Okoiti & another v Ministry of Transport and Infrastructure & 4 others (Petition 548 of 2015) [2024] KEHC 15185 (KLR) (Constitutional and Human Rights) (3 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15185 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 548 OF 2015

EC MWITA, J

DECEMBER 3, 2024

BETWEEN

OKIYA OMTATAH OKOITI ..... 1ST PETITIONER

NYAKINA WYCLIFFE GISEBE ..... 2ND PETITIONER

AND

MINISTRY OF TRANSPORT AND INFRASTRUCTURE ..... 1ST RESPONDENT

THE KENYA RAILWAYS CORPORATION ..... 2ND RESPONDENT

THE NATIONAL TREASURY ..... 3RD RESPONDENT

CHINA ROAD & BRIDGE CORPORATION (KENYA) ..... 4TH RESPONDENT

THE HON. ATTORNEY GENERAL ..... 5TH RESPONDENT

RULING

1. The petitioners filed a notice of motion application dated 29th September 2016, seeking a review of the ruling delivered on 15th July 2016 by Lenaola J (as he then was) and reinstatement of the petition filed on 9th December 2015 to hearing before a neutral judge in matters concerning the Standard Gauge Railway project. The court is also asked to declare that the respondents committed perjury.

2. The motion is supported by an affidavit and was moved through written submissions with brief oral highlights. The petitioners stated that in striking out the petition, the court miscarried justice by ignoring the fact that the Mombasa-Nairobi-Kisumu-Malaba SGR project was not procured and implemented as a single project. Contrary to that, the project was procured and implemented in phases as evidenced by annexture 000-2 in the affidavit in support of the application.

3. According to the petitioners, phase 1 covered Mombasa to Nairobi; Phase 2A covered Nairobi to Naivasha; Phase 2B covered Naivasha to Kisumu and Phase 2C covered Kisumu to Malaba portion of the SGR project.

4. The petitioners asserted that the feasibility study and Environmental and Social Impact Assessment were done on Mombasa – Nairobi section (Phase 1). This is similar to the application for and issuance of the Environmental Impact Assessment Licence from the National Environmental Management Authority (NEMA).

5. The petitioners maintained that Petition No. 58 of 2014 (consolidated with petition No. 209 of 2014), and the resultant Civil Appeal Nos. 10 and 13 of 2015, challenged the constitutionality and validity of the procurement for Phase 1 of the SGR project. Petition No. 130 of 2015 was also limited to investigations that were being conducted by the Ethics and Anti-Corruption Commission (EACC) into the alleged corruption in the procurement of phase 1 of the SGR project.

6. The petitioners faulted the court's findings at paragraphs 22, 23 and 27 of the ruling and that their documents had been struck out for being illegally obtained. They took the view, that the learned judge considered issues that were not before him in Petition 58 of 2014. They also took the view, that the sub judice rule could not apply with regard to this petition in so far as petition No. 130 of 2015 was concerned.

7. The petitioners again argued that the doctrines res judicata and sub judice could not be invoked as absolute bar to these proceedings. This is because these proceedings were premised on phase 2 of the SGR project, while the proceedings and decisions in Petition No. 58 of 2014 and Petition No. 130 of 2015, concerned phase 1 of the SGR project. The petitioners asserted, therefore, that the court's finding on res judicata and sub judice was an error apparent on the face of the record which justifies a review of that ruling.

8. The petitioners again asserted that they have obtained new and compelling evidence that the Mombasa-Nairobi- Malaba- Kisumu SGR project was not procured and implemented as a single project.

9. The petitioners maintained that although they had filed and served a Notice of Appeal, the intended Appeal was not filed thus, this court has unfettered powers and discretion to grant the orders sought. They relied on the decisions in African Airlines International Ltd v Eastern & Southern African Trade & Development Bank (PTA BANK) [2003] eKLR and Hoima District NGO Forum & Others v Murungi & 5 Others (Civil Misc. application No-HCT-12-CV-MA-0013 of 2013) [2013] UGHCCD 131 (1October 2013).

10. The petitioner asserted that the application was filed timeously and as soon as the new evidence relied upon became available showing that the Mombasa-Nairobi-Kisumu-Malaba SGR was not procured as a single project. The court was therefore wrong in its ruling because while the dispute in this petition arose from the procurement of the Nairobi – Naivasha phase of the SGR; the dispute in Nairobi Constitution Petition No. 130 of 2015, concerned the audit by the EACC of the two procurements processes for the Mombasa- Nairobi phase of the SGR. Civil Appeal No. 10 of 2015 was a successful appeal against the decision in Nairobi Constitutional Petition No. 58 of 2014 consolidated with petition No. 209 of 2014. The courts' finding on res judicata and sub judice was therefore an error apparent on the face of the record.

11. It was the petitioners' position that the 2nd respondent misrepresented the substance of this matter and was guilty of perjury on the assertions at paragraphs 3(i) of the replying affidavit sworn on 11th January 2016.

12. According to the petitioners the issue in Nairobi Petition No. 58 of 2014 as consolidated with petition No. 209 of 2014 was on the impropriety and governmental administrative shortfalls in the procurement process in awarding the tender for the construction of Phase 1 of the SGR project and not the current subject matter which concerns Phase 2A.

13. The petitioner also argued that the 2nd respondent misled the court at paragraph *3*(ii) and (iii) that the substance of this submission was sub judice. The 2nd respondent received the petition in 2015 and filed response in 2016. The only SGR project underway then was Phase 1. The SGR Madaraka Express begun operations in 2017 hence they could not have gone to court to seek to quash the award of a tender which was not in existence.

14. The petitioners maintained that by swearing affidavits and other pleadings to the effect that the various phases of the SGR project were procured and implemented as a single project yet in their knowledge it was not, the respondents committed perjury and should be punished The petitioners relied on Riccarti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR and urged that the application be allowed.

2nd respondent's response

15. The 2nd respondent opposed the application through a replying affidavit and written submissions. The 2nd respondent argued that the application had not disclosed any mistake or error apparent on the face of the record (ruling of the court) on its preliminary objection; the petitioners had failed to demonstrate discovery of new and important evidence which, after exercise of due diligence, could not have been within their knowledge or produced before the ruling and they failed to demonstrate any other sufficient reason for reviewing the ruling.

16. According to the 2nd respondent, the petitioners admitted to filing a Notice of Appeal and, therefore, their application is an abuse of the court process. The prayer that the petition be reinstated and placed before a neutral judge in matters concerning SGR project amounts to forum shopping.

17. The 2nd respondent took the view, that the ruling was made after the court heard all parties and took into account the materials parties had placed before it. The application is, therefore, an appeal disguised as one for review which this court lacks jurisdiction to grant.

18. The 2nd respondent maintained that this petition is res judicata and sub judice as held by the court in that ruling as the issues raised by the petitioners were pending determination in the Court of Appeal and the High Court.

19. The 2nd respondent relied on section 80 of the *Civil Procedure Act*; Order 45 Rule 1 of the Civil Procedure Rules 2010 and the decisions in Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira [2022] eKLR and Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others [2021] eKLR, to argue that the petitioners had failed to adequately prove that the alleged new evidence was not available or within their knowledge and could not have been produced at the time the ruling was delivered.

20. The 2nd respondent also maintained that the petitioners did not meet the threshold for review; the alleged evidence (marked 000-2) are correspondences and notices from the National Environmental Tribunal for a distinct issue that had no relation to the case at hand. The petitioners had also attached several newspapers articles whose probative value is contentious. The petitioners had always been aware of the evidence relied on which formed the crux of their petition. There was no reference to any evidence that was not within their purview when the court delivered its ruling.

21. The 2nd respondent reiterated that the grounds the petitioners raised could only be considered in an appeal by an appellate court but not in an application for review. Reliance was placed on the decision in National Bank of Kenya Limited v Ndungu Njau [1997] eKLR and Ajit Kumar Rath v State of Orisa & Ors on 2 November, 1999 AIR 2000 S C 85, and urged that the application be dismissed with costs.

4th respondent's response

22. The 4th respondent also opposed the application through grounds of opposition of opposition and written submission. It was the 4th respondent's position that the petitioners were always aware of the facts set out in ground (a) of the application. There has therefore been no discovery of new evidence that was not within the petitioners' knowledge or that could not be produced at the time the court delivered the ruling.

23. The 4th respondent asserted that the application is an abuse of the court process as it challenged the merits of the ruling which should only be done in an appeal. The 4th respondent also took the position that there is no error apparent on the face of the record or sufficient reason or cause that would warrant a review of the ruling. The petitioners were also guilty of delay in making the application.

24. The 4th respondent relied on the decision in National Bank of Kenya v Ndungu Njau [1997] eKLR and Nakuru Industries Limited v Sirbrook (K) Ltd [2017] eKLR for the argument that the petitioners did not point out the error or omission that is self-evident in the ruling. On the contrary, the application attacked the merits of the ruling which could only be done in an appeal.

25. The 4th respondent again relied on the decision in Sheila Akinyi Marco & 2 others v Sasanet Ltd & 3 others [2009] eKLR for the contention that the petitioners' arguments that this petition involves the Nairobi- Naivasha phase of the SGR and hence different from petition No. 58 of 2014 were addressed by the court at paragraphs 21-25 of that ruling.

26. The 4th respondent placed more reliance on Stephen Marira Mwangi v David Njiri Stephen & 7others [2019] eKLR and Sheila Akinyi Marco & 2 others v Sasanet Ltd & 3 others (supra) that the petitioners did not set out any new evidence to show that the documents they had listed could not be obtained with reasonable diligence before this petition was filed. They also did not indicate how each of those documents could have had an influence on this court concluding that the petition was not res judicata and sub judice. The court was urged to dismiss the application.

27. The 1st, 3rd and 5th respondents did not file responses or not take part in the application.

Determination

28. I have considered the application, responses and arguments by parties. I have also considered the decisions relied on. The application seeks a review of the ruling delivered on 15th July 2016 and to have the petition reinstated to hearing. The reasons advanced for seeking review are that there is an error apparent on the face of the record and that the petitioner have discovered new evidence thus, the court should allow their application for review.

29. The 2nd and 4th respondents opposed the application on grounds that the petitioners had not demonstrated the apparent error on the record; shown the alleged new evidence and demonstrate that the new evidence could not be available at the time the ruling was delivered despite exercising due diligence. They further argued that the application is a challenge to the merit of the ruling which is a ground for appeal and not review.

30. Section 80 of the *Civil Procedure Act* grants the court power to review its decisions on terms that are just. Order 45 rule (1) of the Civil Procedure Rules provides grounds under which the court may exercise the review jurisdiction. That is, the court may review its judgment, ruling or order where it is shown that there is an error apparent on the face of the record, to correct an omission on the part of the court; on discovery of new evidence or important matter that was not in the possession of the applicant when the decision was made or for any other sufficient cause or reason. In this respect, the court exercises judicial discretion which should be exercised judicially.

31. The law has long been settled regarding when a court should exercise its review jurisdiction. In *National Bank of Kenya Limited v Ndungu Njau (Civil Appeal No. 211 of 1996)* [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.

For the court to exercise its review jurisdiction, the error or omission must be self-evident and clearly discernible from the record. It should not require arguments to establish such error omission.

32. I have perused the ruling delivered on 15th July 2016 as well as the arguments by parties. The ruling was on preliminary objections raised against the petition that the issue of procurement of the SGR project was res judicata and that the petition and application as filed were also sub judice since the issues in the petition were pending in Petition No. 130 of 2015 in the High Court and in Civil Appeal No. 10 of 2015 in the Court of Appeal.

33. The preliminary objections were argued before Lenaola J (as he then was) and after analysing the issues in the petition and those in the other petitions the court allowed the preliminary objections. In its ruling, the court reproduced at paragraph *20* the questions the petitioners had presented to court for determination in petition 58 of 2014 namely; prayers (a) to (h). The court then stated at paragraph *21*:

> Issue No. (a) above specifically refers to the "Mombasa -Nairobi-Malaba/Kisumu Standard gauge railway project." Prayer (b) of the Petition also refers to the single sourcing of the 4th respondent to "supply and implement the standard gauge railway project."
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> The court further stated at paragraph *22*:
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> In my judgement in that petition, I specifically, at paragraph 12-2, (sic), set out the petitioners' case and it was clear to me then and now that they were addressing the SGR project as a whole and not in stages as they have now submitted.

34. The court then stated at paragraph 30 of the ruling:

> ...it is obvious to me that prayers A, B and J of the petition should be best pursued in Petition No. 130 of 2015 and not in this petition by dint of the sub judice rule. For avoidance of doubt, Prayers A, B and J are not barred by res judicata because the prayers are predicted upon the letter of 2nd April 2015 as well as Article 35 of *the Constitution* and in my judgment in Petition No.58 of 2014 while I expunged certain documents from the record, I did not close the door opened by Article 35 of *the Constitution* and the petitioners are at liberty to pursue the obtainance of that information as they have properly done in Petition No. 130 of 2015.

35. The court concluded thus:

> It is obvious from my findings above that all the prayers in the present Petition are barred by either res judicata or by the sub judice rule. All is however not lost for the Petitioners because in C A. No. 10 of 2015, they will obtain a re-look at the decision in Petition No. 58 of 2014 and in Petition No. 130 of 2015, they will have the issue of information sought addressed. The present Petition is therefore doomed for the above reasons and must be struck out and the option of stay of this Petition pending determination of the appeal and Petition No. 130 of 2015 is not a viable one for obvious reasons.

36. It is plain from the excerpts from the impugned ruling that the court considered the issues raised in this petition against those in petition 58 of 2014 and 130 of 2015 and also whether one of the issues in those petitions was about the whole or part only of the SGR project. The court concluded that the petitioners "were addressing the SGR project as a whole and not in stages" as they were arguing in the present petition.

37. The court having determined in that ruling that the petitioners had challenged and addressed the SGR project as a whole and not in phases, it cannot be correct to argue that it was an error on the record when the court concluded that the issue raised in the present petition was the same issue raised in petition 58 of 2014; that the same issues were also pending in petition 130 of 2015 and before the Court of Appeal in Civil Appeal No. 1 0 of 2015. The court also concluded that the petition had challenged the whole of the SGR project and not phase 1 only.

38. If the court was wrong in holding that the matter was res judicata because of the earlier decision and sub judice because of petition 130 of 2015 and *CA No. 10 of 2015*, then that would amount to an error of law or wrong conclusion of law and or fact that can only be challenged by way of an appeal.

39. As the Court of Appeal stated in National Bank of Kenya Limited v Ndungu Njau (supra), it will not be a sufficient ground for review that another Judge could have taken a different view of the matter. It will also not be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.

40. Similarly, in Francis Origo & another v Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001, the Court of Appeal observed that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. And in Pancras T. Swai v Kenya Breweries Limited [2014] eKLR the Court of Appeal again stated that where a party bases his review application on the failure by the court to apply the law correctly, it faults the decision on a point of law which is a good ground for appeal but not a ground for an application for review.

41. Flowing from the above decisions and upon evaluating the application and the impugned ruling, the inescapable conclusion the court comes to, is that the petitioners have not demonstrated that there is an error apparent on the phase of the record to justify this court summoning its review jurisdiction. In the ruling the court considered the issue raised in this petition visa vis the issues in petition No.58 of 2014 and 130 of 2015 as well as in Civil Appeal No. 10 of 2015 and concluded that this petition was res judicata in so far as the judgment in petition No. 58 of 2014 was concerned and sub judice in relation to petition 130 of 2015 and Civil Appeal No. 10 of 2015. Any errors in that ruling could only be errors on conclusions of law or wrong application of the doctrines of res judicata and sub judice which could only be grounds of appeal and not review.

42. This court is also not satisfied that there is discovery of new evidence or important matter since the court concluded that the issue that had been delt with was in relation to the whole of the SGR project and not Phase 1 only as the petitioners had submitted.

43. Consequently, and for the above reasons, the application is declined and dismissed. Costs being discretionary, each party shall bear own costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF DECEMBER 2024

E C MWITA

JUDGE