



REPUBLIC OF KENYA



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Africa Oil Turkana Ltd & 2 others v Interstate Petroleum Co. Ltd; 0903658 BC Ltd (Supporting Creditor); Monena & 4 others (Contributor) (Winding Up Cause 1 of 2011) [2023] KEHC 22298 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22298 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
WINDING UP CAUSE 1 OF 2011
AC MRIMA, J
SEPTEMBER 20, 2023**

BETWEEN

AFRICA OIL TURKANA LTD & 2 OTHERS & 2 OTHERS PETITIONER

AND

INTERSTATE PETROLEUM CO. LTD RESPONDENT

AND

0903658 BC LTD SUPPORTING CREDITOR

AND

MAOSA KENGARA MONENA & 4 OTHERS CONTRIBUTOR

RULING

1. This ruling relates to the application by way of Notice of Motion dated November 3, 2022. It was taken out by Edward Kings Onyancha Maina, the 5th Contributor in this cause.
2. The application sought the following prayers: -
 1. that this application be and is hereby certified urgent.
 2. That the limb of the ruling given on 28.05.2019 barring the 5th Contributor making any application without leave of the court be and is hereby rescinded and nullified forthwith ab initio.
 3. That the costs incidental hereto abide in the further court proceedings.



3. The application was premised on the grounds appearing on its face and was supported by an affidavit of the applicant. The applicant also filed written submissions dated May 15, 2023 in further support to the application.
4. The application was opposed by the Petitioners.
5. They filed and relied on a replying affidavit sworn by one Donald Mahaga, who described himself as a Director of the 1st petitioner, the General Manager of the 3rd petitioner and the Country/Local Representative of the 2nd petitioner. They also filed written submissions dated February 8, 2023 and an evenly dated List and Bundle of Authorities.
6. Having carefully considered the instant application, this court has also taken time to peruse the record. Needless to say, the record speaks for itself.
7. Several applications have since been handled and rulings rendered by various Judges. They include the rulings dated May 28, 2019 and November 18, 2019 by Hon. Chemitei, J, the ruling dated March 30, 2021 by Hon. Bwonwong'a, J (now retired) and the ruling dated December 21, 2021 by Hon. Kimaru, J (as he then was).
8. One of the orders in the ruling dated May 28, 2019 by Hon. Chemitei, J, which is now the subject of the instant application, stated as under: -
 - c). Any further claim by the Contributor in respect to this winding up cause ought to be instituted with the leave of the court.
9. The Applicant is yet to appeal against the said ruling. However, he instead filed several applications challenging the basis upon which the Taxing Officer had based the instructions fees on.
10. On November 18, 2019, Hon. Chemitei, J delivered a ruling where he disallowed the applications. The applicant was further directed, by an order of the court, to instead lodge an appeal against the orders of the court if he was dissatisfied.
11. The applicant then filed a Notice of Appeal against the ruling delivered on November 18, 2019, to the Court of Appeal. However, the record is not clear on the state of the said appeal.
12. When Hon. Chemitei, J was transferred from the station, the applicant instituted execution proceedings before Hon. Bwonwong'a, J. In his ruling dated March 30, 2021 the Learned Judge struck out the applicant's application for the same reason that leave had not been sought and obtained prior to filing the execution application.
13. A similar execution application was again filed by the applicant when Hon. Bwonwong'a, J. was transferred from the station. This time round, the application was handled by Hon. Kimaru, J. In his ruling delivered on December 21, 2021, the Learned Judge also disallowed the execution process on account of failure to obtain leave of the court and further since the applicant had appealed against the ruling dated November 18, 2019.
14. The applicant then approached this court with the instant application seeking to challenge the ruling rendered on May 28, 2019 which effectively barred the Contributors from filing any further claim in this matter without the leave of the court.
15. To this court, unlike the rest of the applications which were on execution, the instant application is different. It instead sought to challenge the orders made on May 28, 2019. The application under consideration is, therefore, not *res judicata*.



16. The applicant decried that all his applications seeking execution were disallowed on account of the pendency of the impugned order. He prayed for the setting aside.
17. The application was brought under sections 1A, 3A and 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. It is, hence, an application seeking review.
18. The Petitioners filed several decisions on the subject. The decisions comprehensively cover the subject such that this court may only, but sum up the law on review applications as variously discussed in the said decisions.
19. The power of review in the High Court is anchored in the *Civil Procedure Act*, cap. 21 of the Laws of Kenya and the *Civil Procedure Rules*, 2010.
20. Section 80 of the *Civil Procedure Act* provides as follows: -
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.
21. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 further provides for review in the following manner: -
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.
22. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, *Parliamentary Service Commission v Martin Nyaga Wambora & others* [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and another v Shah* [1968] EA, upon establishing the following principles: -
 - (31) Consequently, drawing from the case law above, particularly *Mbogo and another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
 - i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this court.
 - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the court;



- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the court, how the court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

23. The Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya v Ndungu Njau* observed as follows in respect of reviews applications: -

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 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 proceeds on an incorrect expansion of the law.

24. The import of section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* was considered by the High Court in Miscellaneous Application 317 of 2018, *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.



- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
25. Returning to the case at hand, and taking guidance from the foregoing, this court will now consider whether there is any plausible ground(s) in support of the application.
26. In doing so, the court will look into the following heads: -
- i. Whether there is any discovery of new and important matter or 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 order was made.
 - ii. Whether there is a mistake or error apparent on the face of the record.
 - iii. Whether there is any other sufficient reason.
 - iv. Whether the review was sought without unreasonable delay.
27. On the discovery of new and important matter or evidence, there seems to be nothing in the application suggesting that the Applicant relied on this ground.
28. As to whether there is a mistake or error on the face of the record, the applicant seemed to argue that the court rendered a slip mistake when it made the impugned order. However, going by the nature of the then proceedings and the rationale of the order as discussed by Hon. Bwonwong'a, J and Hon. Kimaru, J (as he then was) in their respective rulings, the contention that the order was made in error can not stand.
29. On the aspect of any other sufficient reason, it is imperative to note that the substantive matter was struck out with costs and those orders still remain unchallenged. The matter has, since then, been in Court on account of execution proceedings on costs.
30. The costs were taxed. As stated, the applicant challenged the taxation and lost. He lodged a Notice of Appeal to the Court of Appeal. According to the record, the taxed costs were fully paid. At one point, the court even ordered a refund of overpaid costs to the petitioners. There is also evidence of payment of the adjournment costs ordered by the court on two instances.
31. With such a background, there is mainly nothing the review of the impugned order is likely to attain. Even if the application is allowed, still the Applicant will not be able to levy any execution on costs



as such costs were long taxed and settled and the taxation has not been set-aside or reviewed. The application, therefore, serves no meaningful purpose.

32. On the issue of delay, the impugned order was made on May 28, 2019. The application was made over 4 years later. The delay, which by any standard is extraordinary, is further not explained. In such a scenario, the maxim of equity that equity aids the vigilant and not the indolent applies. As it is today, equity is no longer an equitable remedy, it was elevated under article 10(2)(b) of the *Constitution* to a constitutional principle. (See the Court of Appeal in *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR).
32. The upshot is that none of the grounds in support of a review application has been sufficiently demonstrated. The application is, therefore, for rejection.
33. As the matter comes to the end, this court has noted that there are several instances where execution proceedings were irregularly initiated by the Hon. Deputy Registrar of this court. For clarity, there are no pending costs due to the applicant in this matter since, according to the record, the taxed costs, as well as the adjournment costs ordered to be paid to the applicant by the court, were all settled.
34. Going forward, unless a new order on costs is made by this court, there is no valid basis for the Hon. Deputy Registrar allowing any execution proceedings in this matter. Therefore, a Deputy Registrar who will, without due care and caution, proceed to, once again, issue execution proceedings risks facing disciplinary action.
35. Having said so and drawing from the foregoing, the following final orders do hereby issue: -
 - a. The Notice of Motion dated November 3, 2022 is hereby dismissed.
 - b. For clarity, the Order by Hon. Chemitei, J contained in the ruling delivered on May 28, 2019 that 'Any further claim by the Contributor in respect to this winding up cause ought to be instituted with the leave of the court' still stands.
 - c. Any pending application which was filed by any of the Contributors after the 28th May, 2019 without leave of the Court is hereby struck out with costs accordingly.
 - d. The Hon. Deputy Registrar and the In-Charge of the High Court Civil Registry shall ensure that order (b) is fully complied with before allowing any of the Contributors to file and institute any processes in this matter.
 - e. The 5th Contributor, Edward Kings Onyancha Maina, shall bear the costs of the application.
 - f. If need be, leave to appeal is hereby granted.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF SEPTEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for the 5th Contributor/Applicant in Person.

Miss Bhulla for Daly, Learned Counsel for the Petitioners and Supporting Creditor.

Mr Kanja and Mr Obonyo for Petitioners.

No appearance for the rest of the parties.



Regina/Chemutai – Court Assistants.

