Miguna & 6 others v National Housing Corporation (Petition 21 of 2017) [2023] KEHC 22355 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 21 OF 2017

OA SEWE, J

SEPTEMBER 20, 2023

IN THE MATTER OF ALLEGED VIOLATION OF THE PETITIONERS'RIGHTS AND FUNDAMENTAL FREEDOMS

AND

IN THE MATTER OF ARTICLES 19, 20, 21, 22(1), (2) AND (3), 23(1) & (3), 25(A) & (C), 27, 28, 40, 42, 46, 47, 53, 70 AND 162(2)(B) OF THE OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RENT RESTRICTION ACT, CHAPTER 296 OF THE LAWS OF KENYA

BETWEEN

DOMINIC OTIENO MIGUNA ..... PETITIONER

AND

SALIM HASSAN JOHA ..... 1ST RESPONDENT

ROBERT OUKO OGUNDO ..... 2ND RESPONDENT

ROSE NANCY SINDIGA ..... 3RD RESPONDENT

ROSE MGANDI ..... 4TH RESPONDENT

DAVID SIMWA ..... 5TH RESPONDENT

EMMANUEL MWANDOE ..... 6TH RESPONDENT

AND

NATIONAL HOUSING CORPORATION ..... RESPONDENT

RULING

(1) Before the Court for determination is the Notice of Motion dated 22nd June 2021. It was filed by M/s Cootow & Associates on behalf of the respondent under Article 159(2)(d) and 165(3) of the *Constitution*, Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya as well as Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 for orders that:

(a) the Court be pleased to review and set aside orders issued in this matter by Justice Farah Amin on 12th September 2019 referring this matter to mediation or any other alternative dispute resolution mechanism.

(b) the costs of the application be provided for.

(2) The application was premised on the ground that there is an error apparent on the face of the record because, as at 12th September 2019 when the impugned order was made, the Court was functus officio. The application was supported by the affidavit of Mr. Augustus Wafula, Advocate, sworn on the 22nd June 2022, in which he averred that the petitioners filed this Petition on 17th May 2017 and that the respondent objected thereto by way of a Notice of a Preliminary Objection dated 19th June 2017, contesting the Court's jurisdiction to hear the matter on the ground that the Petition was res judicata. He added that the Court considered the Preliminary Objection and rendered its decision on 15th October 2018, striking out the Petition with costs.

(3) Mr. Wafula further averred that, being aggrieved by that decision, the petitioners filed an appeal to the Court of Appeal which was similarly struck out, thereby affirming the ruling dated 15th October 2018. He therefore contended that the orders by Justice Farah Amin dated 12th September 2019 by which the dispute was referred to mediation was made in error, granted that the Court was already functus officio. Thus, Mr. Wafula deposed that it is in the interest of justice that the error be rectified to bring the proceedings herein to closure in line with the established principle that litigation must come to an end. He added that no party stands to be prejudiced if the orders sought are granted considering that the parties had an opportunity to litigate the dispute both before this Court and the Court of Appeal and the proceedings brought to an end for practical purposes.

(4) A perusal of the record shows that, although given several opportunities to file a response to the application, the petitioners' counsel failed to do so. Accordingly, the matter was fixed for ruling on the basis of the court proceedings. It is also noteworthy that, although Mr. Wafula made reference to the ruling dated 15th October 2018 at paragraph 3 of his Supporting Affidavit, what was annexed is in fact a ruling dated 24th May 2018 in respect of an application for temporary injunction pending appeal. I have nevertheless perused the court record and the picture painted thereby is as follows:

(a) When the petitioners filed this Petition, they concomitantly filed a Notice of Motion dated 10th May 2017 under a Certificate of Urgency seeking a temporary injunction to restrain the respondent from evicting or harassing them or interfering with their tenancy pending the hearing and determination of the application and ultimately the Petition. The application was certified urgent and fixed for hearing on 24th May 2017. The court record further shows that, on the hearing date, the parties agreed, inter alia, to "forgo the application and to deal with the Petition instead." The respondent thereafter filed a Notice of Preliminary Objection dated 19th June 2017 contending that the Petition was res judicata. The Preliminary Objection was urged

before Hon. Chepkwony, J. who thereafter upheld the same in her ruling dated 15th March 2018; with the result that the entire Petition was struck out.

(b) Being aggrieved by the decision of the Court, the petitioners filed an appeal to the Court of Appeal vide their Notice of Appeal dated 21st March 2018. In a subsequent ruling dated 24th May 2018, the Court (Hon. Chepkwony, J.) acknowledged that an appeal had been filed against the ruling dated 15th March 2018, but nevertheless dismissed the application for temporary injunction pending appeal on the ground that no arguable appeal existed where there was a lack of jurisdiction. That the appeal was heard and determined was deposed to by Mr. Wafula at paragraph 4 of his Supporting Affidavit, though no copy of the decision was availed. The outcome, according to the unrebutted averment by Mr. Wafula, was that the appeal was struck out on 15th October 2018; thereby affirming the determination made herein by Hon. Chepkwony, J. on 15th March 2018.

(c) Thereafter, on the 12th September 2019, the file was placed before Hon. Amin, J. during the service week and having heard the parties, the Court made an order, which is the subject of the instant application, that:

> "Notwithstanding that the Petition is dismissed this Court will not close the file because there is an appeal pending.
>
> It is further ordered that this dispute and all the associated files be referred to mediation.
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> This Court takes the view that mediation is a better use of tax payers' money than contested litigation..."

(d) Attempts to have the impugned order set aside by Hon. Ogola, J. as the Presiding Judge by way of administrative directions was declined by the Judge on 15th March 2021. Instead he left it to the parties to proceed as they may wish and marked the petition as "stood over generally". It was thereupon that the respondent filed the instant application.

(5) In the light of the foregoing, the single issue for determination is the question whether, in the circumstances, the respondent has made out a case to warrant review of the order dated 12th September 2019.

(6) The review jurisdiction is reposed in Section 80 of the *Civil Procedure Act*, which states as follows:

> "Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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."

(7) The procedural imperatives for the above provision are to be found in Order 45 Rule 1 of the Civil Procedure Rules, wherein it is provided 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) I hasten to point out that the application has been made before this Court because Hon. Farah Amin, J. had been transferred out of the station by the time the application was filed. As pointed out by Mr. Wafula in his submissions on 3rd May 2023, the judge has since left the Judiciary. In the premises, the matter was proceeded with pursuant to Rule 45(2)(2) of the Civil Procedure Rules, which provides that:

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing."

(9) Accordingly, I have given due consideration to the application. From the aforesaid provisions, 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 that time; or

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

(c) there is any other sufficient reason; and

(d) the application had been brought without unreasonable delay.

10. In this instance, the application is predicated on the ground that there is an error apparent on the face of the record; and for this purpose it is now settled that the error must be self-evident on the record. Hence, in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal held that:

"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 the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.

(11) As to what amounts to an error apparent on the face of the record, the Court of Appeal, in *Nyamogo & Nyamogo Advocates v Kago* (2001) 1 EA 173, had this to say:

"An error apparent 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 a 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 a long drawn process of reasoning or on points where there may 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 apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

(12) In the instant matter, it is manifest that by the time the impugned order was made, a fundamental point of jurisdiction had been raised and upheld by a court of concurrent jurisdiction on the basis that the suit was res judicata. The order was affirmed on appeal by the Court of Appeal, thereby bringing the dispute to closure for all intents and purposes. I therefore have no hesitation in finding that the impugned order was made in error as the Court was functus officio at the time.

(13) The principle of functus officio was considered by the Supreme Court in the case of *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling), where the court cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832 stating:

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

(14) Similarly, in Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) (supra), the Court of Appeal held as follows on the functus officio doctrine:

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century. In the Canadian case of *Chandler Vs Alberta Association Of Architects* [1989] 2 S.C.R. 848, Sopinka J. traced the origins of the doctrines as follows (at p. 860);
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> "The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:
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> Where there had been a slip in drawing it up, and,
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> Where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. vs. J.O. Rose Engineering Corp.*, [1934] S.C.R. 186"

(15) Thus, it is plain that the impugned order was made in error and therefore is the sort of order envisaged by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. The error is apparent on the face of the record and does not require elaborate arguments to establish. I am also satisfied that the instant application was filed without undue delay.

(16) In the result, the respondent's application dated 22nd June 2021 is hereby allowed and orders granted as hereunder:

(a) That the order issued in this matter by Justice Farah Amin on 12th September 2019 referring this matter to mediation be and is hereby reviewed and set aside.

(b) That there be no order as to costs as the matter is hereby marked closed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF SEPTEMBER 2023

OLGA SEWE

JUDGE