Mpalale & 6 others v Amuok & 3 others (Civil Suit E122 of 2021)
[2023] KEHC 62 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEHC 62 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E122 OF 2021

OA SEWE, J

JANUARY 18, 2023

BETWEEN

KENNEDY MUDI MPALALE ..... 1ST PLAINTIFF

RAPHAEL OCHOLA ..... 2ND PLAINTIFF

RUKIA KHAMISI ..... 3RD PLAINTIFF

MOSES OMONDI OTIENO ..... 4TH PLAINTIFF

ABDALLA NYANDO ..... 5TH PLAINTIFF

TARACISIO MWANIKI ..... 6TH PLAINTIFF

MICHAEL OGWENO ..... 7TH PLAINTIFF

AND

GABRIEL AMUOK ..... 1ST DEFENDANT

JOSEPH TITO ..... 2ND DEFENDANT

DANIEL OMALA ..... 3RD DEFENDANT

REGISTRAR OF SOCIETIES ..... 4TH DEFENDANT

RULING

1. The notice of motion dated March 21, 2022 was filed by the 1st, 2nd and 3rd defendants under sections 1A and 3A of the *Civil Procedure Act*, chapter 21 of the laws of Kenya, as well as orders 42 and of the *Civil Procedure Rules*, for orders that:

   (a) Spent

   (b) Spent

(c) That the court be pleased to review its orders granted herein ex parte on March 2, 2022 pending the hearing and final determination of the application for review filed herein by the 1st, 2nd and 3rd defendants.

(d) That the costs of the application be provided for.

2. The application was premised on the grounds that it has come to the knowledge of the 1st, 2nd and 3rd defendants (hereinafter, "the applicants") that the plaintiffs/respondents are now intent on completely paralyzing the operations of the Mombasa Water Kiosk Operators Association (the Association) following the issuance of the ex parte orders dated March 2, 2022; which would expose the members of the Association to irreparable loss and damage. They further averred that their failure to attend court virtually on March 2, 2022 was due to an honest mistake on the part of their counsel. They added that they are keen on opposing the respondents' application dated December 17, 2022; and therefore that it is in the interest of justice and fairness that the orders of March 2, 2022 be set aside.

3. The application was supported by the affidavit of the 1st applicant, Gabriel Amuok, sworn on March 21, 2022 on behalf of the 1st, 2nd and 3rd applicants. Mr Amuok averred that they were duly served with the court order dated March 2, 2022 and that they all had the intention of vehemently opposing the respondents' application dated December 17, 2021. He further deposed that, to that end, they instructed an advocate who proceeded to file their Memorandum of Appearance and Defence in good time on January 24, 2022 and February 8, 2022, respectively. The 1st applicant further stated that it was by an honest mistake in their counsel's diary that there was no attendance virtually on March 2, 2022. He explained that the matter had been mis-diarized for March 9, 2022 by the clerk of their advocate. They consequently prayed that they be given a chance to defend the respondent's application; in respect of which they filed a Replying Affidavit on March 4, 2022.

4. In response to the application, the respondents filed a Replying Affidavit on March 28, 2022, sworn by the 1st respondent, Kennedy Mudi Mpapale; their stance being that the application is incompetent, bad in law and therefore an abuse of the process of the Court. The 1st respondent explained that he was present in their advocate's office on March 2, 2022 when the matter proceeded virtually; and that before proceeding ex parte, the court placed aside the file and gave time for the applicants' counsel to be in attendance. He further averred that by March 2, 2022 no replying affidavit had been filed on behalf of the applicants; and that so far, no explanation has been given for that omission. Thus, the 1st respondent urged the court to dismiss the application for it also offends the oxygen rule.

5. The applicants filed a further affidavit on April 1, 2022 in response to the respondents' replying affidavit. The essence thereof was to reiterate their assertion that failure by their advocate to attend virtual court on March 2, 2022 was due to an honest mistake which ought to be excused by the court in the interest of justice. At paragraph 5 of the Further Affidavit, the 1st applicant explained that the matter was mis-diarized for March 9, 2022; and that a Replying Affidavit was otherwise filed within time on March 4, 2022; within 3 clear days of the hearing date.

6. A perusal of the record shows that when the respondent's application dated December 17, 2021 was filed, the Court declined to issue ex parte orders and directed that it be served for hearing inter partes on March 2, 2022. It is common ground that the application was duly served for virtual hearing on March 2, 2022 as directed by the Court; and that there was no appearance by the defendants/respondents on March 2, 2022. Accordingly, the Court proceeded ex parte and granted a temporary injunction pending the hearing and determination of the suit. It was thereupon that the respondents filed the instant application.

7. Although the application was expressed to have been brought under orders 42 and 45 of the *Civil Procedure Rules*, the facts hereof do not seem to commend themselves for consideration under either provision. Whereas order 42 deals with appeals generally, which this matter is not; order 45 provides for review. Hence, rule 1 thereof provides that:

   (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.

8. It is therefore plain from the aforesaid provision that a party seeking review is under obligation to demonstrate that:

   (a) there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or

   (b) that there is some mistake or error apparent on the face of the record; or

   (c) that there was any other sufficient reason;

9. What transpired on March 2, 2022 was that an application was heard ex parte upon proof of service. There was therefore no error or mistake apparent on the record of the Court in that respect. In the same vein, it cannot be said that there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or sufficient reason to warrant review. What transpired was that counsel was duly served but out of inadvertence, the matter was diarized for a different date, namely March 9, 2022. That being the case, the appropriate provision would be order 51 rule 15 of the *Civil Procedure Rules* which gives the court the general power to set aside ex parte orders made in respect of applications.

10. In the circumstances set out herein above, I am satisfied that the explanation given is plausible; and that applicants are not to blame for the mishap. Indeed, as aptly stated by the Court of Appeal in *Philip Keipto Chemwolo and Mumias Sugar Co Ltd v Augustine Kubende* [1986] eKLR:

> " The principle obviously is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

11. In the premises, I am satisfied that the applicants' notice of motion dated March 21, 2021 is meritorious. The same is hereby allowed and orders granted as hereunder:

   (a) That the orders made herein on March 2, 2022 be and are hereby set aside;

   (b) That the application dated December 17, 2021 be and is hereby reinstated for disposal on merit;

   (c) The costs of the application be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18TH DAY OF JANUARY, 2023.

OLGA SEWE

JUDGE