Githambo General Contractors v Ray Construction Company Limited (Civil Suit 135 of 2009) [2023] KEHC 1791 (KLR) (2 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1791 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT 135 OF 2009

FN MUCHEMI, J

MARCH 2, 2023

BETWEEN

GITHAMBO GENERAL CONTRACTORS .... PLAINTIFF

AND

RAY CONSTRUCTION COMPANY LIMITED .... DEFENDANT

RULING

Brief Facts

1. This application is dated April 6, 2022brought under section 1A, 1B and 3A of the *Civil Procedure Act* and Order 45 Rules 1 and 2 of the *Civil Procedure Rules* seeks for the orders of review and setting aside the ruling delivered on February 13, 2015 delivered by Sergon J.

2. The respondent opposed the application and filed his replying affidavit dated October 4, 2022.

The Applicant's Case__

3. It is the applicant's case that the court entered judgment in the suit herein onSeptember 23, 2011which was never appealed nor set aside. The respondent thereafter filed two preliminary objections. The court heard the preliminary objection dated April 14, 2014and delivered its ruling on February 13, 2015striking out the suit with costs. The applicant argues that the court erred in hearing the preliminary objection because there was already a judgment in place. As such, the applicant seeks for review the said ruling on the premise that the decision was an error apparent on the face of the court record.

The Respondent's Case

4. The respondent states that the import of the ruling dated February 13, 2015was to the effect that the plaint did not disclose a reasonable cause of action against the respondent's company and as such, the preliminary objection was upheld and the entire suit was struck off with costs.

5. The respondent contends that the application is bad in law as it has not presented any of the grounds that must be met for an order of review to be considered.

6. Moreover, the ruling was delivered on February 13, 2015and the applicant filed its application for review onApril 6, 2022. Thus the timelines between the ruling and the instant application depict a clear and unreasonable delay and ought to be struck off with costs. Furthermore, the instant application is time barred as the cause of action arose on 14/8/2007 and the application has been brought 15 years later well over the permitted time period of six (6) years.

7. The respondent further contends that the applicant attempted to institute a duplicate suit over the same transaction and the same was struck out for being statutorily time barred over 5 years ago. Moreover, the respondent argues that the applicant lacks the locus standi and authority to bring the instant application as he is neither a proprietor of the sole proprietorship nor is he a duly authorized representative of the respondent company and this issue was determined in the previous suit. The respondent further avers that the duly authorized proprietor of the applicant company confirmed that he had no claims against the respondent.

8. Parties hereby disposed of the application by way of written submissions.

The Applicant's Submissions

9. The applicant filed submissions dated January 5, 2023, which by their content are not relevant to his application. The submissions relate to the merits of the main suit to which it attached documentation to support his contentions. This court will restrict only itself to the issues concerning the instant application.

The Respondent's Submissions

10. The respondent relies on section 7 of the *Civil Procedure Act* and the case of *A. N. M v P. M. N* [2016] eKLR and submits that the instant application is *res judicata* by the fact that the ruling dated June 29, 2017 essentially locked out the applicant's claims for reason of being time barred. The said ruling has neither been set aside nor has it been reviewed. The respondent argues that the applicant is being overly litigious as when the first suit was struck out for having no reasonable cause of action, the applicant instituted another suit in a different jurisdiction but over the same subject matter. The said suit was dismissed on the grounds that it was statutorily time barred. The respondent submits that the applicant's suit is based on a road works contract entered into on August 14, 2007. The alleged breach of that contract that gave rise to the applicant's initial suit as pleaded by him severally in Civil Suit No. 135 of 2009 and Civil Case No. 11 of 2015 occurred latest in May 2009.

11. The respondent argues that the applicant's action is admittedly founded on contract. In calculation of time, the six year period came to an end sometime in the year 2015. Thus the applicant should not be allowed to litigate on issues of breach of contract arising out of the said contract in the year 2022 as this would be an injustice to the respondent. To support its contention, the respondent relies on the case of *Gathoni v Kenya Co-operative Creameries Ltd* [1982] KLR 104.

12. The respondent further argues that in bringing the instant application thirteen (13) years after the cause of action arose, amounts to an inexcusable and unreasonable delay to which the applicant has not given any justifiable reasons for the delay. The respondent relies on the case of *Mohsen Ali & another vs Priscillah Boit & another* E & L No. 200 of 2012 [2014] eKLR to support its contentions.

13. The respondent refers to section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* and submits that the applicant as not satisfied the conditions set out to grant order of review. The respondent relies on the case of *Nyamogo and Nyamogo Advocates v Kogo* [2001] E.A. 173 and submits that the applicant has not demonstrated any error apparent on the face of the record, which does not require an elaborate argument. Instead the applicant has merely requested the court to review its decision with no lawful reasons attached to the request as required by law.

14. The respondent relies on the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR and further argues that the applicant has not established that there is new evidence produced before the court for examination.

15. The respondent contends that the applicant has filed new documents attached to his submissions thus introducing new evidence without the leave of the court. The respondent submits that the applicant ought to have attached any documents on to his supporting affidavit as attaching the documents to his submissions does not give the respondent an opportunity to properly examine and rebut the documents. As such, the respondent prays that the said documents be expunged from the court record.

Whether the application is merited.

16. Order 45 of the *Civil Procedure Code* sets out the parameters for an application for review 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 order made 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 which he applies for the review.

17. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

18. The applicant herein has grounded his application on an error or mistake apparent on the face of the record.

19. The question then begs as to what constitutes a mistake or error on the face of the record. In the case of *Muyodi v Industrial and Commercial Development Corporation & another* (2006) 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:-

> In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this court said that an error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may be conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.

20. Similarly in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR the court stated:

> 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 provisions of law cannot be a ground for review.

21. The court went on to say:-

> The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the *Civil Procedure Rules* and section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/ decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.

22. Evidently, from the above, it is clear that the error if any, ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. The applicant in the instant application attributes the error apparent on the face of the record to the fact that there was in place a judgment delivered on September 23, 2011which was not appealed against, but the court delivered a ruling on February 13, 2015 striking out its case. I have perused the court record and noted that the matter was heard ex parte and judgment delivered

on September 23, 2011. Thereafter, the respondent filed an application dated 3/11/2011 to have the ex parte judgment set aside on the grounds of lack of proper service. The court delivered its ruling on 21/11/2011 and found that the application had merit, set aside the ex parte judgment and directed that the matter be set down for hearing of the main suit. The respondent then filed a preliminary objection dated February 27, 2012on the basis that the applicant's plaint did not disclose any reasonable cause of action. The applicant thereafter amended his plaint on May 30, 2012 but the respondent filed another preliminary objection dated April 14, 2014on the same contention and further that the applicant lacked capacity to bring forth the claim. The court heard the preliminary objection datedApril 14, 2014and delivered its ruling on February 13, 2015, whereby it upheld the preliminary objection and struck out the applicant's suit with costs.

23. Based on the foregoing, it is evident that the applicant's prayers for review are misplaced. The applicant has not demonstrated an error apparent on the face of the record and moreover, what the applicant is contesting cannot be entertained by an application for review. The applicant ought to have filed an appeal against the ruling of the court as opposed to seeking for review. This court lacks the jurisdiction to review the orders of another judge of equal or concurrent jurisdiction.

24. I have considered the main issues raised herein and reach a conclusion that this application dated April 6, 2022 lacks merit.

25. The application is hereby dismissed with each party to meet its own costs.

DATED AND SIGNED AT NYERI THIS 2ND DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 2nd day of March, 2023