Musau & 2 others v Independent Electoral & Boundary Commission & 2 others (Petition 2 of 2013) [2024] KEHC 120 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

PETITION 2 OF 2013

FR OLEL, J

JANUARY 17, 2024

BETWEEN

THOMAS MALINA MUSAU ..... 1ST PETITIONER

STEPHEN NDAMBUKI MULI ..... 2ND PETITIONER

JOHN NTHULI MAKENZI ..... 3RD PETITIONER

AND

THE INDEPENDENT ELECTORAL & BOUNDARY COMMISSION .... 1ST RESPONDENT

LEONARD OKWMWA ..... 2ND RESPONDENT

STEPHEN MUTINDA MULE ..... 3RD RESPONDENT

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 5th July 2022 brought pursuant to provisions of Section 1A, 1B, 3A, of the *civil procedure Act*, Order 22 rule 22, Order 45 rule (1) and Order 51 of the Civil Procedure Rules, and all other enabling provision of law. By the said application, the Appellant/applicant seeks;

    a) That pending the hearing and determination of this application, an order do issue staying the orders of the Honourable court issued on 27.06.2022 and all execution proceedings against the applicants.

    b) That an order do issue for review and/or setting aside of the ruling and subsequent orders issued on 27.06.2022.

c) That the application dated 29.07.2020 be reinstated together with all the interim orders issued therefrom.

d) That costs of this application be borne by the 1st petitioner.

2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the 3rd petitioner/applicant one John Makenzi Nthuli dated 5th July 2022. The applicant states that vide the ruling dated 27.06.2022, the court did strike out his application dated 29.07.2020 and thereby gave the 3rd respondent liberty to proceed with execution. In the dismissed application dated 29.07.2020, the applicants did contend that they had raised pertinent issues being; that they had not given instructions to counsel to file this instant petition and further that, they did not sign the said petition. Thus the purported signatures on the petition were forgeries.

3. Further a grave error had occurred in determining the application dated 24.11.2022 as the court had indicated that they had not filed any documents to oppose the said application, which position was not true as they had filed a replying affidavit on 21.12.2021 and served the same upon the respondents. The ruling was thus made without the trial court having the benefit of reading through their explanation as to why the application dated 29.07.2020 should not be dismissed. The applicants thus prayed that the orders sought be allowed as they stand to suffer irreparable loss and damage and were likely to loose their assets and/or be committed to civil jail.

4. This application was opposed by the 1st petitioner/Respondent Thomas Malinda Musau who filed his replying affidavit dated 28th July 2022. He basically stated that he was opposed to being condemned to pay any costs related to this application as he had never participated in the application dated 24.11.2021, which ruling the applicant sought to review.

5. The 3rd Respondent did oppose this application through a replying affidavit filed by his advocate one Geoffrey Muriungi Kiugu dated 15th July 2022. They did contend that the said application was misconceived, frivolous and amounted to an abuse of the process of the court, as the courts revision powers were limited to correcting an apparent error on the face of the records which error ought to be self-evident and should not require elaborate argument to decipher. The issues raised were substantive in nature and the court at this stage could not be called upon to refer to the said issues as raised in the application dated 29th July 2020.

6. The applicant was also faulted for failing to ensure that their replying affidavit was in the court record, and they could not transfer the said mistake upon the court as it was their error, but also such could not amount to an error on the face of the record. The ruling of the trial court dated 27.06.2022 was also well considered/grounded and indeed the court had concurred with the respondents that the application dated 29th July 2020 had not been prosecuted for over one and half years. The respondents further faulted the applicant for not attending court whenever the matter arouse and was thus to blame for their own indolence. The 2nd and 3rd respondents thus prayed that this application be dismissed with costs.

B. Submissions.

Applicants' Submissions

7. The applicant did submit that under Section 80 of the *civil procedure Act*, and order 45 of the civil procedure rules the court had extensive powers to review its orders, if there were new and important matters of discovery which was not within the knowledge of the applicant despite due diligence, if there was an error or mistake on the face of the record and for other sufficient cause or reason. The application

was premised on the fact that there was an error on the face of the record and that sufficient reason did exist to warrant granting of the orders as sought. Reliance was placed on *Muyodi vs Industrial and commercial Development corporation & Ano* (2006) 1 EA 243.

8. The court had erred in failing to consider his replying affidavit, despite having had it filed on time. In the said replying affidavit they had enumerated at length the challenges encountered and steps taken to expeditiously dispose off their application dated 29.07.2020 and the court would have noted that they had always attended court with a view of having the said application heard and determined. Further reliance was placed in the cases of *Edison Kanyabwera Vs Pastori Tumwebaze* (2005) UGSC 1 & *National Bank of Kenya Ltd Vrs Ndungu Njau* (1997) eKLR.

9. The applicant urged this court to find that indeed they had satisfied the requirement for review and setting aside of the ruling dated 27.06.2022 and prayed that their application be allowed and they be given a chance to be heard with respect to the application dated 29.07.2020.

Respondents Submissions

10. The 3rd Respondent filed submissions, where he did emphasized that there was no error on the face of the record, which was self-evident as not to require an elaborate argument. The applicant was to blame for not ensuring that his replying affidavit was on record as at the time the court was making its considered decision, and thus such a mistake cannot amount to an error on the face of the record to warrant the review of the orders issued on 27.06.2021. Reliance was placed on *Paul Odhiambo Onyango & Another Vs Kalu works Limited* (2020) eKLR, where the court held that failure to take into account submissions which were not on the court record was not an error apparent on the face of the record. It would have been only if the submissions were on record but in error the court failed to consider the same.

11. The 3rd respondent further submitted that the trial court did consider the evidence on record and proceedings before it made its ruling to dismiss the application dated 29th 07. 2020. The lack of the replying affidavit did not change that fact that the said application had remained unprosecuted for more than one and half years and thus urged this court to find that the review application was not merited. Reliance was placed on *Delta Connections Limited vs Alfred Mwaringa Decha* (2021) eKLR and *Sadar Mohamed Vs Charan Signh & Another* (1963) EA 557.

12. The 3rd respondent thus urged this court to find that the said application is unmerited and prayed that it be dismissed with costs.

C. Analysis & Determination

13. I have carefully considered the Application, Supporting Affidavit, the Respondent's relying affidavit and submissions filed and discern that the only issue for determination is whether this court should review its orders dated 27.06.2022 dismissing the 2nd and 3rd petitioners/applicants notice of motion application dated 29th July 2020 and directing them to pay storage charges of Motor vehicle registration Number KBA 136H Toyota Hilux

14. Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

> Section 80. Review
>
> " 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."

[Order 45, rule 1.] Application for review of decree or order.

"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.

(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"

15. From the above provisions, 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 hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

16. The Court of Appeal had the following to say in an application for review in the case of *National Bank of Kenya Ltd vs Ndungu Njau*.

"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 for 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 law cannot be a ground for review."

17. As regard "sufficient reason" and "discovery of new evidence" the Court of Appeal in *Pancras T. Swai vs Kenya Breweries Limited*, Civil Appeal No.275 of 2010 made the observation that:

> " As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly, of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly, on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In *Sarder Mohamed vs Charan Singh Nand Sing and Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In *Shanzu Investments Limited vs Commissioner for Lands* (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata and Another vs Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that;
>
> > " any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."
> >
> > [30] The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the Court is deemed to be alive to." (Emphasis added)

(Also See also *Barclays Bank of Kenya Ltd vs Abdi Abshir Warsame and Darare Transporters Limited* [2006] eKLR; and *Ndirangu vs Commercial Bank of Africa* [2002] 2 KLR. 603.)

18. To the statutory grounds, may also be add instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see *Serengeti Road Services -v- CRBD Bank Limited* [2011] 2 EA 395. Also, to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see *Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited* (supra).

19. First and foremost, it is common ground that the applicant did indeed file a replying affidavit to the notice of motion application dated 24.11.201. The said replying affidavit was filed on 21.12.2021, but for inexplicable reasons the same was not placed in the court record and by the time the trial judge retired to write his ruling dated 27.06.2022 he obviously proceeded as if no replying affidavit had been

filed and deliver his considered ruling striking out the applicant's application dated 29.07.2020 and allowing the respondent to proceed with execution.

20. The applicant urged this court to find that this was an error on the face of the record as their replying affidavit was not considered, while the respondent's position was that this was not an error. As clearly stated in *Paul Odhiambo Onyango & Another Vs Kalu Works Limited* (2020) eKLR & *Delta connections Ltd Vs Alfred Mwaringa Deche* (2021) eKLR where the court fails to consider submissions filed and/or replying affidavit filed, the same does not become a valid ground of review but appeal. But the question which arises herein is if the applicants were prejudiced by what occurred and if it in the final analysis it resulted to an injustice.

21. There is the principle that law should ordinarily not stand in the way of administration of justice and that, 'law has [occasionally] to bend before justice'. This has often led to the conclusion that the court, always retains an inherent jurisdiction to ensure that there is no miscarriage of justice or failure of justice or abuse of the judicial process.

22. Thus in *Benjoh Amalgamated Limited & Anor -v- Kenya Commercial Bank Limited* [2014] eKLR, the Court of Appeal itself a creature of the *Constitution* deriving its powers from both the *Constitution* and statute law but without express powers of review, stated as follows:

> " [57] Jurisprudence that emerges...shows that notwithstanding that it[the court] has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to [sic]correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection.
>
> .....
>
> (61) ...This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice."(emphasis mine)

23. Due to the unfortunate circumstances which occurred herein, the applicants replying affidavit was not considered by the court and was not placed in the court file. Blame for the same is a coin toast which cannot be effectively determined based on the facts pleaded. The net effect of this is that the applicants were gravely prejudiced and their right to equal protection and equal benefit of the law under Article 27(1) and right to fair hearing as guaranteed under Article 50(2) of the *Constitution* of Kenya will be infringed unless the court intervenes. This in my mind constitutes sufficient reason upon which review maybe granted both in the interest of justice and also based on the universal principal of the right to be heard.

24. As stated in *Wangechi Kimata and Another vs Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that;

> " any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not

in themselves form a genus or class of things which the third general head could be said to be analogous."

25. With regard to the right to be heard, it was the position in *Onyango Oloo vs. Attorney General* [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

> " The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio." [Emphasis mine].

26. This was a restatement of Lord Wright's decision in *General Medical Council vs. Spackman* [1943] 2 All ER 337 cited with approval in *R vs. Vice Chancellor JKUAT* Misc. Appl. No. 30 of 2007 that:

> " indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision." If the principles of natural justice are violated in respect of any decision, it is,

27. In *Ridge vs. Baldwin* [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:

> " Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."

Disposition

28. The application dated 5th July 2022 is therefore partially allowed. The orders issued on 27.06.2022 are hereby reviewed and set aside. The application dated 29.07.2020 is thus reinstated for hearing on merit.

29. Noting the length of time it has taken to dispose of the said application (29.07.2020) and in the interest of justice, while balancing the interest of both parties, I direct that the application dated 29.07. 2020 be heard and disposed off on priority basis and not later than 90 days from the date of this ruling.

30. The applicant is granted 14 days to file and serve a further affidavit to support the said application and upon service the respondents too are granted 14 days to file a further replying affidavit if need be to respond to issues raised.

31. The applicant thereafter will have ten (10) days to file and serve written submissions to the said application dated 29.07.2020 and upon service the respondents will also have ten (10) days to file their submissions in response. Parties should note that these timelines will not be extended under any circumstances-based delays in having the said application determined.

32. The costs of this application shall be borne by the 2nd and 3rd petitioner's/Applicants and the same is assessed at Ksh. 30,000/= payable to the 3rd Respondent within the next 30 days. In default execution to issue.

33. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 17TH DAY OF JANUARY, 2024.

In the presence of:

Mr. Munene and Mr. Muia for 1st – 3rd Petitioners

Ms. Njeri for 3rd Respondent

Court Assistant – Susan/Sam