un – rebutted.

[16] Having considered all the evidence herein, I find that the Notice of Motion dated 28th March 2022 is devoid of merit. It is accordingly dismissed with costs to the Respondents.

BOAZ N. OLAO.

J U D G E

12TH JULY 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMABY WAY OF ELECTRONIC MAIL ON THIS 12TH DAY OF JULY 2022.

BOAZ N. OLAO.

J U D G E

12TH JULY 2022.