Nzioka & Co Advocates v Harit Sheth Advocates; Otumba (Interested Party) (Civil Case 187 of 2015) [2024] KEHC 2113 (KLR) (Civ) (1 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 187 OF 2015

AN ONGERI, J

MARCH 1, 2024

BETWEEN

NZIOKA & CO ADVOCATES ..... PLAINTIFF

AND

HARIT SHETH ADVOCATES ..... DEFENDANT

AND

BRYAN YONGO OTUMBA ..... INTERESTED PARTY

RULING

1. The application coming for consideration in this ruling is the one dated 6/6/2023 brought under Order 45 Section 80 of the Civil Procedure Rules 2010 Section 1A, 1B, 63(e) and 3A of the *Civil Procedure Act*, Article 50 and 159 of *the Constitution* seeking the following orders:

    i. That the ruling of Justice Sergon delivered on 30th December 2021 in respect of the application dated 18th May 20201 which has Never been argued be set aside and expunged from the record ex debito justitae and this matter be remitted for hearing before another Judge in the division.

    ii. That the application dated 18th October 2021 be canvassed before another Judge before the application dated 18th May 2021 is dispersed.

    iii. That costs of this application be in the cause.

2. The application is based on the following grounds on the face of it and supported on the affidavit of the applicant Bryan Yongo sworn on 6/6/2023 which he deposed that on 18th of May 2021, the applicant did file an application inter-alia that the defendant herein be directed to deposit the sum of

kshs.10,650,000/= in court pursuant to the consent filed herein on the 4th May 2016 and dated 27th April 2016 wherein he was enjoined as an interested party.

3. That during the pendency of the said application, the applicant did file an application dated 18th October 2021 wherein he sought the cross examination of the defendant herein on the affidavit of Richard Kariuki filed herein dated 10th November 2021.

4. That the said application dated 18th October 2021 was to be heard before the application dated 18th May 2021 and the Honourable Justice Sergon directed that parties file written submissions in support of the said application which came up on the 25th November 2021 and the honourable Judge reserved a ruling in respect of the application dated 18th October 2021 for 30th December 2021.

5. That on the said day 30th December 2021, the applicant was shocked when the honourable Justice Sergon rendering himself on the application dated 18th May 2021 noting that the said application was never argued and clearly there was either an oversight on the part of the Judge.

6. That the applicant is extremely prejudiced by the state of affairs and he did severally write to the Deputy Registrar to bring to the attention of the honourable Judge the aforesaid oversight but all in vain and he subsequently raised this matter with the Judicial Service Commissions and the honourable Chief Justice.

7. That it is manifestly important that this honourable court hear the applicant's application aforesaid in the interest of justice granted that he is bound to lose a stupendous sum of kshs.10,650,000/- in light of this oversight.

8. That the delay in filing this application was occasioned by the applicant's efforts to have the Judge suo moto deal with his letter notifying the court of the same.

9. That the applicant's application is anchored on Section 80 which gives the power of review and Order 45 set out the rules and in the instance case, the applicant relies on (b) on account of some mistake or error apparent on the face of the record or for any other sufficient reason being in the instance case that the application dated 18th May 2021 was Never Canvassed.

10. That the circumstances of this case are of such a nature that would warrant this court's exercise of its inherent jurisdiction by invoking the overriding objective as stipulated under Section 1A and 1B of the *Civil Procedure Act*.

11. That it is clear that the whole Section 80 of the *Civil Procedure Act* grants the court powers to make orders for review, Order 45 set out the jurisdiction and scope of review by hinging review to discovering of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason as adumbrated in the case of Muyodi vs. Industrial and Commercial Development Corporation and another (2006) 1 EA 243.

12. That the error apparent on the record herein is self-evident error which does not need elaborate arguments to support it.

13. That the applicant relies in a passage in the 13th Edition of Mulla or the Indian Code of Civil Procedure where Order 47 Rule 1 on review is discussed and at page 1672 it states:

> " A mere error of law is not a ground for review under this rule. It must mfurther be an erroer on the face of the record. The lineof demarcation between an error simpliciter and an errore apparent on th efface of the record when it is obvious and sel-evident and does not require an elaborate argument to be established."

14. That in this case the application dated 18th May 2021 was not coming up for ruling and was not canvassed and the ruling of 30th December 2021 do not tally with the application dated 18th October 2021 which as was for cross-examination of the defendant.

15. The question that arises in such a situation is "What is meant by the word 'Record' does it mean the ruling alone. In an English case of R. v Patents Appeal Tribunal (1962) 2 QB 647 the same word was considered. The court had to decide what was record and it held that a record includes documents which are the basis of the decisions as well as the statement of the decision itself.

16. In the instant case, the documents forming the basis for the impugned decision would be the application dated 18th October 2021 and this honourable court should conjunctively scrutinize all the pleadings dated 18th May 2021 and 18th October 2021 and it is instructive the at the submissions filed by the parties giving rise to the ruling dated 30th December 2021 was in respect of the application dated 18th October 2021 and the record in respect to this matter would include all the above enumerated documents and to be able to assess whether the applicant's claim that there is an error on it , the court needs to scrutinize all of them.

17. That additionally, Article 50 (1) Supra reads;

> " Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or, if appropriate, another independent and impartial tribunal or body".

18. That the applicant relies on Articles 50 and 159 of *the Constitution* of Kenya and in so far as the application dated 18th May 2021 is concerned, there was no right to a fair hearing, as adumbrated in Adolf Gatonga Vs. Mwangi thiongo (1982 – 1988) 1 KAR 1027.

19. That the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system as adumbrated in Onyango Oloo vs. Ag. (1986 – 1989) EA 456

> " There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned, unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. See Sangram Singh vs. Election Tribunal, Kotah AIR 1955 sc 664 AT 711."

20. That in Ridge vs. Baldin (1964) AC (1963) 2 A11 ER 66, the court while discussing the right to a fair hearing observed as follows;

> "the principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and question the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process."

21. That a management committee of Makondo Primary school and another vs. Uganda National Examination Board HC Civil Misc Application no. 18 of 2010, the Ugandan Supreme Court stated as follows regarding the rules of natural justice;

> " It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of human kind. It was ordained by the divine hand of the Lord God

hence the rules enjoy superiority over all laws made by human kind and that any law that contravenes or offends against any of the rules of natural justice is null and void and of no effect. The rule as captured in the latin phrase "audi alteram parterm" literally translates into "hear the parties in turn" and has appropriately been paraphrased as "do not condemn anyone unheard" This means a person against whom there is a complaint must be given a just and fair hearing."

22. That in the case of RE Hebtulla Properties Ltd (1976 – 1980) 1 KLR 1195 at 1209, it was observed;

> " The tribunal had a duty to hear the landlord on the objection. It did not hear the landlord. There was a violation of the "audi alteram rule"

23. That to the statutory grounds, may also be added 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. The applicant relies on Serengeti Road Services vs. 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 system of justice. See Benjoh Amalgamated Ltd & another vs. KCB (supra).

24. That it is practically impossible to itemize what would be "sufficient reason" for purposes of review under the courts 'residual jurisdiction' or inherent powers. The exceptional instances when obvious injustice would be worked by a strict adherence to the terms of the order or decree as originally passed are copious.

25. That in Chandrakant Joshubhai Patel vs. R (2004) TLR 218, it has been held that an error stated to be appear on the face of the record;

> " Must be such as can be seen by one who runs sand reads that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions"
>
> In this instance, the error is Glaring.

26. That in the instant case, the error is self-evident on the face of the record itself as demonstrated by the record and the error is not one that can be subject of an Appeal.

27. That the applicant further aligns himself to the Court of Appeal decision in the case of Richard Nchapi Leiyagu vs. IEBC & 2 others Civil Appeal 18 of 2013.

28. That it is manifestly clear that the application dated 18th May 2021 was not coming up for hearing on the 25th November 2021, so that there is no way the Judge would have rendered a ruling on a matter that was not coming up for hearing hence the glaring and apparent error in the face of the record and/ or mistake that occurred by the confusion of the applications dated 18th May 2021 and 18th October 2021 which motion dated 18th October 2021 which resulted in the ruling dated 30th December 2021 with respect to the application dated 18th May 2021.

29. That it is apposite to recall as to how the law defines error on the face of the record and the applicant relies in the ae of Independent Medico-legal unit vs. Attrorney General of the Republic of Kenya No. 2 of 2012 (EACJ) the court explained itself on the case as follows;

> " The error apparent must be self-evident not one that has to be detected by a process of reasoning, no error can be an error apparent where one has to travel beyond the record to see

the correctness of the judgment. It must be an error which strikes one by mere looking at the record, and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. A clear case of error apparent on the face of the record is made one where without elaborate argument, on could point to the error and say, here is a substantial point of law which states that one can on the face, and there could reasonably be no two opinions entertained about it. In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish."

30. That the hallmark of this discretionary power requires consideration of the whole context of the challenged ruling, judgment or order by which the court exercised its judicial authority, as it is one of the many weapons in the armory a litigant may use and is primarily important in the expeditious administration of justice.

31. That in light of the events ad Encapsulated by the applicant the basis of the review on the decision by ultra vires as the said application dated 18th May 2021 was never canvassed. So that the said ruling was made ex-parte without taking into account evidence of probative value advanced by the applicant and the issues raised in the motion dated 18th October 2021 which were integral to the determination of the application dated 18th May 2021 rendering the decision Voidable hence the rigor of the logic to the decision was somewhat impaired.

32. That the court erred in not permitting the applicant to canvass his application dated 18th May 2021 and in its broadest sense the applicant means denial of a right to be heard quoting the words of the privy council in A. G. vs Ryan (1980) AC 718;

"It has now, been settled by law that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority".

33. That in its wider aspect, natural justice and legal justice contains the very kernel of the fairness in the administration of justice and those are the salient features enshrined in Article 50 of *the Constitution*.

34. That it should be pointed that the state of affair is herein violated Article 50 of *the constitution* in the circumstances because constitutive elements of this hovel concept were lacking.

35. That similarly the notion of equality of arms premised under Article 27 as read with Article 50 of *the Constitution* guarantees that everyone who is a party to civil or criminal proceedings shall have a reasonable opportunity of presenting his or her case to the court under conditions which do not place him or her at substantial disadvantage vis-à-vis his or her opponent.

36. That it is evident that the applicant never had a chance to positon his evidence for the court to conclusively determine the issues at stake the basis of the application dated 18th October 2021 to cross-examine the defendant which application was to be heard before the application dated 18th May 2021.

37. That the applicant has cited sufficient reasons apparent which qualify for the rounds prescribed under the provisions of Order 45 Rule 1 of the Civil Procedure Rules 2010, Section 63(e) and 3A of the *Civil Procedure Act*.

38. That it is in the interest of justice that the application herein be allowed.

39. The defendant was granted leave to file a replying affidavit on 18/7/2023 opposing the Application. In it was deponed that after they were served with the Interested Party's Application dated 18/5/2021 a replying affidavit thereto was duly filed on the Defendant's behalf on 14/6/2021 and served upon the Interested Party on 15/6/2021.

40. Thereafter, this matter came up for directions on 16/6/2021. Pursuant to the directions the interested party filed a further affidavit sworn by him on 17/6/2021 and served the same upon the defendant's advocates on 18/6/2021.

41. The Interested Party then filed his Written Submissions dated 15/6/2021 in respect of the Application and served the same upon the Defendant's Advocates. Thereafter the matter came up for directions on 16/6/2021.

42. The matter was then mentioned on 28/7/2021 where the plaintiff's advocate indicated that they did not wish to file any document and the defendant was granted leave to file and serve a further replying affidavit. The matter proceeded and Hon Mr. Justice Sergon delivered a ruling dated 30/12/2021.

43. He deponed that the interested party inordinately delayed filing the application from the ruling and it is clear herein that the interested party was present when the said ruling was delivered and was therefore aware of the same yet waited until 6/6/2023 before filing the application and has not provided any valid reason for the long delay.

44. The parties filed written submissions as follows; interested party submitted that the application dated 18/10/2021 was to be heard before the application dated 18/5/2021. On 30/12/2021 the applicant was shocked when the court made a ruling on the application dated 18/5.2021 noting that the said application was never argued.

45. The applicant is therefore extremely prejudiced by the state of affairs as he did severally write to the Deputy Registrar to bring to the attention of the court the aforesaid oversight. The applicant argued that it is important the court hear the applicant's application in the interest of justice granted that he is bound to lose Kshs. 10,650,000.

46. The interested party submitted that the delay in filing the application herein was occasioned by the applicant's efforts to have the judge suo moto deal with his letter notifying the court of the same. The interested party's Application is anchored on Section 80 which gives the power of review and Order 45 set out the rules and in the instance case, the applicant relies on (b) on account of some mistake or error apparent on the face of the record or for any other sufficient reason being in the instance case that the application dated 18/5/2021 was never canvassed.

47. The interested party submitted that Section 80 of the *Civil Procedure Act* grants the court powers to make orders for review, Order 45 set out the jurisdiction and scope of review by hinging review to discovering of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason. That in the instant case the error is self-evident on the face of the record itself.

48. On the delay the interested party submitted that the court is not shackled by statutory or procedural obligations but its duty bound to correct mistakes under its inherent jurisdiction. The applicant referred to Article 259 (8) of *the constitution* and submitted that there is no statutory definition of unreasonable delay but courts look at the facts of each case to see whether there has been unreasonable delay and the explanation of the delay.

49. The defendant submitted that the claim that the application dated 18/5/2021 was never argued is factually wrong as the parties filed numerous affidavits and submissions at several dates in respect of the said application.

50. That it is thus abundantly clear that the application had been in fact fully argued and ventilated and neither of the parties had given the court any indication that they wished to have any other hearing thereof.

51. The defendant argued that the court had before it an application and the parties filed subsequent affidavits and submissions. Thus, there was nothing stopping the Honorable judge from rendering himself on the application, which he did by way of ruling dated 30/12/2021. There was no glaring error apparent on the record as the Hon. Judge was perfectly entitled to proceed and rule on the application as he did.

52. The defendant submitted that in the current case the interested party seeks to review and set aside the ruling delivered on 30/12/2021 yet waited more than 17 months before he filed the application herein. The interested party indicated that he was trying to get the Hon Judge to correct the alleged error is not valid or acceptable. There is no provision in law allowing such alleged error to be corrected suo moto or by the Hon. Chief Justice on a complaint.

53. The parties highlighted their submissions in court as follows;The applicant submitted orally in court the interested party submitted that the application dated 18/10/2021 was to be heard before the application dated 18/5/2021.

54. That on 30/12/2021 the applicant was shocked when the court made a ruling on the application dated 18/5/2021 noting that the said application was never argued.

55. The applicant said that is therefore extremely prejudiced by the state of affairs as he did severally write to the Deputy Registrar to bring to the attention of the court the aforesaid oversight. The applicant argued that it is important the court hear the applicant's application in the interest of justice granted that he is bound to lose Kshs. 10,650,000.

56. The Applicant/interested party submitted that the delay in filing the application herein was occasioned by the applicant's efforts to have the judge suo moto deal with his letter notifying the court of the same. The interested party's Application is anchored on Section 80 which gives the power of review and Order 45 set out the rules and in the instance case, the applicant relies on (b) on account of some mistake or error apparent on the face of the record or for any other sufficient reason being in the instance case that the application dated 18/5/2021 was never canvassed.

57. The interested party submitted that Section 80 of the *Civil Procedure Act* grants the court powers to make orders for review, Order 45 set out the jurisdiction and scope of review by hinging review to discovering of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason. That in the instant case the error is self-evident on the face of the record itself.

58. On the delay the interested party submitted that the court is not shackled by statutory or procedural obligations but its duty bound to correct mistakes under its inherent jurisdiction. The applicant referred to Article 259 (8) of *the constitution* and submitted that there is no statutory definition of unreasonable delay but courts look at the facts of each case to see whether there has been unreasonable delay and the explanation of the delay.

59. The applicant said that the Judge dealt with the application dated 18/5/2021 instead of the one dated 18/10/2021 which was under consideration.

60. The applicant further said that in the application dated 18/10/2021, he had sought to cross examine one RICHARD KARIUKI who swore an affidavit dated 10/11/2021.

61. He said the reason he sought to cross-examine the said deponent was because he had attached petty cash vouchers to the said affidavit which are not related to this case.

62. He said when the matter coming for hearing on 25/11/2021, it was the application dated 18/10/2021 which was canvassed but the court delivered a ruling in the application dated 18/5/2021 which was not canvassed.

63. The respondent on their part submitted orally that there was no error by Hon. Justice Sergon when he delivered the ruling 30/12/2021.

64. Further that the application on which the Judge ruled was filed first dated 18/5/2021 prior to the one dated 18/10/2021.

65. The respondent submitted that the application dated 18/5/2021 was fully canvassed by filing replying affidavits and written submissions of both parties.

66. The respondent submitted that the submissions were filed prior to the filing of the application dated 18/10/2021.

67. The respondents said in para 6 & 7 of their submissions they listed the submissions filed in the application dated18/5/2021.

68. He said there was no order by the court that the application dated 18/10/2021 be heard before the one dated 18/5/221 and the Judge rendered himself in the application dated 18/5/2021.

69. The respondent submitted that the applicant wrote letters to the Chief Justice two months after the ruling and cleared the Judge of mischief, fraud and open bias but he did not say there was an error apparent on the face of the record.

70. The respondent also submitted that there has been a delay in filing the application dated 6/6/2023 seeking review and the same should be disallowed.

71. The issues for determination in this application are as follows;

    (i) Whether the ruling dated 30/12/2021 should be reviewed and set aside ex debito justitae.

    (ii) Whether the application dated 18/10/2021 should be heard before the application dated 18/5/2021.

72. On the issue as to whether the ruling dated 30/12/2021 should be reviewed and set aside, the governing provisions are Section 80 of the *Civil Procedure Act* and Order 45 of which state as follows;

    80. Review

    Any person who considers himself aggrieved—

    by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

    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.

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

    Any person considering himself aggrieved—

    by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

    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.

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".

74. I find that in the current case, there is no discovery of new and important evidence or error apparent on the face of the record to warrant the review of the ruling the Ruling dated 30/12/2021.

75. I also find that there is no other sufficient reason to review the order of the court.

76. It was not disputed that the application dated 18/5/2021 was filed and canvassed before the one dated 18/10/2021.

77. If the applicant wanted to have the application dated 18/10/2021 canvassed before the one dated 18/5/2021, he ought to have asked for priority to be given to the later application dated 18/10/2021.

78. I find that even if the current Applicationdated 6/6/2023 seeking review met the threshold for review (which it does not), there has been delay in filing the same.

79. In the case of Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR it was held that:-

> "An unexplained delay of two years in making an application for review under Order 44 Rule I (now Order 45 Rule 1) is not the type of 'sufficient reason' that will earn sympathy from any court"

80. On the issue as to whether the application dated 18/10/2021 should be heard before the application dated 18/5/2021, I find that the application dated 18/10/2021 has been overtaken by events since the Judge already rendered himself in the application dated 18/5/2021.

81. In paragraphs 9 and 12 of the Ruling dated 30/12/2022, the court stated as follows;

> " There is no dispute that the Interested party is seeking for an order to enforce by execution against the defendant to recover a sum of ksh.10,650,000/=. The defendant has averred that the Interested party has fully been paid and that the interested party gave a letter of discharge to the defendant. The Interested party has admitted authoring the letter of discharge dated 18th May 2016. He however claims that he was duped by the defendant to write such a letter.
>
> The Interested party has not stated how he was duped by the defendant. In the absence of credible evidence to prove how he was duped by the defendant to issue the letter of discharge, I find that the defendant has satisfactorily established that the Interested party willingly authored the letter dated 18th May 2016 discharging the defendant from further liability to the Interested party.
>
> It is clear from the language of the Interested party's letter dated 18th May 2016 that the Interested party irrevocably discharged the defendant from any liability under the undertakings made to the plaintiff (Nzioka & Co. Advocates) dated 29th March 2013 and 5th April 2013.

In the end, I find the Interested party's motion dated 18th May 2021 to be without merit. The same is dismissed with each party bearing their own costs."

82. I find that the application dated 18/10/2021 which was seeking to cross examine one Mr. Robert Kariuki has already been overtaken because the court already said that the Interested party is not owed any money by the Respondent.

83. In the circumstances, to set aside the ruling of 30/12/2021 would be tantamount to sitting on appeal over the orders of my predecessor.

84. I also find that the delay in filing the Application is inordinate and the reason for delay is not plausible.

85. I find that the application dated 6/6/2023 lacks in merit and I dismiss it.

86. Each party to bear its own costs of the said application.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF MARCH, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... for the Interested Party