Aspam Energy Kenya Limited v Put Sarajevo General Engineering Company Limted & 2 others (Civil Appeal E817 of 2022) [2025] KEHC 11832 (KLR) (Civ) (28 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11832 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E817 OF 2022

DKN MAGARE, J

JULY 28, 2025

BETWEEN

ASPAM ENERGY KENYA LIMITED ..... APPELLANT

AND

PUT SARAJEVO GENERAL ENGINEERING COMPANY LIMTED .... 1ST RESPONDENT

AFRICACE LIMITED ..... 2ND RESPONDENT

HENRY KURIA KARARA T/A WESTMINISTER MERCHANTS AUCTIONEERS ..... 3RD RESPONDENT

(Appeal from the Ruling and order of Honourable A.N. Makau (Principal Magistrate) delivered in Milimani CMCC No. 6442 of 2018 on 16.9.2022.)

JUDGMENT

1. This is an appeal from the Ruling and order of Honourable A.N. Makau (Principal Magistrate) delivered in Milimani CMCC No. 6442 of 2018 on 16.9.2022.
2. In the Memorandum of Appeal dated 14.10.2022, the Appellant raised the following grounds of appeal:
    a. The learned magistrate erred in law and fact in finding that the Appellant must have known the actions of the 3rd Respondent.
    b. The leaned magistrate erred in law and in fact in finding the Appellant responsible for the actions of the 3rd Respondent.

c. The leaned magistrate erred in law ad fact in failing to find that an application under Order 45 of the Civil Procedure Rules would also be based on any other sufficient reasons.

3. In essence, the Appellant contended that the learned magistrate erred both in law and in fact by wrongly concluding that the Appellant must have been aware of the 3rd Respondent's actions and further, by holding the Appellant liable for those actions. Additionally, the magistrate failed to appreciate that an application under Order 45 of the Civil Procedure Rules can also be grounded on any other sufficient reason, not just error or discovery of new evidence.

4. The impugned ruling arose from the application by the Appellant dated 8.2.2022, where the Appellant sought to review the Ruling and Order of the lower court dated 14.1.2022. The Order sought to be reviewed related to contempt of court in which the directors of the Appellant were found to be in contempt of the court order of 18.6.2021. The application was premised on the grounds as anchored in this appeal, that the said directors ought not be punished as there was emergence of new evidence not placed before court at the time of making the impugned ruling.

5. In response to the application, the 2nd Respondent as Objector filed a replying affidavit sworn by Jason Savonge on the grounds that the Appellant had not met the threshold for review under Order 45 of the Civil Procedure Rules.

Analysis

6. The jurisdiction of this court to grant review is well set out in law. Section 80 of the *Civil Procedure Act* states 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".
>
> Section 63 (e) of the *Civil Procedure Act* states that:
>
> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

7. Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

> " (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.

(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 on which he applies for the review"

8. The raison d'être for the discretionary power of review is to find whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. This power inheres in every court of plenary jurisdiction and is premised on preventing miscarriage of justice or an injustice. This resonates with the reasoning of Kuloba J (as he then was) in Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

9. The Appellant sought to set aside contempt of court orders. The persons cited to be punished for contempt of court were the directors and the supply chain manager of the Appellant. They based this on lack of actual knowledge. The nature of the issues raised in the application for review still are the same ones that were or could be raised in the initial application.

10. The courts have consistently declined to review, vary, or rescind their own decisions, except where it is necessary to give effect to its original intention at the time the decision was made. Departing from this principle would be perilous, as it would invite indiscriminate challenges to the correctness of the Court's decisions. This will also render redundant the appellate system. Review is not a mechanism for parties to convince the court to rethink its position and gain new wisdom than it was initially possessed of when deciding the case. It is not the time to ask the court to expand its knowledge of the law and

imbue new wisdom. This position was affirmed by the Court of Appeal in Mahinda v. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418.

> "The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

11. The orders of the lower court dated 8.6.2021 directed the directors of the Appellant to release the 2nd Respondent's property. The Appellant had the duty to demonstrate that there was discovery of new and important matter or evidence. It was to be shown that the new evidence was not within the knowledge of the Appellant, and not just its directors; or that it could not be produced at the time the orders were made. The Appellant must also satisfy the Court that this was the case even after exercise of due diligence. In the case of Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party) [2019] KEHC 4666 (KLR), Eric Ogola, Alfred Mabeya M. Thande JJ, posited as follows:

> 17. In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay.

12. The gist of the Appellant's application was that the 3rd Respondent, as appointed auctioneers, negligently and in disregard of the instructions by the Appellant proceeded to sell the 2nd Respondent's motor vehicle. To this court, the 3rd Respondent could only initiate action on instructions of the Appellant. This was not a new matter of evidence that could not have been discovered by exercise of due diligence or at all. The Appellant indeed knew that the 3rd Respondent had instructions and whatever they could do with the instructions was in the knowledge of the Appellant. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

13. I am unable to fault the finding of the lower court. A company acts through its agents and is deemed to have ratified the acts of its agents. That is at least as far as the outside world is expected to perceive the acts and omissions of a company as expressed in the Royal British Bank vs. Turquand (1856) 6 E. & B 327 Exch.Ch. The directors of the company were liable for contempt and there was no matter of evidence or information in allegation that the agent of the Appellant had no authority of the Appellant in her dealings. Such argument as to the liability of agents of the company was not an issue before the court in contempt proceedings as it could constitute the subject matter as to the liabilities and rights of

the parties to the cause of action. The Court of Appeal in Ndigirigi v Nzioki & 4 others (Civil Appeal 85 of 2020) [2024] KECA 538 (KLR) (9 May 2024) (Judgment) stated as follows:

> ...That rule, as stated in the case of Royal British Bank vs. Turquand (1856) 6 E. & B 327 Exch.Ch has it that a third party dealing with a company is not bound to ensure that all internal regulations of the company have in fact been complied with as regards the exercise and delegation of authority. In that case, the board of directors had borrowed money from the bank on a bond bearing the company's seal, and even though no resolution had been passed by the company in general meeting, the company was nevertheless bound...

14. Therefore, the lower court exercised its unfettered discretion within the bounds of the law to address a manifest injustice. To have acted otherwise would have been capricious and whimsical, thereby defeating the very purpose for which the law exists, which is the pursuit of justice. In the case of Ramakant Rai v. Madan Rai, CR LJ 2004 SC 36, the Supreme Court of India aptly pronounced itself on the exercise of judicial discretion as follows:

> Judicial discretion is canalized authority not arbitrary eccentricity.Cardozo, with elegant accuracy, has observed:
>
> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains.

15. As to costs, the Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

16. In the circumstances, I am inclined to dismiss the appeal with costs of Ksh 75,000/= to the 2nd Respondent.

Determination

17. The upshot of the foregoing is that I make the following orders:

    a. The appeal lacks merit and is dismissed with costs of Ksh. 75,000/= to the 2nd Respondent payable within 30 days. In default, execution to issue.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 28TH DAY OF JULY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Orange for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Court Assistant – Michael