**Samruddha Resources Kenya Limited v Kenya Revenue Authority & 3 others (Constitutional Petition 258 of 2018) [2025] KEHC 3413 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3413 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CONSTITUTIONAL PETITION 258 OF 2018**

**J NGAAH, J**

**MARCH 21, 2025**

**BETWEEN**

**SAMRUDDHA RESOURCES KENYA LIMITED ..... PETITIONER**

**AND**

**KENYA REVENUE AUTHORITY ..... 1ST RESPONDENT**

**DIRECTOR CRIMINAL INVESTIGATION ..... 2ND RESPONDENT**

**ATTRORNEY GENERAL ..... 3RD RESPONDENT**

**AFRICA PORTS & TERMINAL LIMITED ..... 4TH RESPONDENT**

## RULING

1. The application before court is the chamber summons dated 28 June 2024 expressed to be brought under sections IA, IB and 3A of the *Civil Procedure Act* (Cap. 21); Order 1 Rule 10 and 14; and, Order 45 of the *Civil Procedure Rules*. The application seeks orders:

> " 1. That this Honourable Court be pleased to issue an Order striking out the name of the 4th Respondent from the suit herein.
>
> 2. That this Honourable Court be pleased to review its Ruling dated 16th April, 2024 to enjoin Africa Ports & Terminals Limited as the 4th Respondent and the same be hereby set aside."

**The applicant also seeks the order for costs.**

2. The application is supported by the affidavit of Kailesh Chauhan who has sworn that, at the time material to this application, he was the managing director of Africa Ports & Terminals Limited, the 4th respondent in this petition.

3. The petitioner filed a petition dated 26 November, 2018 against the respondents and initially included the applicant as a necessary party in the petition. Subsequently, by an application dated 3 April, 2024, the petitioner sought to have the necessary party joined to the suit as the 4th respondent.

4. The necessary party opposed the application and filed a replying affidavit to that end. The petitioner was, however, joined as the 4th respondent. According to the 4th respondent, the "petitioner has wrongfully and unlawfully enjoined the 4th Respondent in the suit herein".

5. According to the applicant, the application to join the necessary party as the 4th respondent was allowed on 16 April 2024 without the knowledge of the 4th respondent and that the application ought not to have been allowed because the application and its service were incompetent.

6. The petitioner is said to have failed to serve a mention or a hearing notice upon the applicant who, at the time, was only aware of the mention date on 12 June, 2024. It has also been sworn that "the court and this suit have been compromised" and thus the court's decision of 16 April, 2024 allowing the application to join the 4th respondent in the petition is not safe. Chauhan has sworn that, in any event, no valid claim lies against the 4th respondent.

7. In response to the application, the petitioner filed a replying affidavit sworn by Parag Pawar who has introduced himself as the petitioner's general manager. According to him, the application to join the 4th respondent to the petition was filed and duly served on the 4th respondent's advocates by way of email addresses indicated as mwakiretiadvo@gmail.com and kasige@malaw.co.ke which are the email addresses parties have used to correspond.

8. The petition had been fixed for mention on 10 April 2024 for directions when the petitioner's advocates indicated to court that they were in the process of filing an application to make the 4th respondent a substantive party in the proceedings which the court obliged and deferred the mention to 10 April 2024 for further directions. However, the court did not sit on that day as the day was gazetted as a public holiday to celebrate Eid-ul-Fitr. The Court further directed, via e-mail, that the matter will be mentioned on 16 April 2024. The e-mail of was copied to all parties.

9. Despite having been served with the chamber summons on 5 April 2024, the 4th respondent failed to file any response to the Application prior to 16 April 2014.

10. On 16 April 2024 Ms. Kiti, the learned counsel for the 2nd and 3rd respondents appeared and informed the court that they would not be objecting to the application. The Honourable Court, upon noting that no response had been filed from the other respondents, directed parties to appear before it at 12:00 p.m. for directions. Consequently, the application was allowed without any opposition being noted or formerly filed in court.

11. It is, therefore, not be true that that the 4th respondent was unaware of the date of 12 June 2024 despite exercising proper due diligence. The date is said to have been on court tracking system all this while.

12. It is not in dispute, and indeed the record shows, that the order that has provoked this application was granted on 16 April 2024. The record of the proceedings on the material day before Sewe, J. is as follows:

> " Ms. Essajee present HB for Mr. Khagram for the petitioner
>
> Ms. Kiti present for the 2nd and 3rd respondents
>
> Ms. Essajee:

The application was filed on 5/4/2024. We served our counterparts. We have not been served with any response. We can take directions.

Ms.Kiti:

We have no objection to the application

Court:

Matter placed aside till 11.00 a.m for further directions.

Later at 11.01 am

Cor as before

C/A Dorothy

Ms. Essajee present HB for Mr. Khagram for the petitioner

Ms. Kiti present for the 2nd and 3rd respondents

Court: There appears to be no affidavit of service confirming service on the 1st respondent and the necessary party.

Ms. Essajee:

All these parties were served. I request time to file our affidavit of service.

Court.

File placed aside till 12.00 noon today for further directions.

Later at 12.00 noon

Cor as before

Ms. Essajee present for the petitioner

Ms. Kiti for the 2nd and 3rd respondents

N/A for or by the 1st respondent or the necessary party

Ms. Essajee: Todays date was served upon us by the court. The matter was initially fixed for 10/4/2024 which was declared a national holiday. We have nevertheless filed an affidavit of service to prove that counsel for the necessary party was served with our application.

Court:

I have seen the affidavit of service sworn by Mr. Ondego in proof of service of the application on counsel for the necessary party. I have further confirmed that all the parties were notified of today's date by the court. There being no appearance or response for or by the necessary party and Ms. Kiti having indicated that she has no objection to that application, it is hereby ordered that:

1) The notice of motion dated 3/4/2024 be and is hereby allowed.

2) Leave be and is hereby granted to the petitioner to substitute the necessary party herein, Africa Ports & Terminals Limited and enjoin it as the 4th respondent to the petition.

3) Amended petition be filed and served within 7 days from the date hereof.

4) Any response to the amended petition be filed within 7 days of service of the amended petition.

5) Mention on 8/5/2024 for further directions NTI

6) Costs in the cause."

13. The applicant's position on these proceedings and, in particular, on the impugned the order is found in paragraphs 9, 10,11,12 and 13 of the grounds upon which the application is based. The applicant has pleaded as follows:

"9. That the application should never have been allowed since the application and the service of the same was incompetent.

10. That the petitioner failed to serve a Mention or Hearing notice upon the 4th Respondent who at the time was only aware of the Mention date on 12th June,2024.

11. That the Court and this Suit have been compromised and thus the decision to allow the aforementioned application is not safe.

12. That consequently the Petitioner has no claim against the 4th Respondent ab initio.

13. That deliberately enjoining the 4th Respondent to this suit without contractual or lawful grounds is malicious, frivolous and an abuse of the court process on the part of the Petitioner."

14. These averments have also been captured as depositions in paragraphs12 to 15 of the affidavit of Chauhan.

15. The averments and depositions clearly demonstrate that the applicant is challenging the court's decision to join the 4th respondent to the petition on the merits rather than on any of the grounds set out as the grounds for review under order 45 (1) of the *Civil Procedure Rules*.

16. Again, when the applicant avers and swears that "the court and this suit have been compromised", he is thereby questioning the integrity of the proceedings and the impartiality of the court in reaching the decision to join the 4th respondent to the petition as one of the respondents.

17. Order 45(1) of the *Civil Procedure Rules* upon which an order for review may be sought reads as follows:

1.

(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.

18. It is clear from this rule that one may apply for review on three grounds; first, upon discovery of a new important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not possibly be produced by the applicant as at the time the order or decree by which he is aggrieved was made; second, if there was a mistake or error on the face of record and third, if there is any other sufficient reason.

19. Looking at the applicant's affidavit in support of the application, none of these grounds have been demonstrated to exist. Although the applicant has attempted to introduce the ground of discovery of a new important matter of evidence on the face of the application, what is alleged to have been discovered is the impugned order itself. To this end, the applicant has pleaded as follows:

> "7. That the application was allowed on 16th April, 2024 unbeknownst to the Applicant herein.
>
> 8. That the 4th Respondent only discovered this new and important information when the matter came up for mention on 12th June, 2024, information which even after the exercise of due diligence, was not within its knowledge."

20. Certainly, the order which the applicant seeks to have reviewed cannot be said to be the "new and important matter or evidence" envisaged in order 45 rule 1(b). The new and important evidence contemplated in this rule must be evidence that existed at the time the order was made and which could probably have influenced the decision of the court if it was brought to its attention before the order was made. It follows that without any grounds for review, the application for review of the order made on 16 April 2024 is misconceived.

21. That said, it has been demonstrated that the applicant is challenging this court's decision on merits and, among other things, the applicant has challenged not only the integrity of this court but also the learned judge's appreciation of the evidence and the law. In a nutshell, the applicant is saying that the learned judge misdirected herself on the facts and misapprehended the law.

22. If this is the position that the applicant has adopted, a proper recourse would have been to appeal against that decision rather than seek its review.

23. In *Abasi Balinda versus Fredrick Kangwamu & Another* (1963) E.A 558 a court was asked to review its order on costs on the ground that the court was alleged to have taken an erroneous view of the evidence and of the law relating to the question of whether a returning officer was a necessary party to an election petition. The court (Bennet, J.) appreciated that section 83 of the Uganda Civil Procedure Ordinance (equivalent to section 80 of our *Civil Procedure Act*) conferred upon the court jurisdiction to review its own decisions in certain circumstances and order 42 (which is equivalent to order 45 of our *Civil Procedure Rules*) prescribed the conditions subject to which and the manner in which the jurisdiction should be exercised.

24. In interpreting that jurisdiction and in the process, dismissing the applicant's application, the court cited with approval a passage from *Commentaries on the Code of Civil Procedure* by Chitaley & Rao

(4th Edition), Vol. 3 page 3227, where the learned authors explained the distinction between a review and an appeal and had this to say;

> "a point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal"

25. Again, our own Court of Appeal explained this much better in *National Bank of Kenya Ltd versus Njau* (1995-1998) 2EA 249 (CAK); at page 253 of the judgment, the Court said: -

> "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. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review." (Underlining mine).

26. Taking cue from these decisions, I am not persuaded that the applicant's application is merited. In my humble view, it is misconceived and an abuse of the process of court. It is hereby dismissed with costs. Orders accordingly.

**SIGNED, DATED AND DELIVERED ON 21 MARCH 2025.**

**NGAAH JAIRUS**

**JUDGE**