



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO.2 OF 2019

GEORGE KITHI.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

FRED TSOFA MWENI.....1ST INTERESTED PARTY

YEHUDA SULAMI.....2ND INTERESTED PARTY

Coram: Justice Reuben Nyakundi

Mr. Alenga for the Director of Public Prosecutions

Gikandi & Co. Advocates for the Respondent

Otieno B.N. & Associates Advocates for the 1st Interested Party

Munyithya, Mutugi, Umara & Munza Advocates for the 2nd Interested Party

RULING

The 2nd Interested Party brought an application before this court seeking orders for the honourable court to discharge, vary and or set aside the order of stay issued on 31/10/2019 and allow the respondent to initiate and commence criminal proceedings against the Petitioner. The motion is supported by an affidavit sworn by Simon Mutugi an Advocate of the High Court practicing in the name and style in the Firm of Munyithya, Mutugi, Umara and Muzna Co. Advocates.

The petitioner filed a notice of preliminary objection dated 13/10/2020 on the grounds that the Interested Party affidavit in support of the application herein be struck out for being sworn on behalf of Yetunda Sulami for being improper and illegitimate in absence of the facts not having been deposed by the Interested Party himself. The application so filed was canvassed by both counsels filing brief written submissions.

DETERMINATION

The application raises issues of construction and interpretation of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules which ought to be determined on the strength of the record and affidavit evidence. For the applicant to succeed under these provisions he must demonstrate to the court the following grounds exist in so far as the impugned ruling, or judgement or order subject matter of review is concerned:

(a) That there is a discovery of new and important evidence which could not have been produced by the applicant at the time when the ruling or judgement was passed on 16/10/2019.

(b) That there is some mistake or error apparent on the face of the record and the ruling should be corrected to include the correct concepts, figure or sentence.

(c) That the errors or mistakes or discovered new evidence not conserved within the ruling are likely to occasion prejudice or an injustice to the applicant.

(d) That it is in the interest of justice that the judgement and orders of the court be reviewed.

The recitals of the above grounds are in consonant with the principles in *Mulembe Farm Ltd & Another v John B. Masika & Others CA No. 230 of 2004 CAK [2011] eKLR*, *Mwihoko Housing Co. Ltd v Equity Building Society CA No. 316 of 2002*, *Obunyo v Were – Busia High Court No. 12 of 2002 [2004] 1KLR*.

Similarly the Court of Appeal in *Nyamogo & Nyamogo V Kogo*[2001]EA 170 stated as follows:-

“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 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 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 even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

I have studied the motion and the affidavit in support and the submissions of counsel for the Interested Party. The affidavit as deposed main grievance is for the court to review the orders for stay of execution sought and granted because the petitioner is yet to lodge an appeal to the Court of Appeal.

The petitioner filed a preliminary objection challenging the affidavit in support for being offensive and further a replying affidavit deposing to the fact that there is indeed an appeal pending before the Court of Appeal. It is relevant to state that some of the arguments of the applicant make some sense but the Court of Appeal regulates its own calendar of case flow management.

The purpose of stay was meant to facilitate the regime of the appeal process as provided under section 1 (A), 1(B) of the Civil Procedure Act and Order 42 rule 6 or Order 40 Rule 1 & 2 of the Civil Procedure Rules.

Bearing in mind the above set guidelines, from the evidence on record there is no error apparent on the face of the record, or mistake or new evidence which could not have been obtained for use by the Applicant to call for review of the Ruling on stay of execution. Secondly the Applicant has not demonstrated existence of special circumstances to discharge or set aside the orders of the Court to enable the Applicant pursue his constitutional right of appeal.

I am of the view that the legislature while enacting section 80 and Order 45 rule 1 of the Civil Procedure Act and Rules did not intend it to be used as a back - door procedure for courts to re-open their decisions. The preliminary objection on the offending affidavit by Counsel Simon Mutugi is a moot question which I don't intend to delve into at this stage of the proceedings.

For the reasons already given, I do not think the facts by the 1st Interested Party provide adequate grounds for statutory review procedure. More significantly, the preliminary objection taken by the applicant on the affidavit being offensive as sworn by legal counsel for the Interested Party has undeniable support of the law. The motion dated 24th August, 2020 is hereby denied with no orders to cost.

DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 16th DAY OF JULY, 2021.

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling/judgement has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

jpjurists@gmail.com, jpjurists@mmum.co.ke info@otienobn.co.ke, msaodpp@gmail.com