



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 76 OF 2020

KENNETH JUMBA (Suing as the Chairman of TOI OPEN AIR MARKET

TRADERS SOCIETY).....PLAINTIFF/APPLICANT

-VERSUS-

JOSHUA OGOL.....1ST DEFENDANT/RESPONDENT

FRANCIS MUNYAO.....2ND DEFENDANT/RESPONDENT

DENNIS OPIYO.....3RD DEFENDANT/RESPONDENT

BENARD ONYANGO.....4TH DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant in this instance has brought the Notice of Motion dated 28th October, 2020 supported by the grounds laid out on its face and the facts stated in his affidavit. The applicant sought for the following orders:

i. Spent.

ii. THAT this Honourable Court be pleased review and/or set aside its ruling/decision delivered on 9th October, 2020 and the consequential orders.

iii. THAT in substitute thereof, this Honourable Court allows the plaintiff/applicant to resolve the issue of chairmanship of the society internally.

iv. THAT costs of the application be provided for.

2. The 1st to 4th defendants/respondents resisted the Motion by putting in Grounds of Opposition dated 20th November, 2020 plus the replying affidavit sworn by the 3rd respondent on like date.

3. At the interpartes hearing of the instant Motion, this court gave directions for the parties to file and exchange written submissions.

4. I have considered the grounds set out on the face of the Motion together with the facts deponed in the affidavits supporting and opposing the Motion, the Grounds of Opposition, and the rival submissions plus the authorities cited in reliance thereto.

5. A brief background of the matter is that the applicant instituted a suit against the respondents vide the plaint dated 4th June, 2020 and sought for various reliefs, including a declaratory order that the applicant is the chairman of Toi Open Air Market Traders Society (“the society”) and a permanent injunction restraining the respondents from interfering with his reign as chairman.

6. The suit was accompanied by the application dated 4th June, 2020 in which the applicant sought for interlocutory injunctive orders against the respondents pending the hearing and determination of the suit. The application was opposed by the respondents.

7. Upon hearing the parties' respective positions on the aforementioned application, this court dismissed it for lacking in merit, vide its ruling delivered on 9th October, 2020.

8. The applicant now seeks to review and/or set aside the above ruling through the instant Motion.

9. The germane principles to guide this court in deciding whether to review its earlier ruling are found under **Order 45 of the Civil Procedure Rules, 2010** and reaffirmed under **Section 80 of the Civil Procedure Act Cap. 21 Laws of Kenya**, set out in the manner below:

“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.”

10. The following are the instances in which a court can review a decision already in place:

a) the discovery of new and important matter or evidence, or some mistake or error apparent on the face of the record, or

b) any other sufficient reason.

11. From my study of the instant Motion, it is clear that the applicant is relying on the principles of “error apparent on the face of the record” and “sufficient reason.”

12. In respect to the principle of apparent error or mistake, the applicant states in his affidavit that in arriving at its decision, this court did not take into account the fact that the applicant is still the serving chairman of the society pending an election, and therefore erred in finding that the applicant had already been replaced as chairman and in consequently dismissing his application on that basis.

13. The applicant in his submissions made reference to the case of **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR** in which the Court of Appeal had the following to say regarding an error on the face of the record:

“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.”

14. In reply, the respondents contend that there is no error or mistake apparent on the face of the record and that the allegations made by the applicant are purely intended to mislead this court.

15. The respondents further contend that the ruling delivered by this court was correctly and accurately drawn, thereby requiring no review or setting aside. In short, it is the argument of the respondents that the applicant has not met the threshold for a review of the ruling in question.

16. The respondents relied inter alia, on the case of **Joseph Matano Hamisi & another v Titus Shikokoti Onyango [2016] eKLR** where this court rendered itself thus on the subject of review:

“...from the foregoing it is clear that the applicants have not satisfied the conditions that necessitate a review...Moreover, I do not see any mistake or error apparent on the face of the record, as far as the Ruling by the Honorable Judge is concerned. The judge carefully tackled the matter by consideration the arguments of the parties in arriving at the conclusion he did.

In conclusion, there is also no other sufficient reason provided by the applicant that necessitates a review of the orders. I am convinced that, this is not a matter deserving of an order of review. It is not enough as stated in the National Bank of Kenya case supra, that I would have applied my mind differently in the matter. If the applicants are aggrieved, their remedy lies with the Court of Appeal.”

17. From my perusal of the pleadings, application which gave rise to the ruling of 9th October, 2020 and the ruling itself, I note that the subject relating to the applicant’s chairmanship of the society was adequately addressed by the parties and considered by this court, as indicated in its ruling.

18. Consequently, I am not convinced that there is any error or mistake apparent on the face of the ruling delivered on 9th October, 2020 so as to warrant a review of the same. If anything, I am of the view that if at all the applicant was aggrieved the said ruling, he was at liberty to challenge it through the proper channels since this court cannot revisit issues which it had already made a determination on.

19. In finding so, I am guided by the reasoning of the Court of Appeal in the case of **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR** relied upon by the parties, where it held that where the matters in dispute had fully been canvassed by a court, the said court cannot sit on appeal against its own decision.

20. I further associate myself with my earlier decision in the case of **Cape Suppliers Limited v Treadsetters Tyres Limited [2019] eKLR** cited by the respondents, thus:

“I am of the view that the applicant’s attempts at revisiting issues that have already been determined by this court would essentially be calling for an appeal by this court against its very decision.

If anything, the grounds brought forth by the applicant are more suited as grounds of appeal rather than for review. I therefore have no basis on which to review the decision already in place.”

21. This brings me to the second principle on sufficient reasons. On his part, the applicant states that unless the ruling and order issued by this court is reviewed, he will be unable to execute any contracts or perform his chairmanship duties, thereby resulting in grave prejudice to a number of traders of the society; and that it would be in the public interest for this court to exercise discretionary power of review in respect to its earlier ruling.

22. The applicant is also of the view that the respondents do not stand to suffer any prejudice should an order for review be granted.

23. On their part, the respondents contend that no sufficient reasons have been given to warrant a review of the ruling delivered on 9th October, 2020.

24. Upon considering the record and the rival positions, I reiterate the contents of my earlier ruling that it is apparent that the running/management of the society has been at the helm of the respondents and that it would be imperative for the status quo to be maintained.

25. For the foregoing reasons, I am of the view that no proper grounds have been laid to warrant a review of my earlier ruling.

However, there is nothing which prevents the applicant and the members of Toi Open Air Market Traders Society from using the internal mechanism to resolve the dispute.

26. The upshot is that the Motion dated 28/10/2020 lacks merit. It is dismissed with no order as to costs

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/Applicant

..... for the 1st to 4th Defendants/Respondents