Njoroge v Belasi Developers Limited & 2 others (Commercial Case E004 of 2023) [2025] KEHC 4581 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

COMMERCIAL CASE E004 OF 2023

FN MUCHEMI, J

APRIL 3, 2025

BETWEEN

JULIAH MURUGI NJOROGE ..... PLAINTIFF

AND

BELASI DEVELOPERS LIMITED ..... 1ST DEFENDANT

MARTIN MBURU MWANGI ALIAS MAXWELL MBURU MWANGI ..... 2ND DEFENDANT

JAMES KAGOI MWIRI ..... 3RD DEFENDANT

RULING

1. The application dated 16th November 2024 for orders of review and setting aside the ruling delivered on 22nd July 2024 in this suit and in particular, the issue of condemning her to meet the costs of the suit.

2. In opposition to the application, the 3rd respondent filed Grounds of Opposition dated 2nd December 2024.

Plaintiff/Applicant's Case

3. The applicant states that she instituted the present suit vide her plaint dated 15th November 2023 seeking for general damages for breach of contract by the defendants. The 3rd defendant entered appearance and filed a Notice of preliminary Objection dated 6th December 2023 on the grounds that the instant court lacked jurisdiction pursuant to Article 162(2)(b) of the *Constitution* and Section 13 of the *Environment and Land Court Act*.

4. The applicant avers that she filed her Notice of Withdrawal of the Suit on 6th June 2024 for the reason that the suit had been overtaken by events at the time, upon receipt of the arbitration award on 23rd May 2024.

5. The applicant avers that she then instructed her advocate to file for recognition of the award and seek for interim reliefs acknowledging that the other orders previously granted had been lifted. The same was filed on 6th June 2024 as HCCOMMARB/E001 of 2024. The applicant further states that the said suit was placed before Honourable Justice Muchemi on numerous occasions until she made a finding that the counsel for the applicant should appear before Justice Benjamin Musyoki who was handling the instant suit prior to been given any further interim reliefs since the matter was being handled by Justice Musyoki.

6. The applicant states that her counsel appeared before Justice Musyoki on 2nd July 2024 where he explained to the court what had transpired in both instances and that the instant suit had been withdrawn and was not pending before the court anymore.

7. The applicant states that the instant court determined the matter and delivered its ruling on 22nd July 2024 on the 3rd respondent's Notice of Preliminary Objection despite her having withdrawn the suit and the court being well aware of the said fact. The applicant further states that the learned trial judge erred in law and in fact in failing to consider her Notice of Withdrawal of Suit which was duly filed in court before the ruling was delivered and proceeded to uphold the preliminary objection striking out her suit with costs to the 3rd respondent. The applicant argues that having formally filed her Notice of Withdrawal of Suit, the court was no longer vested with jurisdiction to determine the suit.

8. The applicant states that the Honourable Judge in his ruling found that her submissions had not been filed and she had sought an adjournment when the matter came up before him on 6th June 2024 yet she filed her submissions dated 31st January 2024 alongside a Further Affidavit which the court never considered in coming up with its ruling.

9. The applicant states that the 3rd respondent has filed his party and party bill of costs after being awarded costs of the suit contrary to the law as it was functus officio and should it be taxed and set for execution, she shall stand to suffer irreparable loss and damage.

10. The applicant avers that Section 7 of the *Arbitration Act* has been a problematic section of the law in the sense that the same asks for the filing of suit whereas a suit would never be tenable since whenever parties are before an arbitral process, the matter must be determined in this forum with no option of ever being brought before any other judicial forum. The applicant argues that the question of which forum to approach in matters of arbitration that commercial nature such as the sale and procurement of land is not a settled issue in law and courts have differed with each other on which forum is suitable between the Environment and Land Court or the High Court, being the same court that the enforcement of arbitral award is filed.

11. The applicant further argues that the honourable court ought to have been guided by various findings of similar matters where there has been divergent opinion, considering the nature of the suit in itself is not a suit in total but a suit for the sole purpose of obtaining interim reliefs and were the court to depart from that finding, the Supreme Court has directed that such diversion from similar findings should be clearly explained which the court did not do in its ruling.

12. The applicant avers that there has been no delay in bringing the instant application.

The 3rd Respondent's Case

13. The 3rd respondent relies on Order 45 Rule 1 of the Civil Procedure Rules and states that the application does not meet the threshold for review as the applicant has not tabled any new evidence nor is there any error apparent on the face of the record of the impugned ruling. The 3rd respondent

further states that the ruling was delivered on 24th July 2024 which is four months before the applicant filed the instant application and the same qualifies as unreasonable delay.

14. The 3rd respondent further relies on Section 27 of the *Civil Procedure Act* and states that costs follow the event as his preliminary objection carried the day. Additionally he filed a Notice of Motion, Statement of Defence and Replying Affidavit to the applicant's numerous pleadings and thus the court cannot be faulted for awarding costs to him.

15. The 3rd respondent states that the applicant's notice of withdrawal of suit dated 6th May 2024 was filed on 6th June 2024, one day after Honourable Justice Musyoki had reserved a ruling date for his preliminary objection. The applicant did not take any steps to arrest delivery of the said ruling and cannot be seen to now complain about the outcome of the ruling with respect to costs. The 3rd respondent argues that in any event, even if the applicant had been diligent enough to place the withdrawal on the record and have the same adopted as an order of the court, which she has not, as a general rule, costs follow the event, withdrawn suit notwithstanding, and the suitor must pay the defendant the costs of the suit.

16. The applicant filed a Further Affidavit dated 19th February 2025 and states Order 45 Rule 2 of the Civil Procedure Rules stipulates that an application seeking for orders for review should be filed in court without unreasonable delay which period has been held and is taken to be within six months from the date of the impugned decision. Thus, the applicant argues that the instant application was filed without unreasonable delay having been filed barely four months after the delivery of the impugned ruling.

17. The applicant avers that the suit was first mentioned on 5th June 2024 when she informed the court of her intention to withdraw the suit and it was rescheduled to the following day, 6th June 2024 to confirm filing of her notice of withdrawal of suit which she had done hence it was long before the ruling was delivered and after the court was notified of the intention to withdraw the suit.

18. The applicant states that an award of costs is not cast in stone but courts have the ultimate discretion which must be exercised judiciously subject to the prescribed conditions and limitations. As such, the applicant argues that the 3rd respondent was only entitled to costs of the application, if any.

19. The applicant argues that the oversight on the part of the court in disregarding the withdrawal of his suit amounts to sufficient reason warranting the grant of orders for review.

20. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

21. The applicant relies on Section 25(1) of the Civil Procedure Rules and the cases of Beijing Industrial Designing & Research Institute vs Lagoon Development Ltd [2015] eKLR and Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and boundaries Commission & 7 Others [2014] eKLR and submits that the notice to withdraw the suit took effect from the date when the said notice was filed and the court ought to have refrained from delivering its ruling in respect of the 3rd respondent's preliminary objection. The applicant argues that in delivering a ruling in the matter, the honourable court failed to consider her notice of withdrawal of suit which is tantamount to an error or mistake on the face of the record and if allowed to go unchallenged, serves the purpose of defeating the ends of justice.

22. The applicant further relies on the case of Muyodi vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243 and submits that she has met the threshold for the grant of orders of review due to an error apparent on the face of the record as the court delivered a ruling

in a matter that was withdrawn. The applicant further argues that once the said notice of withdrawal was filed and served upon all parties, the court became functus officio. To support her contentions, the applicant relies on the cases of Raila Odinga vs IEBC & 3 Others Petition No. 5 of 2013 and Alexander Anthony Wahiu & 2 Others vs Joseph Kariha Wahiu & Another [2022] eKLR.

The 3rd Respondent's Submissions.

23. The 3rd respondent refers to the case of National Bank of Kenya Ltd vs Ndungu Njau [1997] eKLR and submits that the applicant has not presented any new or important evidence nor is there an error apparent on the face of the impugned ruling.

24. The 3rd respondent submits that the applicant's notice of withdrawal of suit dated 6th May 2024 was not on record when the matter came up for mention on 5th June 2024. The said notice was filed on 6th June 2024 and again on 17th June 2024 both dated well past the date on which the court had reserved the ruling on the preliminary objection dated 6th December 2023.

25. The 3rd respondent further submits hat the applicant has not provided any evidence to show when the said notice was filed or when it was served.

26. The 3rd respondent submits that his preliminary objection dated 6th December 2023 was reserved for ruling on 5th June 2024 and both counsels were in attendance in court whereby the applicant's counsel failed to have the said notice of withdrawal of suit on the record on said date but no notice was served upon him. On the face of the notice itself, there is no indication that it was to be served upon opposing counsel as it lacks the words "to be served upon" and opposing counsel's address of service is also missing. The 3rd respondent submits that to date, the said notice has never been served on him which is contrary to the provisions of Order 25 Rule 1 of the Civil Procedure Rules. The 3rd respondent submits that the notice of withdrawal if at all was filed, the said filing took place after the preliminary objection had been reserved for ruling.

27. The 3rd respondent relies on the case of Sabera Makena & 2 Others vs Daniel Baariu [2021] eKLR and submits that in the absence of a duly filed and served notice of withdrawal of suit affording him an opportunity to address the court on the issue of costs, this honourable court was not functus officio on the date the motion in limine was reserved for ruling.

28. The 3rd respondent refers to the case of Nyali View Limited vs National Bank of Kenya Limited [2022] KEHC 16605 (KLR) and submits that his preliminary objection carried the day and he is deserving of the said costs. The 3rd respondent submits that he incurred costs in drafting a Notice of Motion dated 6th December 2023, a Memorandum of Defence dated 5th December 2023 and a Replying Affidavit dated 6th December 2023. Court filing fees for the said pleadings were similarly incurred.

29. The 3rd respondent further relies on the case of Daniel Torotich Arap Moi vs Mwangi Stephen Muriithi & Another vs National Bank of Kenya Limited [2022] KEHC 16605 (KLR) and submits that submissions cannot take place of evidence in the deliberation and determination of a matter before a court of law. The 3rd respondent argues that the applicant's suit was not determined on the strength of his submissions or the lack of the applicant's submissions. The shortcomings of the applicant's case are as clear as the light of day. The 3rd respondent argues that the applicant sought to rope him in unnecessary litigation and in the wrong forum whereas the party she sought relief from, the 1st respondent, was the only party before the arbitrator which arbitration award was delivered on 23rdMay 2024. The basis of the underlying litigation was a contract for sale of land entered into between the applicant and 1st respondent. The 3rd respondent submits that he did not feature in the allegations of wrongdoing as lodged by the applicant in various fora. Thus, whether the applicant's submissions were

considered is immaterial in the instant action. The 3rd respondent submits that the applicant lost her case on the merits and he was rightly awarded costs for defending himself.

30. The 3rd respondent submits that the applicant filed the instant application four months after the delivery of the impugned ruling and only after she was awoken out of her slumber by filing his bill of costs. The 3rd respondent argues that the applicant is indolent and not deserving of this honourable court's discretion.

The Law

Whether the application is merited.

31. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-

Rule 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 order made 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 which he applies for the review.

32. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

33. Notably, the applicant did not ground her application on any of the grounds in Order 45 of the Civil Procedure Rules until the 3rd respondent brought out the issue in his grounds of opposition. The applicant in her Further affidavit then grounded her application on sufficient reason. Furthermore, the applicant raised the issue on error apparent on the face of the record in her submissions. It is trite law that submissions do not constitute evidence. This principle was enunciated in the Court of Appeal decision in Daniel Torotich Arap Moi vs Mwangi Stephen Muriithi & Raymark Limited [2014] eKLR held:-

> Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language" each side endeavoring to convince the court that its case is

the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.

34. The applicant has raised the ground of 'for any other sufficient reason'. The phrase 'any other sufficient reason' was illuminated in the case of Republic vs Cabinet Secretary for Interior and Co-ordination of National Government ex parte Abullahi Said [2019] eKLR:-

> A court can review a judgment for any other sufficient reason. In the case of Sadar Mohammed vs Charan Singh & Another {1963} EA 557 it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.) Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), the equivalent of our Order 45 Rule 1, states that the expression, 'any other sufficient reason' means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out.....would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment.
>
> I also find useful guidance in Tokesi Mombili & Others vs Simion Litsanga [2004] eKLR where the Court of Appeal held as follows:-
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> In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
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> Where the application is based on sufficient reason it is for the court to exercise its discretion.

35. From the foregoing, the applicant has not demonstrated any discovery of new matter. On the issue of any error apparent on the face of the record, the Court of Appeal in the case of Muyodi vs Industrial and Commercial Development Corporation & Another (2006) 1 EA 243, considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:-

> In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this Court said that an error 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 long drawn process of reasoning or on points where there may be 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.

36. The error apparent on the face of record alluded to by the applicant being that the court failed to consider her notice of withdrawal of suit and therefore rendered its ruling, is not self evident and requires an elaborate argument. It requires detailed examination, scrutiny and elucidation of facts. It is therefore my considered view that the error on record as purported by the applicant does not fall within the ambit of an error apparent on the face of the record. The issues raised by the applicant require a long drawn out process of arguments by both parties for the court to make a final decision. As such, it is my view that those are grounds for appeal rather than review as they relate to the substance of the matter.

37. The applicant has brought the present application 4 months after the impugned decision. It is trite law that an application for review ought to be made without unreasonable delay. The applicant has not advanced any reasons for the four month delay before filing the current application. Which in my view, is inordinate and unreasonable.

38. It is my considered view that the applicant has not met the threshold to warrant grant of orders for review. Accordingly, the application dated November 16, 2024 lacks merit and is hereby dismissed with costs to the 3rd respondent.

39. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 3RD DAY OF APRIL 2025.

F. MUCHEMI

JUDGE