



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

WINDING UP CAUSE NO. 2 OF 2010

IN THE MATTER OF SALAMA BEACH HOTEL LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT (CHAPTER 486 LAWS OF KENYA)

AND IN THE MATTER BETWEEN

HANS JUERGEN LANGER.....APPLICANT/UNDER PROTEST

VERSUS

ISAAC RODROT.....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Katunga Mbuvi & Co. Advocates for the Applicant/Under protest

Munyithya, Mutugi, Umara & Muzina Advocates for the Respondent

R U L I N G

Before me is an application moved by **Hans Juergen Langer** apparently under protest against **Isaac Rodrot** expressed to be brought under Section 1A, 1B, 3, 3A & 80 of the Civil Procedure Act, Order 22 Rule 22, Order 45 Rule 1 of the Civil Procedure Rules, Article 10,22,23, 48, 50, 73, 159 and 232 of the Constitution seeking one substantive order;

1. That the honourable Court be pleased to review, vary and or set aside, the Certificate of costs issued on 11th February, 2019 and or Orders of the Honourable Court thereof.

In support of the Motion is an Affidavit sworn by the Applicant and Protestor Hans Langer according to the applicant the Certificate of Costs is being executed against him instead of Salama Beach Hotel Limited. That the respondent is yet to lift the veil to pierce the corporate seal so as to get access to the directors. That the said actions are unlawful and detrimental to good governance. That for that reason the Court finds it fit to review the Ruling dated 11th February, 2019 so that substantive justice can be served in the matter.

On the question of reviewing the Ruling, Counsel for the Respondent filed grounds of opposition dated 18th May, 2021 alleging that the Motion is unfounded and an abuse of the Court process. Counsel further argued that no cogent reasons have been advanced why the applicant is pursuing this kind of remedy belatedly when all issues on this issue stand concluded.

The application was canvassed by way of skeleton written submissions by both counsels. Counsel for the applicant relied on the principles in **CA No. 36 of 2015 – Malindi Accredo AG & 5 Others V Steffano Uccelli & another [2017] eKLR**. On the other hand Counsel for the Respondent submitted and invited the Court to be guided by the principles in **Odhiambo Ogina V Andrew Horace O.Omondi[2014]eKLR, Josphine Moraa V Ken Sagini & 8 Others[2010]eKLR, Luka Wagana & 2 Others V Charles Alexander Kiai & another [2020]eKLR**. Counsel emphasized the principles of re judicata and the provisions of Rule 11(1) (2) and (4) of the Advocates Remuneration Order on the reciprocity and application of it to the facts of the Motion on extension of the Certificate of Costs. That is the status of the grievance and parties' scope of the inquiry in order for the Court to render its decision.

Determination

It is no doubt in the letter and spirit of Rule 11 of the Advocates Remuneration Order the intended appellant shall lodge a reference and serve copies thereof on all persons directly affected by the reference within 14 days from the date of the Certificate of Costs. I consider that the whole of the provisions of the rule mandatory thereto to meet a situation as the one in which the Applicant found himself. The applicant does not take either of these steps.

In this motion, the objection proceedings to execution and enforcement of the Certificate of Costs have been taken pursuant to section 80 of the Civil Procedure Act and Order 45 Rule (i) of the Civil Procedure Rules. The remedy of review is employed to quash, set aside or vary, the Judicial decision of a Court, usually in cases where there is no right of appeal, it is discretionary remedy derived from the inherent jurisdiction of the Court under section 3A of the Civil Procedure Act exercised by means of review.

Briefly, the cases in which a decision can be questioned on review fall into the following classes: Firstly, where the decision involves an error of law or fact apparent upon the face of the record. Secondly, mistakes or omissions in the Courts reasoning that amounted to an error of Law. Third in the decision or order found in favour of the Respondent as against the aggrieved party subject to the possibility of infringement of a right. Fourth, learning this vexed question on exercise of discretion between the two grounds for which review may be granted, the applicant must also demonstrate existence of discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made. Fifth, for any other sufficient reason desired to obtain a review of the decree or order subject to the application being made without unreasonable delay. See the illustrations of these principles in *National Bank of Kenya Ltd V Ndungu Njau Muyodi V Insurance and Commercial Development Corporation & another [2006]1EA 243*, *Richard Nchapai Leiyang V IEBC & 2 Others CA No. 18 of 2013* *Paul Mwaniki V National Hospital Insurance Fund, Board of Management [2020] eKLR*.

In the case of *Nyamogo & Nyamogo V Kogo[2001]EA 170* the Court succinctly stated as follows on the application of the Court's jurisdiction under these provisions:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness 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.”

From the above cases law, this application raises important and difficult issues in the field of equitable reliefs as envisaged in section 80 of the Act and Order 45 Rule 1 of the Civil Procedure Rules. That jurisdiction on review is concerned with the scope of the power itself. Rather than with the nature of the decision-making process which led to its being exercised in a particular way to call for it to be reviewed. The rule is concerned with the decisions made without having given proper considerations to relevant matters, or evidence and or that the applicant at time was not able to avail that relevant evidence for the Court's consideration. In my view while considering the ambit of the power on review, it is necessary to bear in mind that it's one of the rare protections afforded to aggrieved parties to a litigation in respect of due process and fair administration of justice. Therefore, it has limits in its scope of operations. It cannot be right that that whenever a litigant does something in a judicial process whenever they regret later and they thought they ought not to have done, they can say that a mistake, error or omission has occurred to invoke the review remedy of a judgement or order. It is also important for the review Court to have in mind that equity does not afford a litigant aggrieved with an order of the Court a free pass to apply for review and rescind a decision which subsequently proves unpalatable or unfortunate and therefore asks the same Court to substitute it with another. The reliefs on review is only available if the necessary conditions under order 45 Rule (1) of the Civil Procedure Rules for its grant are satisfied. All that is required to be shown in this regard is that the considered material was an error or mistake and the unconsidered relevant evidence would or might have affected the Court's decision.

Therefore, in a case such as the present the Court would or might have made a different order or decision in the matter. That is in my view a correct statement of the Law. As to the case at bar the facts relevant to the Applicant's application are set out at length in the affidavit of **Langer** to which reference is made to the impugned Ruling. The claim and dissatisfaction as fashioned does not entitle the Court to review and to substitute its own view of the decision for that matter as rendered in the Ruling dated 11th February, 2019 I respectfully disagree with the Applicant that lifting the Corporate veil may amount to a making of a decision to be subjected to review jurisdiction within the scope of section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Such a result cannot be achieved by the route of attributing any fault on the part of the Court.

In the exercise of Judicial discretion which formed the decision obtainable and pronounced to the parties on 11th February, 2019 the case is entirely wanting in any of those elements which are commonly to be met by an applicant, in case of attempts to set aside, vary or rectify a ruling/judgement of the Court.

One other issue which calls attention of the Court is the delay and length of time taken before the Applicant moved the Court appropriately. Having regards to the facts which are herein stated, I cannot find any evidence in which the Applicant has explained himself the reasons for the inordinate delay to seek a remedy under order 45 Rule 1 of the Civil Procedure Rules if anything it is simply a jurisdiction designed to ensure the equitable relief under review is effectuated within a reasonable time bounds and to ensure that it is not used simply when parties have second thoughts to the decision.

Equity acts on the conscience. In my judgement the Applicant could not conscientiously insist upon his legal rights under review when he is guilty of laches. I would therefore reject this new frontier of proceedings initiated by the applicant which is unsupported by legal principles necessary to afford him the discretion of the Court. It follows, therefore the Motion dated 3rd May, 2021, is denied with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JULY,2021

.....

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.

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