



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC MISC. No. 11 OF 2020

MUSA SAID.....APPLICANT

VERSUS

MIRAJI MUSTAFA.....1ST RESPONDENT

SWALEH MUSTAFA.....2ND RESPONDENT

AHMED MUSTAFA.....3RD RESPONDENT

HUSSEIN MUSTAFA.....4TH RESPONDENT

KULTHUM MUSTAFA.....5TH RESPONDENT

RULING

1. The applicant commenced these proceedings through Notice of Motion dated 18th May 2020. The application was struck out with costs through ruling delivered by N. A. Matheka J on 26th October 2020. The applicant later filed Notice of Motion dated 5th January 2021, the subject of this ruling.

2. The following orders are sought in the application:

1. THAT this Honorable Court be pleased to review its ruling given on the 26th day of October 2020 striking out the Applicant's Notice of Motion Application dated the 18th day of May 2020 and set it aside.

2. THAT on the grant of Prayer No 1 therein this Court be pleased to fix the Applicant's Notice of Motion Application dated the 18th day of May 2020 for Inter Parties Hearing on a priority basis.

3. THAT the Costs of this Application be provided for

3. The application is supported by an affidavit sworn by the applicant. He deposed that there is an error apparent on the face of the record in that based on the material that was presented before it, the court ought not have concluded that *sub-judice* and *res judicata* under **Sections 6** and **7** respectively of the **Civil Procedure Act** had been established.

4. The respondents opposed the application through notice of preliminary objection dated 22nd February 2021. The objection was however heard and determined through ruling dated 21st April 2021. It seems that besides the preliminary objection, the respondents did not file any other response to the application.

5. Parties were ordered to file written submissions in respect of the application. When the matter came up for scheduling date of ruling and none of the parties had filed any submissions despite having been accorded ample time to do so, the court decided to render a ruling based on the material on record.

6. Pursuant to **Order 45 Rule 2 (1)** of the **Civil Procedure Rules**, an application such as the present one ought to be heard by the judge who made the order sought to be reviewed. It turns out that my sister N. A. Matheka J who made the order sought to be reviewed has since proceeded on transfer to another station and I have taken her place. In the circumstances, I now consider and determine the application under

Order 45 Rule 2 (2) of the Civil Procedure Rules.

7. I have considered the application and the material on the record. The law relating to review is found at **Section 80 of the Civil Procedure Act** which provides:

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.

8. **Order 45 Rule 1 of the Civil Procure Rules** makes further provisions on review as follows:

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.

9. It is trite law that a party who has filed an appeal automatically excludes himself from the option of review. The Court of Appeal restated as much in the case of **Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR** where it held:

... The respondent lodged a notice of appeal on 30th August, 2016. ... It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. ...

*Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: **Kamalakshi Amma v A. Karthayani [2001] AIHC 2264**). The respondent's application for review was therefore incompetent hence the court did not have jurisdiction to grant the orders sought under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.*

10. A perusal of the record herein shows that the applicant filed a Notice of Appeal on 5th November 2020 against the ruling and order sought to be reviewed. On the same 5th November 2020, the applicant's advocates delivered to the Deputy Registrar a letter dated 3rd November 2020 in which the applicant expressed both dissatisfaction with the ruling of 26th October 2020 and an intention to appeal against it.

11. In view of the existence of the Notice of Appeal, this court lacks jurisdiction to grant the orders sought in Notice of Motion dated 15th January 2021. A suit or application filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**. The present application must inevitably be struck out.

12. Even if I had to consider the application on its merits, I would not have allowed it. The applicant contends that there is an error on the face of the record, the error according to him being that based on the material that was presented before it, the court ought not have concluded that *sub-judice* and *res judicata* under **Sections 6 and 7** respectively of the **Civil Procedure Act** had been established. Even assuming for a moment that the applicant is right, an erroneous conclusion of law or evidence is not a ground for review. See **Jameny Mudaki Asava v Brown Otengo Asava & another [2015] eKLR**.

13. In the result, Notice of Motion dated 5th January 2021 is struck out. Since no response was filed against the application, I make no order as to costs.

Dated, signed and delivered at Kakamega this 30th day of November 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Applicant

No appearance for the 1st and 2nd Respondents

No appearance for the 3rd, 4th and 5th Respondents

Court Assistant: E. Juma