Seii & 10 others v Nairobi City County Government & others (Environment & Land Petition E019 of 2024) [2025] KEELC 109 (KLR) (23 January 2025) (Ruling)

Neutral citation: [2025] KEELC 109 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E019 OF 2024

AA OMOLLO, J

JANUARY 23, 2025

BETWEEN

JEROTICH SEII & 10 OTHERS & 10 OTHERS & 10 OTHERS & 10 OTHERS & 10 OTHERS & 10 OTHERS ..... PETITIONER

AND

NAIROBI CITY COUNTY GOVERNMENT & OTHERS ..... RESPONDENT

RULING

1. The 9th Respondent/Applicant filed a notice of motion dated 18th September 2024 supported by an affidavit sworn by JingJing Qu on the same date seeking for the following orders;
    a. Spent
    b. That the Honourable Lady Justice be pleased to review and/or revise the orders on her ruling delivered on 16th September, 2024 limiting the 9th Respondent's development and construction activities to four floors pending the hearing and determination of the petition.
    c. That this Honourable Court be pleased to pay an urgent official site visit to Nairobi/Block 17/392-Kilimani Area, Nairobi to observe and take note of the nature of the surrounding buildings and ongoing construction activities along Ndemi Road and its environs.
    d. That the Costs of this application be borne by the Petitioners.
2. The motion is premised on the grounds that the Petitioners have knowingly and intentionally misled this honourabe Court into delivering a ruling based on malice, deceit and misrepresentation of facts that the Applicant had commenced development and construction activities on the subject property devoid of any requisite approvals.
3. That it is on record that the Honourable while delivering the ruling on 16th September 2024 stated that the Petitioners counsel misled the court to believe that there was ongoing construction on the

subject property. That the court also conceded that in the circumstances that the construction was yet to commence, the application dated 13th June 2024 was premature.

4. Further, that it is on record that the Petitioner's suit is prematurely before the Court for the reason that no actual violation of the Petitioners' rights to a clean and healthy environment has been actually infringed. The Applicant deposed that it is fallacious that the 9th Respondent/Applicant had commenced construction of the suit project as alleged by the Petitioners in their Application dated 13th June 2024 and submissions filed in support thereof.

5. That in the impugned ruling, the court stated that the 9th Respondent failed to disclose where 60 trees would be replanted and that the Applicant submitted plans on the same as captured by the 6th Respondent in its Replying Affidavit dated 23rd August 2024 at paragraph *6*,*7* and *8* deposing that the Applicant holds a lawfully obtained Environmental Impact Assessment (EIA) License from NEMA.

6. That the 9th Respondent reiterated in its replying affidavit dated 23rd August 2024 stipulated that the National Construction Authority (NCA), the municipal authority that regulates constructions, did not have any objections to the construction of the subject property and in fact issued the Applicant herein with a Certificate of Compliance for the proposed construction.

7. Further, the Applicant contended that the Petitioners/Respondents have failed to prove their allegations that the approvals issued to the Applicant are invalid, adding that that the construction of a foundation supporting 4 floors is separate and distinct from the approved foundation constructed to support 18 floors. The Applicant also stated that should the foundation and structural design of the subject property be altered and the construction be limited to 4 floors pending the hearing and determination of the Petition filed, it would be impractical to continue with construction of the building to 18 floors or any other floor at a later stage.

8. That the Petitioners wilfully with spite misled the court on the mistake belief that no local physical and land use development plan had been prepared and that the 9th Respondent had not obtained the requisite approvals for the construction of the building. That unless this Honourable Court reviews its ruling dated 16th September 2024, the Applicant stands to be greatly prejudiced as it shall be condemned on account of an unjustifiable mistake. Thus, it is extremely crucial that this court does conduct an official site visit to the subject property in order to be better appraised with the facts of this case as they exist on the ground in reaching a just and fair determination.

Grounds of opposition:

9. In response, the Petitioners filed grounds of opposition dated 22nd October 2024 stating that;

    i. the application does not satisfy the legal requirements for review and specifically seeks to appeal against the decision of the court made on 16th September 2024 under the guise of a review.

    ii. the Application has been filed after the Petitioners lodged an appeal against the ruling and consequential orders made on 16th September 2024 in the Court of Appeal in Civil Appeal No. E668 of 2024 *Jerotich Seii & 10 Others v Nairobi City County Government & Others*.

    iii. the said appeal and the application for stay under Rule 5(2)(b) of the *Court of Appeal Rules* 2022 is proceeding in the Court of Appeal and is yet to be determined.

10. The Petitioners/Respondents contended that filing of the instant application when there is an ongoing appeal at the Court of Appeal offends the doctrine of subjudice.

Submissions:

11. The Applicants made oral submissions on 29th October 2024 stating that there is sufficient reason warranting review of the impugned Order. That the Petitioners misled the court to believe that the 9th Respondent was constructing which is not true. In support they relied on the facts contained in their supporting affidavit and which they argue has not been contradicted.

12. The Petitioners/Respondents filed submissions dated 28th October 2024 submitting that there is no copy of the order in respect of which the review is sought in the application and that the copy of the ruling marked as annexure JQ-1 is not a formally extracted ruling. They aver that the same having not been certified by the Deputy Registrar makes the Application fatally defective.

13. In support of their argument, the Petitioners cited the case of *Suleiman Murungav Nilestar Holdings Limited & Another* (2015) eKLR which held that the plain reading of the above provision (referring to Order 45 Rule (1)) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought and failure to do so renderers the application defective.

14. The Petitioners stated that without prejudice that the application is fatally defective, the Applicant has not established any sufficient reason(s) analogous to the two specified in Order 45 Rule 1 warranting review of the impugned orders. They cited the case of *Official Receiver and Liquidator v Freight Forwarders Ltd* (2000) eKLR, *Shanzu Investments Limited v Commissioner for Lands* (Civil Appeal No.100 of 1993), *Sadar Mohamed v Charan Singh & Another* (1963) EA 557 and *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* 92019) eKLR High Court of Kenya Nairobi Judicial Review Division Misc Appl No.317 of 2018 among others outlining principles to be considered in applications for review of judgements or rulings.

15. They submit that no evidence has been adduced in the application to support the contention that the 9th Respondent will suffer colossal economic and financial losses if the impugned order is not set aside. Further, the Petitioners stated that the application is an attempt and akin to asking the Court to sit on appeal of its own decision and reverse it, yet, they are aware that the said ruling is subject of appeal which has already been filed and is yet to be heard and determined.

16. In support, they relied in the case of *Omota & Another v Ogutu* (Civil Appeal No. E005 of 2021) [20220] KEHC 16441(KLR) (19th December 2022) which held that the fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope.

Determination:

17. This application by the 9th Respondent/Applicant is premised on Order 45 Rule 1 seeking for review of orders made by this court on 16th September, 2024 on account of mistake/error apparent on the face of the record and for sufficient cause. Vide the the impugned ruling, a conditional order of temporary injunction was granted limiting the 9th Respondent's development and construction activities upto four floors pending the hearing and determination of the petition.

18. There are two issues that emanate for determination before this court; Whether the application is fatally defective and whether the application has met the threshold for review. The Petitioners/Respondents have argued that the Applicant has not annexed a formally extracted order, and certified by the Deputy Registrar. Thus, it has not complied with Order 45 (1) of the *Civil Procedure Rules*, which ommission renders the application fatally defective. They added that due to the pendency of their appeal lodged before the court of appeal, this application should not be entertained.

19. I agree with the Petitioners that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order. The requirement, is to enable the court to determine the impugned point as espoused by (per Visram, J. as he then was) in *Wilson Saina v Joshua Cherutich t/a Chirutich Company Ltd* [2003] eKLR; and for there to be clarity as to what "aggrieves the applicant", (Lesiit, J. in *Belgo Holdings Limited v Robert Kotich Otach & Another* [2009] eKLR).

20. Be that as it may, looking at annexure JQ-1, the ruling attached is typed and signed making it sufficient for the court to establish the orders complained about. Thus, the failure by the Applicant to annex the formally extracted orders did not prejudice the Petitioners neither is it fatal. This court relies on the oxygen principles as provided under section 1A, 1B, 3 and 3A of the *Civil Procedure Rules* and article 159 of the *Constitution* of Kenya that justice shall be administered without undue regard to procedural technicalities.

21. On the second limb regarding the pendency of the appeal lodged by the Petitioners, my answer lies in the provisions of Order 45 rule 2 of *CPR* which states that:

> " A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review." (underline mine for emphasis).

22. The Petitioners have not pleaded that the grounds raised for seeking review forms the same basis as the grounds they have raised before the Court of Appeal. In the absence of such evidence, the Rules allow the 9th Respondent to bring the present application since they have not appealed the order. The objection on this ground is also without merit.

23. The next issue for determination is whether the motion has met the threshold for review. Order 45 Rule 1(1) of the *Civil Procedure Rules*, 2010 sets out the grounds for review and provides as follows: -

> " 1.
>
> (1) Any person considering himself aggrieved-
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> 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."

24. As already stated, the review is sought on the ground of mistake or error apparent on the face of the record and for sufficient cause as outlined in the supporting affidavit. An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established as explained in *Paul Mwaniki v NHIF Board of Management* [2020] eKLR. Thus, the question here is whether in the subject ruling there was any such mistake or error on the face of the record. The Applicant posits inter alia, that the Court should have arrived at a different determination in the ruling because the Petitioners "misrepresented facts" to the court that no physical and land use development approvals had been obtained. That the Petitioner failed to prove that the licenses were invalid; and that this court also failed to consider the Applicant's/9th Respondent's grounds of opposition dated 26th June 2024 specifically paragraph 3 thereof. Further, that the court granted orders that were not sought in their application thereby making a mistake apparent on record.

25. The facts set out in the affidavit in support of the application is akin to asking the court to reconsider the evidence that was pleaded and reverse her decision. The so called errors deposed to are not errors apparent on the face of the record, rather what the Applicant view as failure by this court to take note of the fact that they had all the required approvals and so there was no merit in issuing the conditional injunction. Secondly, that they had not started construction hence the application which was granted were premature. These are issues which go into the merit of the decision in interpreting the purpose of conservatory orders as relates to rights that are being or likely to be violated.

26. Some of the issues the Applicant has deponed as comments made by this court after the delivery of the Ruling did not form part of the record and was not intended to set aside the orders that issued. Neither did the conditional order require the Applicant to revise the contents of their development licenses but to allow them partially commence their project pending the determination of the Petition. The said reasons do not amount to mistake or error. In the case of Omota & Another v Ogutu supra is apt holding that the fact of a party believing that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review which is limited in scope. The same position was espoused by the Court of Appeal in the case of *National Bank K Ltd versus Ndung'u Njau* (1996)eKLR which 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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

27. Further, under the heading for sufficient reasons, it is trite that the reasons offered for 'sufficient reason' must be analogous or ejusdem generis to the other grounds/reasons stipulated in Order 45 Rule 1. Mativo J. in *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers* [2016] eKLR held:

> " Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & Others*[8]had this to say:-
>
> "... A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can

be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."

28. The grounds stated in the supporting affidavit do not relate to the headings of error apparent on the face of the record nor discovery of important evidence. The Applicant essentially argued that the orders ought not to have issued because they have the requisite licenses' (which the Petitioners are challenging their validity) and that they are suffering substantial economic loss. On the prayer for an order that this court pay an urgent official site visit to Nairobi/Block 17/392-Kilimani Area, Nairobi to observe and take note of the nature of the surrounding buildings and ongoing construction activities along Ndemi Road and its environs. If the same was intended to collect evidence in support of the application for review, then it goes outside the scope of review. review.

29. In conclusion, I find that the Application lacks merit and is a candidate for dismissal. It is so dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JANUARY, 2025

A. OMOLLO

JUDGE