



REPUBLIC OF KENYA



**Reliable Freight Services Ltd v Mediterranean Shipping Company S A & another
(Civil Suit 594 of 2000) [2023] KEHC 21070 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 594 OF 2000
DKN MAGARE, J
JULY 10, 2023**

BETWEEN

RELIABLE FREIGHT SERVICES LTD PLAINTIFF

AND

MEDITEREEANEAN SHIPPING COMPANY S A 1ST DEFENDANT

EMBU HIGHWAY TRASNSPORTERS LTD 2ND DEFENDANT

RULING

1. The application was filed on April 12, 2023 seeking directions as follows;
 - a. That this Honourable court be pleased to review its ruling and order delivered and issued on October 17, 2019, by the Honourable Justice P JO Otieno.
 - b. That this Honourable Court be pleased to discharge and/or vary and/or correct and/or amend and/or set aside the ruling and order delivered and issued on October 17, 2019 by the Honourable Justice PJ O Otieno.
 - c. That this Honourable court be pleased to order that the plaintiff's case be re-opened and heard for purposes of adducing the statement of Carren Ojwang.
 - d. That costs of this application be provided for.
2. The main ground is that the Supreme Court has gravamen of the application is that Supreme Court Case No 20 of 2017 *Modern Holding Vs Kenya Ports Authority* [2020] eKLR gave directions on the state of the Kenya Ports authority vis-à-vis Section 62 of the *Kenya Port Authority*.



3. In the said case of Modern Holdings (EA) Limited v Kenya Ports Authority [supra], the supreme court, while dealing with the judgment of PJ O Otieno stated as hereunder: -

“ 58. The history of this matter bears repetition. The acts complained of, occurred in 2008. Both parties litigated at the High Court from 2009. Eleven (11) years later, the dispute remains alive. We have stated above that arbitration under Section 62 is an option both parties should have taken but did not. The jurisdiction of settlement of civil disputes under Article 165(3)(a) of the Constitution was however properly invoked but rejected by the respondent as an afterthought only because it lost the case before the High Court (Otieno J)

59. The justice of the case would therefore lead us to one remedy: that the appeal ought to be allowed only to the extent that we hereby declare that, the respondent having, at the outset, not demanded compliance with Section 62, the jurisdiction of the High Court was properly invoked.”

4. I also note, that though the Kenya Ports Authority indicated that the matter should go to arbitration, the matter has not been taken to arbitration many years later. This court has unlimited jurisdiction to hear and determine the matter as per the plaint herein filed and the Kenya ports authority is a proper party.
5. This case was filed 23 years ago but only the plaintiff has testified. There will be no harm in re-admitting the Kenya Ports Authority. There documents are on record and nothing adverse has so far occurred. The changed circumstances require that we do substantive justice.
6. According to the supreme court, in not so many words, section 62 of the KPA Act essentially has the same effect as Section 6 of the Arbitration Act. Thus, it means the circumstances that obtained on 17th October 2019 have changed. This was not an error of law but such other change in circumstances by the guidance given by the highest court in the land.
7. I agree with the applicant that the effect of the Supreme Court decision is to review new circumstances in line with the circumstances of October 17, 2019. Order 45 Rule 1 Provides 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.”

8. Section 80 of the *Civil Procedure Act* states as doth: -

“Review 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.

9. There was no appeal preferred from the decision. In the circumstances section 80 (a) has been complied with. I also note that the case had not been concluded. Had it been concluded no party could be added.

10. This court is enjoined under Article 159 of the *constitution* to do substantial justice. The Supreme Court in *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR, stated as follows: -

“(54) We have discussed the application of Article 159 already (See the Law Society case above). In *Raila Odinga v I.E.B.C & others* (2013) eKLR, this Court observed further:

“Article 159(2) (d) of *the Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.”

(55) Be that as it may, the essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties. In the instant issue, therefore, while we agree again that the rules must be complied with;

11. *Nuru Ruga Ali & another v Commodity House Limited & 3 others* [2021] eKLR, Justice Nyakundi, stated as doth: -

“The mere fact that the appellants had applied for adjournment previously does not mean he was not entitled to a trial on the merits. The term substantive justice under Article 159 (2) (D) of *the Constitution* cover a range of obligations and duty to the Court to be insulated with a foresight to administer justice against the backdrop of the right to a fair hearing under Article 50 of *the Constitution*.” Legal author and scholar Sir William in dealing with the legal system and substantive justice in his book (History of English Law 3rd Edition Vol 11 -251) had this to say;-

“One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedural rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and a technical



system that the decision of cases turns almost entirely upon the workings of its rules and only occasionally and unconditionally upon the merits of the cases themselves”.

12. Errors of law are not grounds for review. However, in this case, the supreme court has clarified the law and as such it is not an error of law but new circumstances that obtain. It is similar to re-sentencing cases that arise in criminal cases after a certain sentence is found to be unconstitutional. In this case, the court struck out the Kenya Ports Authority to facilitate arbitration under section 62c of the KPA Act. The supreme court has prescribed the tenets for so doing, the arbitration has not been invoked as a fact and this case has also been concluded. The new circumstances demand that this court proceeds with Kenya Ports Authority included.
13. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, the court, John M. Mativo held as doth: -

“25. Discussing the scope of review, the Supreme Court of India in the case of^[15] had this to say:-

the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

14. I am therefore satisfied that there is merit in the application. I allow the application. Prayer 1 and 2 of the matter will have to start denovo to give the 2nd defendant a right to cross examine the witnesses, necessary documents be filed within 30 days.

Determination

15. The upshot of the foregoing is that I find the application dated April 11, 2023 allowed in the following terms;
- a. The order given on October 17, 2019 removing the 2nd respondent KPA from the proceedings is hereby set aside and KPA is reinstated to the suit.
 - b. The matter to proceed afresh. Pre-trial directions to be given after the ruling. KPA to be served with this ruling and order forthwith.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 10TH DAY OF JULY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Odipo for the Plaintiff



No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Isaac Onyango for the 3rd defendant

Court Assistant Brian

