Yooshin Engineering Corporation v Aia Architects Limited (Miscellaneous Commercial Application E013 of 2023) [2024] KEHC 5989 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5989 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS COMMERCIAL APPLICATION E013 OF 2023

DKN MAGARE, J

MAY 24, 2024

BETWEEN

YOOSHIN ENGINEERING CORPORATION ..... APPLICANT

AND

AIA ARCHITECTS LIMITED ..... RESPONDENT

RULING

1. This is a Ruling on an Application dated 29/2/2024 seeking the review of the Ruling of this Court dated 20/12/2023.

2. The Application is stated to be brought under the provisions Section 1A, 1B, 3, 3A, 63 and 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

3. The Applicant seeks relief that the Ruling and Order delivered by this court on 20/12/2023 and all consequential orders be set aside and/or vacated.

4. The Application is premised on the grounds on the face of it as well as the Supporting Affidavit of Mohammed Munyanya sworn on 29/2/2024 as doth:

> "That the Applicant only learnt of the existence of these proceedings upon service by the auctioneer's warrants of attachment and notice of proclamation.
>
> The Applicant was not heard before the Ruling."

5. The Application was opposed through a Replying Affidavit of the Respondent sworn by one Mary Njagi on 14/3/2024.

6. It is deposed that the Applicant was duly served with the Bill of Costs and Taxation Notice by email under Order 5 Rule 22B of the *Civil Procedure Rules* through their known email address. The certificate of costs was equally served by email as per the annexed extracts.

7. The Applicant filed a further affidavit in response to the Replying Affidavit. It was stated that there was an Application to set aside the costs awarded by the Court of Appeal filed on 8/3/2024.

8. Further, that the Applicant was not served with the pleadings in respect to the taxation and these proceedings.

Submissions

9. The Applicant filed submissions dated 9th April 2024 in support of the Application.

10. It was submitted that there was no service and so the Ruling was irregular. They relied on Yooshin Engineering Corporation Limited v AIA Architects Limited (2023) eKLR.

11. It was also submitted that as the taxation proceedings were conducted in the Court of Appeal, these proceedings were supposed to be initiated under the Civil Procedure Rules, 2022.

12. On the part of the Respondent, they filed submissions dated the Applicant had not satisfied the conditions for setting aside a Judgement or Ruling in default. They relied on *Ndungu v Real People Kenya Limited & Another* (2022) eKLR.

13. They submitted that no reference had been preferred against taxation as required under Section 51 of the *Advocates Act* read with paragraph 11 of the *Advocates Remuneration Order*.

Analysis

14. The single issue for my determination is whether the Applicant has met the legal threshold for an Order of review. I note parties to divert into issues as to whether the taxations proceedings and the consequential orders were irregular. The role of this court is limited to the Application dated 19th July 2023 and consequential Ruling dated 20th December 2023 which is said to have been in error.

15. The proceedings leading to the issuance of a decree for the certificate of costs as taxed by the taxing master are not before this court. Consequently, the issue of service as applicable to this court cannot be in respect of the Application the taxations proceedings before the taxing master that are said to have been conducted without hearing the Applicant.

16. Therefore, although the Applicant evaded submitting on review and heavily submitted on irregularity of the Ruling of this Court and the denial of the right to be heard, I have no doubt that the Application raises issues that fall within the purview of the provisions of Sections 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The Jurisdiction of this Court to grant review therein is well set out in the law.

17. Section 80 of the *Civil Procedure Act* states that:

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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".
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> 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.

18. 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"

19. I also associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v 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."

20. I am thus required to determine whether there is an error apparent on the face of the Ruling dated 20th December 2023 that is subject to review in the Application. It is said that the Applicant was not served and this court did not consider that fact in arriving at the ruling.

21. From the face of the Ruling, there is nothing to review in the manner stated in the Application. The Applicant was served as detailed in the Replying Affidavit of the Respondent and the court dates were also updated via the CTS portal. I am thus not convinced that there was an error on the face of the record based on this court's observation that there was no active participation by the Respondent who is the Applicant herein.

22. The Court of Appeal in *Mahinda v Kenya Power & Lighting Co.* Ltd [2005] 2 KLR 418 expressed itself as follows:

> "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."

23. The Applicant to contends that the order pursuant to the Ruling dated 20th December 2023 was irregular and unlawful. The Respondent would better be placed in law to challenge the order by way of an appeal as opposed to review. The jurisdiction of this Court to review its orders is limited under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The Application does not fall within the stated provisions of the law. In the case of *Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party)* [2019] eKLR it was held that:-

> "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."

24. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> "The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. 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."

25. The exercise of my unfettered discretion as argued by the Applicant has to be premises within the bounds of the law. Otherwise it will be capricious and whimsical and defeat the very purpose of serving justice that the law is set to achieve. The Applicant is silent on the cause list which was in Kenya law and the CTS.

26. Whether the court erred in wrongly assuming jurisdiction, it is a matter for infusion of wisdom for ma higher court. A decision can be completely wrong or the court misapprehends the law. It is not up to

the applicant to re-jig the court's memory and school the same court on its misconception of the law. It could even be that one is wondering loudly, how could the high court adopt a certificate of costs in a different matter.

27. I have seen two schools of thought on where the certificate is to be executed. Is it in the matter appealed from or in a separate miscellaneous application. The answer to this is a question of law. Whether this court erred or not, is not for the same court to determine.

28. Finally, the fact that an application to set aside is in the Court of Appeal does not operate as stay.

29. I find no legal basis on which to exercise my discretion in favour of the Applicant. In the case of *Ramakant Rai v Madan Rai*, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> "Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
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> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He s 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".

30. In the circumstances, I am inclined to dismiss the Application.

Determination

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

    a. The Notice of Motion dated 29th February 2024 does not meet the threshold for an order of review and is hereby dismissed with costs of Ksh. 20,000/-.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr Sang for the Applicant

Mr Onyango for the Respondent.

Court Assistant - Brian