



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

PETITION NO. E105 OF 2018

GITAH I GETHENJI.....1ST PETITIONER
AMEE CHALISHAZAR.....2ND PETITIONER
SHEETAL KHANNA.....3RD PETITIONER
NARESH MEHTA.....4TH PETITIONER

VERUS

JAMES NDUNGU GETHENJI.....1ST RESPONDENT
ERIC GOVANI.....2ND RESPONDENT
CHACHA MABANGA.....3RD RESPONDENT
KIHINGO VILLAGE (WARIDI GARDENS) MANAGEMENT LIMITED....NOMINAL RESPONDENT

RULING

1. Through the application dated 11th March 2020, the applicants/petitioners seek orders that: -

1. Spent

2. Spent

3. The respondents be ordered to produce minutes of the meetings and resolutions appointing Messrs Wambua Musyoka & Katiku Advocates to Act for the nominal Respondent in ELC NO 1225 OF 2013 Kirafu Investments Limited and 6 others and Kihingo Village (Waridi Gardens) Limited and Kihingo Village (Waridi gardens) Management Ltd and all instructions issued to the said advocates pursuant thereto.

4. The ruling of 14th November 2019 be reviewed and varied to the following event:

(a) Reinstating for hearing prayer 23(a) of the Petition

(b) Setting aside the order for costs awarded to the respondents and having costs determined after full arguments

5. In the event the review is allowed on terms, the Petition do await the determination of Nairobi E 229 of 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike and others pending hearing before Hon Justice Majanja.

6. The court be at liberty to grant any further relief.

7. The costs of the application be awarded to the applicants.

2. The application is supported by the 1st Petitioner's affidavit and is premised on the grounds that: -

1. The respondents have to-date failed to comply with the orders issued by Hon Justice Makau on 17th October 2019 requiring evidence of authorization issued to the firm of Messrs Wambua Musyoka & Katiku Advocates who have now filed bill of costs when the issue of instructions has not been determined. It is necessary for the court to re issue the order in the interests of justice as no persons should profit from a matter where they have no authority.

2. The issue of instructions is also a contested issue in Nairobi E229 of 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike and others where serious issues of fraud and lack of authority to file suit are pending determination.

3. The 1st and 2nd respondents, during the pendency of the notice of motion dated 10th July 2019 for compromise of the petition filed suit in Nairobi E229 of 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike and others, obtained ex parte orders on 26th July 2019 stopping the implementations of the resolutions passed at the Annual General meeting held on 13th April 2019.

4. Despite applications to set aside the ex parte orders in Nairobi E229 of 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike and others, the orders have been retained and the suit fixed for hearing on 8th April 2020 by Hon Justice Majanja.

5. The Defendants in this petition Nairobi E 229 OF 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike and others filed a counterclaim seeking far reaching orders to bar the defendants from acting as directors for up to 15 years on account of fraud and dishonesty.

6. In the interests of justice, the review application should be allowed as no party should be allowed to profit from its own devious schemes to frustrate the will of the majority shareholders in the Nominal respondent by filing a separate suit to frustrate the implementation of the Special General meeting of 13th April 2019 in reaction to the compromise application in the present suit.

7. The court should in accordance to equity, social justice, inclusiveness and equality expressed under article 10 (2) of the constitution allow the application for review and also stay the suit as prayed as it is unconscionable to allow the respondents abuse court processes and frustrate the will of majority shareholders who conducted the Special General Meeting on 13th April 2019 in accordance with the arbitral award.

8. Based on the orders obtained in Nairobi E229 of 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike and others the will of the Majority has been frustrated and the resolutions cannot be implemented. Had the suit not been filed, resolutions would have been implemented.

9. The court did not consider the issue of costs in the notice of motion dated 10th July 2019 despite the applicant seeking costs on account of the frustration by the respondents whose conduct has all along been inequitable and unlawful.

10. The Court should in the interest of justice review its decision as-

a. There was an error on the face of the record when the court failed to consider that the petitioners had substantially succeeded and obtained various orders in their favour during the pendency of the petition

b. New evidence had come to light to demonstrate that in order to defeat the will of the majority, the 1st and 2nd respondent did not disclose the pendency of various suits at the time the ex parte orders were obtained. This justifies the granting of the prayers sought in the application and awaiting the outcome of Nairobi E223 of 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike and others

c. The right to a fair hearing is a fundamental constitutional right under article 50 and substantive justice is required to be done under article 159(2)(a) that requires justice to be done to all.

3. The 1st, 2nd and Nominal respondents opposed the application through the 1st respondent's replying affidavit sworn on 26th June 2020. He avers that this court lacks the jurisdiction to deal with the prayer for stay of taxation of the Bill of Costs dated 29th January 2020 as taxation falls within the special jurisdiction reserved to the taxing officers. He adds that it is only upon the finalization of the taxation proceedings that the jurisdiction of this court can be invoked by way of a reference under Paragraph 11 of the Advocates Remuneration Order. He adds that the petitioners have not demonstrated that they will suffer any prejudice or loss if the intended taxation were to proceed.

4. The 1st respondent states that this petition was withdrawn on 14th November 2019 and that the withdrawal had the effect of dissipating the petition and discharging all the orders that were subsisting in the petition. He contends that there is therefore no basis upon which prayer No. 3 of the application for the production of minutes of the meeting and resolutions appointing the advocates to act for the Nominal Respondent.

5. Regarding the alleged discovery of new evidence, the 1st respondent states that the petitioners fully participated in HCC E229/2019 and were all along aware of the ex parte orders issued in the said case. It is his case that the petitioners voluntarily withdrew the petition through the application dated 10th July 2019 wherein they intimated that the gist of the petition is spent.

6. It is the respondents' case that the instant application is a clear abuse of the court process as the orders that they seek to review had, by their own admission, been overtaken by events and that there was therefore no way any single prayer could be reinstated in a non-existent petition.

7. On the issue of the alleged error on the face of the record. The 1st respondent avers that any challenge to the order awarding costs to the respondent can only be done on an appeal and cannot be classified as an error on the face of the record.

8. I have considered the pleadings and the rival arguments made by the parties herein. I find that the main issues for determination is whether the applicant has made out a case for the granting of orders for review and whether prayer No. 23(a) of the Petition should be reinstated.

9. The applicant has urged this court to review its earlier ruling by reinstating, for hearing, prayer No. 23 of the petition and the setting aside the order for the award of costs to the respondents.

10. **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.

11. Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review as follows: -

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 review of judgment to the court which passed the decree or made the order without unreasonable delay.

12. In *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR, the Court of Appeal stated that: -

“The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay.”

13. On the issue of discovery of new and important matter of evidence, the applicants' case was that there was new evidence that had come to light which the 1st and 2nd respondents failed to disclose as at the time the ex parte orders were obtained in *Nairobi E229 of 2019 Kihingo Village (Waridi Gardens) Management One Limited v William E Pike* being the pendency of various suits.

14. On their part, the respondents submitted that the alleged non-disclosure was immaterial to this application as it could only be an issue on the E229 suit. They further submitted that the ex parte orders were issued in favour of the plaintiff in its capacity as a legal entity thus absolving the respondents of the non-disclosure claim since they did not sign the application resulting to the said orders.

15. What amounts to new and important matter of evidence was discussed in *Baneland Enterprises vs. NIC Bank Limited & Another Nairobi (Milimani) HCCC No. 251 of 2007*, where it was held that: -

“For the court to favourably consider an application to review a decision of the court on the grounds that the applicant has made discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the original application was argued under Order 44 rule 1 of the Civil Procedure Rules, it must be satisfied that such new and important matter or evidence is of such nature that it would lead any court of law applying its mind to the facts and the law applicable to the case reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered. The applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant.”

16. In the present case, the application that was before court for determination was with respect to the withdrawal of the petition. I find that the issue of non-disclosure was not subject to consideration in the application dated 10th July 2019. In any event the non-disclosure of the pendency of suits would not have affected the outcome of the application. It is therefore my finding that the applicant has not demonstrated how the alleged discovery is material to this application.

17. On the issue of whether there is any mistake or error apparent on the face of the record in awarding costs to the respondents, the applicant contended that the court failed to consider the fact that the petitioners had substantially succeeded and obtained various orders during the

pendency of the petition.

18. The respondents submitted that the same did not amount to an error on the face of the record as it requires an extensive amount of interrogation of the court record with regard to the petition.

19. Courts have held that an error apparent on record ought to be self-evident with no explanation needed to justify it. In *Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*, the court discussed what amounts to an error on the face of the record as follows: -

“...In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that 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 real distinction between a mere erroneous decision and an error apparent on the face of 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 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

20. Similarly, in *Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR*, it was held: -

“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 even though another view was also possible.”

21. In view of the foregoing decisions the question that arises is whether the award of costs to the respondent can be said to be an error on the face of record that can be the subject of a review. The applicants contended that the court should have awarded the costs to the petitioner as they had substantially succeeded in the petition while at the same time considering the misconduct of the respondents.

22. The discretion of the Court in granting or withholding costs is provided for under Section 27 of the Civil Procedure Act which provides as follows: -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by who and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

23. In *the Party of Independent Candidates of Kenya vs Mutula Kilonzo & 2 others, HC EP No. 6 of 2013*, the stated as follows on the issue of costs: -

“It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so.”

24. In light of the above threshold, I find that this court exercised its discretion in awarding costs to the respondents and that inviting the court to review the decision on costs is akin to asking this court to sit on appeal of its decision. I further find that the application does not meet the threshold for granting orders for review.

25. On the issue of whether the court should reinstate prayer 23(a) of the petition. I have perused the court record and I note that the applicants herein withdrew the petition while invoking the provisions of Order 25 Rules 1 of the Civil Procedure Rules which provides that as follows; -

(1) At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.

26. In *Bahati Shee Mwafundi vs Elijah Wambua [2015] eKLR*, the Court held: -

“11. I have considered the Appellants’ Application. The Notice to withdraw this Appeal was filed under the provisions of Order 25 of the Civil Procedure Rules. As rightly submitted by the Respondent there is no provision under that order for withdrawal of the Notice to withdraw an Appeal. Order 25 envisages that once a party withdraws or discontinues a suit such a party may file another suit and such withdrawal or discontinuation cannot be raised as a defence in a subsequent suit.

12. Under Order 25 once a suit is withdrawn or discontinued the Court shall enter judgment for costs against the Plaintiff.”

27. I note that through the application dated 10th July 2019, the applicant moved this court for orders to withdraw the petition as it stood compromised. On 14th November 2019 this court issued orders as follows: -

“That the petition dated 3rd October 2018 be and is hereby marked as compromised and settled in respect of the reliefs at paragraph 23(a), (b) and (c) which are spent following the Special General Meeting held on 13th April 2019 by the shareholders.”

28. The applicant now seeks to have the same petition that was compromised reinstated. My view is that once a suit is withdrawn the same cannot be reinstated and that the only option available to the applicant should be to file a fresh suit. The essence of the petition dissipated upon its withdrawal and cannot be reinstated.

29. Having regard to the findings and observations that I have made in this ruling, I find that the application dated 11th March 2020 is not merited and I therefore dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 15TH DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Maina for 1st, 2nd and Nominal Respondents.

Mr. Otieno Willis for 3rd Respondent.

Mr. Kiguta for Gichuhi for Petitioners/Applicants

Court Assistant: Sylvia.