REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. E023 OF 2021

KENNEDY KORIR SARGO..PLAINTIFF/ RESPONDENT

VERSUS

KCB BANK LIMITED...1ST DEFENDANT/APPLICANT

JAMES ONYANGO JOSIAH

T/A NYALUOYO AUCTIONEERS........................2ND DEFENDANT/APPLICANT

Coram - R. Nyakundi

Ms. Kigamwa Advocate for Plaintiff

Ms. R.R. Mwetich Advocate for Defendant

RULING

1. The applicant herein being aggrieved by the substantive order issued ex-parte on the 23rd of September 2021 has filed the Notice of Motion dated 24th September, 2021 seeking a review of the said orders.

2. The application is premised upon the eight grounds as denoted on the body of the Notice of Motion and an affidavit in support by **R.R Mwetich** dated 24th September 2021 wherein he deponed that a substantive order was made on the 23rd of September 2021 whereas the matter had been fixed for mention and not hearing. Further, the applicant deponed that the matter had not been cause listed on the particular day and as such no information had been relayed to them as regards the court handling the matter.

3. The Application was vehemently opposed by the Plaintiff/ Respondent through his replying affidavit sworn on the 8th October, 2021 wherein he deponed that the application was brought under the wrong provisions of the law. It was his contention that the provisions of order 10 and 12 of the Civil Procedure Rules relate to interlocutory judgments as opposed to applications. Secondly, the Plaintiff/Respondent argued that the decision of court to confirm the interim orders was correct since the court duly exercised its discretion by allowing the motion as it was unopposed by way of a response.

ANALYSIS AND DETERMINATION

4. The only issue for determination in this instant application is whether this court has jurisdiction to review the orders that determined the ex-parte application with finality.

THE LAW

5. There is no doubt that ***Section 80 of the Civil Procedure Act and Order 45 of the Rules*** empower courts with the power of review. However, this power must be exercised within the framework of ***Section 80 Civil Procedure Act and Order 45 Rule 1*** of the Civil Procedure Rules.

6. In particular, Section **80** of the Civil Procedure Act provides: -

80. 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.

7. On the other hand, Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides: -

45 Rule 1 (1) 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 judgement to the court which passed the decree or made the order without unreasonable delay."

8. A clear reading of the above provisions shows that whereas Section 80 gives the power of review, Order 45 sets out the rules and grounds upon which a court exercises the power of review. The rules stipulated under Order 45, restrict the grounds for review and further lay down the scope and jurisdiction of review.

9. Accordingly, Order 45 limits review of decree and judgement to the following grounds-

(a) 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 or;

(b) on account of some mistake or error apparent on the face of the record, or

(c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

10. While affirming the grounds and limits set forth in Order 45, the court in ***Tokesi Mambili and others vs Simion Litsanga [2004] eKLR*** held that: -

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. <u>An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.</u>

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

11. Similarly, in ***Nasibwa Wakenya Moses vs University of Nairobi & Another [2019] eKLR***, the court observed that;

"Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; (a) 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 or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

19. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. <u>The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial."</u>

12. In the instant case, the order sought to be reviewed was made on the 23rd of September 2021. In particular, the applicant's contention is that the orders as granted, have the effect of determining the application in finality, without the defendants being granted an opportunity to be heard and or respond to the application and also their issues before court.

13. The record indicates indeed that on the 26th August, 2021 the court granted the Plaintiff interim orders pending and hearing and determination of the application dated 11th August, 2021 inter-parties. There were no directions as regards filing of response. On the 23rd of August, the court confirmed the interim orders in the absence of the Defendants Counsel. This in my view amounts to an error apparent on the face of record.

14. In ***Muyodi vs. Industrial and Commercial Development Corporation & Another (2006) 1 EA 243***, the Court of Appeal while considering what constitutes a mistake or error apparent on the face of the record stated 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 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 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."

15. Similarly, in ***Paul Mwaniki vs. National Hospital Insurance Fund Board of Management [2020] eKLR***, it was said 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."

16. As highlighted above, there is no doubt that the orders granted on the 23rd of September 2021 were made in the absence of the defendants. The order itself confirms the same. Furthermore, it is clear that the absence of the defendants was not due to their own fault but that there was miscommunication as regards the placement of the file before the judge. Taken altogether, it is clear in my mind that this constitutes an error apparent on the face of the record.

17. Moreover, I have looked at the orders issued on the 23rd of September 2021. The effect of the orders is in effect of a final nature. That is, the orders as granted have the effect of obviously adversely affecting the applicants herein, without affording them an opportunity to be heard. These are orders which prejudicially affected the applicants and failure to give them an opportunity to be heard before making such orders violated one of the cardinal principals of the rules of natural justice - that no man shall be condemned unheard ***(audi alteram partem).***

18. This principle of natural justice cements the fact that a man or woman cannot incur the loss of property or liberty for an offence by a judicial proceeding, until he or she has had a fair opportunity of answering the case against him or her. This principle is reflected in many statutes and provisions of the law, which are geared towards ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made. That is, it is the basic requirement of the principle of natural justice that the opportunity of being heard must be given. Right to hearing provides an individual an opportunity to present his or her case before the court and put forward evidences in support of their case and which would then form the basis of a judicial officer arriving at a fair decision.

19. The ***Halsbury's Laws of England***, 5th Edition. Vol. 61 page 545 at para 640 states:

"The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases."

20. Furthermore, in ***Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (HCK) [2006] 2 KLR 553*** it was held that:-

"The Court observes firstly that the rules of natural justice "audi alteram partem" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialization of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision…It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

21. Finally, the Supreme Court of Canada in ***Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6*** held that:

"The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions." Emphasis added.

22. It is thus trite law that the rules of natural justice must be observed by all courts, inferior tribunals or bodies which exercise either judicial or quasi-judicial powers or who have a duty to act fairly before any final orders are made which adversely affect the rights or interest of a citizen. This is the essence of the rules of natural justice and which are reflected under Article 50 of the Constitution of Kenya.

23. Article 50 (1) of the Constitution protects the right to a fair hearing whereas Article 159 (d) of the same Constitution, provided the principle that justice shall be administered without undue regard to procedural technicalities. This position was clearly ventilated by the Court of Appeal in the case **of FCS LTD v ODHIAMBO & 9 OTHERS [1987] KLR 182 – 188,** where the court held inter-alia:

> ***"The rules of procedure carry into effect two objectives; first to translate into practice the rules of natural justice so that there are fair trials and the second, procedural arrangements whereby the steps of a trial are carried out in good order and within reasonable time. In my opinion where the rules are dealing with the precepts of natural justice, the court would be slow to conclude that they are mere technicalities, which may be swept under the carpet by the brush of Section 3A of the Civil Procedure Act on inherent jurisdiction of the court to do justice."***

24. In ***Abraham Lenauia Lenkeu vs Charles Katekeyo Nkaru [2016] eKLR*,** the court while considering a similar application as the instant case, noted that it would be proper to analyze the impact of an ex-parte order issued under a certificate of urgency, in the context of Article 50 (1), Article 47 and 159 (2) (d) of the Constitution. In this regard, the court noted that an ex-parte order has a direct effect on the substantive rights of the parties, and in particular, the right to be heard and not to be condemned unheard. Thus, granting an ex-parte order and confirming the same without affording the opposite party a chance to access court and be heard, not only flies against the principle of natural justice but also against the Constitutional right to be beard in a free and fair manner.

25. In the present case, the orders sought to be set aside were made in absence of the defendants. That is, the defendants did not have an opportunity to be heard. In particular, it is clear from the record and the pleadings of the parties, that the Defendants herein were not actually absent but were led to believe that the file was to be placed before the judge for mention and direction but not for hearing. In fact, it is clear that both counsel for the plaintiff and the defendants communicated on the material day since the matter had not been listed in the cause list. This in my humble view amounts to an error apparent on the face of the record.

26. In the circumstances, it would be improper to maintain an order issued when a party was not in court and this was not due to his fault; as this would amount to condemning someone who was not aware of the matter and who had no opportunity to file response, unheard.

27. In any case, greater prejudice would be occasioned to the applicant herein if the ex-parte order is allowed to stand. This is because, it would be tantamount to being condemned unheard and would ultimately lead to a miscarriage of justice.

28. In the foregoing, I am persuaded that the application dated 24th September, 2021 is merited and is hereby allowed. Consequently, the orders of this court made on 23rd September, 2021 are hereby reviewed in the following terms;

> 1. ***THAT an interlocutory injunction does issue against the defendant restraining them jointly and severally from selling, transferring, or in whatever way alienating the land parcels known as NANDI/KIMINDA/982 and NANDI/KIMINDA/1233 pending the hearing and determination of the application dated the 11th August 2021 on merit.***
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> 2. ***THAT the defendants do file response to the application dated 11th August 2021 within 14 days.***
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> 3. ***THAT the Plaintiff to file, if necessary, further affidavit in response to 2 above within 7 days.***
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> 4. ***THAT the matter be mentioned before High Court 2 on a date to be fixed at the registry.***

29. It is hereby ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF NOVEMBER, 2021.

R. NYAKUNDI

JUDGE