



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC. APPL.NO. 512 OF 2015

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO COMMERCE PROCEEDINGS IN
THE NATURE OF JUDICIAL REVIEW**

AND

**IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF
KENYA**

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI AND PROHIBITION**

AND

IN THE MATTER OF CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF REGISTRAR OF COMPANIES

AND

**IN THE MATTER OF REGISTRATION OF DIRECTIONS OF GITHUNGURI
CONSTITUENCY RANCHING COMPANY**

AND

**IN THE MATTER OF ARTICLES 22(1), (2), (a), (b), (c) 23(1), 27(1), (2) OF THE
CONSTITUTION OF KENYA (2010)**

BETWEEN

REPUBLICAPPLICANT

VERSUS

THE REGISTRAR OF COMPANIES.....RESPONDENT

EX-PARTE APPLICANT – AHMED CHEGE GIKERA

RULING

1. By a notice of Motion dated 2nd June 2016, the Exparte applicant Ahmed Chege Gikera has moved this court seeking orders:
 - i. That this Honourable court be pleased to review the judgment delivered by Honourable Justice Korir W. on 25th May 2016.
 - ii. Costs be provided for.
2. The application is predicated on the grounds that:
 - a. The aforesaid judgment was made in error as the orders and directions issued by Honourable Mutungi in Misc. ELC 12/2014 on 6th November 2014 had lapsed after the expiry of 90 days.
 - b. And on other and further reasons to be adduced at the hearing hereof.
3. No specific affidavit was sworn in support of the application for review, although the applicant's counsel stated that it is supported by statutory statement and affidavit of Ahmed Chege Gikera.
4. The application was brought under Section 80 of the Civil procedure Act, Order 53 Rule 1(1) (2) and (4) of the Civil procedure Rule 2010, Sections 1A, 3A of the Civil Procedure Act and Section 8 and 9 of the Law of Reform Act Cap 26 Laws of Kenya, and all the enabling provisions of the law.
5. On 5th July 2016 the applicant filed a further affidavit annexing the ruling of 6th November 2014 by Honourable Justice Mutungi.
6. The 1st respondent opposed the application by the applicant through grounds of opposition dated 20th June 2016 stating that the application is frivolous, vexatious and an abuse of the court process; that the application is premised on wrong provisions of the law; that the application offends the principles of issuing a Review of the Decree or Order of the court more precisely that the applicant has not demonstrated any new evidence which was not within his knowledge at the time the decree was passed; that the applicant has not demonstrated any mistake or error apparent on the face of the record to warrant a Review as sought; that the orders sought herein should not issue as the applicant has already filed a notice of appeal; That Review orders are discretionary in nature which must be sought without delay unlike the position herein. That the applicant came to court seven days after the decree sought to be reviewed was issued, thus the discretion of the court should not be used in his favour, that the application is based on contradictory allegations which borders on mere relief, suspicious and speculations and hence the orders sought cannot issue.
7. The 2nd respondent opposed the application through grounds of opposition dated 17th June 2016 through citing a wrong date of the application as 2nd July 2016 instead of June 2016. The grounds of opposition are that: The application is incompetent and warrants striking out; the applicant discloses no ground capable of founding basis for a review; the court considered all the relevant facts and evidence including the ruling made in Nairobi ELC No. 12/2014 in dismissing the applicant's application; the application is in essence an appeal being masqueraded as a review application and to that extent, untenable and without any basis in law; the application is not supported by any affidavit as required and thereby incompetent; the application is a furtherance of the applicant's predilection to abuse the court processes and noted by the court in its judgment; litigation must come to an end; the applicant should not confuse his defeat in the matter with an error by the court; the

court's decision was based on clear facts and law; if the applicant is dissatisfied with the orders made in ELC Miscellaneous 12/2014 he should file an application to set them aside in that matter.

8. Parties also filed written submissions to dispose of the application dated 2nd June 2016 but which submissions were also argued in court orally on 20th July 2016. I shall combine the written as well as the oral submissions as highlighted by the parties respective advocates.

9. In the applicant's submissions dated 5th July 2016 and as canvassed orally in court on 20th July 2016, professor Wangai counsel for the applicant submitted that he relied on the pleadings filed in the application for leave, a further affidavit filed on 5th July 2016 by the exparte applicant and the applicant's written submissions referred to above.

10. In the applicant's written submissions, counsel started by isolating paragraphs 39,40,41,42 and 43 of the judgment by Honourable Korir J and maintaining that the orders given by Honourable Justice Mutungi J on 6th November 2014 and issued on 10th November 2014 to the effect that "the defendants/respondents shall arrange to have an annual general meeting of the company held within the next 90 days from the date of this ruling," had lapsed by 17th December 2015 when the respondents allegedly held the AGM hence the action of holding of the AGM based on the lapsed orders was illegal and that this court should vacate that illegality by reviewing the judgment of Honourable Korir J.

11. On the grounds of opposition filed by the respondents, professor Wangai submitted that they lacked merit and therefore the same should be dismissed. According to Professor Wangai, the orders of Honourable Mutungi J in ELC JR 12/2014 expired on 6th February 2015 and that there were orders from Thika and Kerugoya Court. But that at the time of the purported elections which were based on Honourable Mutungi's orders, there were orders in JR 245/2015 seeking to quash proceedings in the Thika case, which application Honourable Odunga J dismissed even on review. That the judgment of Honourable Korir J delivered on 25th May 2016 was based on orders of Mutungi J made on 6th November 2014 which orders had lapsed hence there was an error on the face of the record since the orders of Mutungi J were non-existent.

12. Both respondents seriously opposed the application for review, contending that the applicant having already filed a Notice of appeal, is not entitled to a review; that there is no new evidence and or error apparent on the face of the record since Honourable Korir J in his judgment was aware and fully appreciated the orders of Honourable Mutungi J; that the same arguments being advanced in this application are the ones made before Honourable Korir J; and that the judge –Korir J appreciated the manner in which the applicant had frustrated compliance with the orders made by Hon Mutungi J.

DETERMINATION

13. In my humble view, the sole issue for determination in the applicant's application dated 2nd June 2016 is whether the applicant has made out a case for review of the judgment of Honourable Korir J delivered on 25th May 2016.

14. The power to review a judgment or orders of a court are donated to court by Section 80 of the Civil Procedure Act and Order 45(1) (b) of the Civil Procedure Rules. It is not an inherent power as submitted by the applicant's counsel since there exist specific provisions of the law that allow for review of the judgment of the court.

15. Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules sets out grounds upon which a party can seek for review of the judgment or order. In this case, the applicant has expressly isolated one of the grounds under the said Rule, that there is an error on the face of the record which error is that the judgment of Honourable Korir J was predicated on the existence of the orders of Honourable Mutungi J made on 6th November 2014 to the effect that the

impugned elections which were held on 17th December 2015 long after the expiry of the 90 days stipulated in the order of 6th November 2014 made by Hon Mutungi J were in order. On the other hand, both respondents seriously opposed the application for review, contending that the applicant having already filed a Notice of Appeal, is not entitled to a review; that there is no new matter or evidence and or error apparent on the face of the record since Hon Korir J in his judgment was aware and fully appreciated the orders of Hon Mutungi J; that the same arguments being advanced in this application are the ones made before Hon Korir J; that the Judge –Korir J appreciated the manner in which the applicant had frustrated compliance with the orders of Mutungi J filing many cases; that the issue of the order of 16th November 2014 lapsing was never raised before Honourable Korir J; and that if the court had incorrectly applied himself to the facts, this court cannot sit on that judgment as if it was the Court of Appeal and that if there was JR ELC 12/2014 wherein the orders for elections were made then there was no need of filing this Judicial Review matter which was intended to confuse parties as observed by Honourable Korir J at paragraph 41 of his judgment; and that litigation must come to an end.

16. In **National Bank of Kenya V Ndungu Njau CA 211/1996** the Court of appeal held that:

“ A Review may be granted whenever the court considers that it is necessary 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 sufficient ground for review that another judge could have taken a different view of the matter. More 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 ground for review.....” the learned judge made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal in his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

17. In **Francis Origo and Another V Jacob Kumah Mungala CA 149/2001** the Court of Appeal stated that:

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review by may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

18. In **Abasi Belinda V Fredrick Kangwamu & Another [1963] EA 557**, cited with approval in **Pancras T.Swal V Kenya Breweries Ltd [2014] eKLR** the learned Bennet J (as he then was held that:

“ a point which may be a good ground of appeal may not be a good ground on an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground of appeal.”

19. Applying the above established principles in applications for review to this matter, I note that from the record, there is a multiplicity of cases filed by the applicant herein challenging the directorship of the 2nd respondent company and as at 12th November 2015 as per annexure JMN 41, he was calling himself as the Chairman/ Director of the company, following parallel elections that he spear headed, but which the Registrar of companies refused to acknowledge.

20. In annexure JMM 36, there is a letter dated 23rd October 2015 which is alleged to be a forgery

committed by the applicant and which is subject of pending criminal proceedings. The court also notes that indeed the orders of 16th November 2014 lapsed on 2nd February 2015 before elections of 17th December 2015 were held. However, there is glaring evidence that the applicant after the lapse of the said orders, also attempted to hold elections of the company on 23rd May 2015 as directed by Honourable G. Onsaringo on 15th May 2015 and returns filed on 25th May 2015, which returns the Registrar of Companies refused to accept.

21. My perusal of the proceedings before Korir J does not reveal the disclosure of the existence of the above order by Hon Onsaringo or even proceedings in JR ELC 12/2014 by Honourable Mutungi J, and it is for that reason that Korir J concluded that even if the court were to find that Judicial Review orders were available to the applicant, he would have declined to exercise his discretion in favour of the applicant for non disclosure. The Honourable Korir J found that there was absolutely no reason why these JR Proceedings were initiated if JR ELC 12/2014 were still inexistence, wherein the orders for holding of elections were made by Honourable Mutungi J on 10th November 2014.

22. Whereas I am in agreement that as the orders of 10th November 2014 had lapsed by the time when elections were held on 17th December 2015, my view is that there was nothing on record in JR 12/2014 and in that order of Hon Mutungi J that precluded the parties, if the orders thereof lapsed, from commencing a fresh process of convening an Annual General Meeting to conduct elections.

23. Furthermore, the correspondence from the record between the parties hereto is clear that the Honourable Korir J found that the applicant had frustrated the process of holding of the said election within the stipulated 90 days as per the orders of Honourable Mutungi J. Further, there is evidence on record to show that the applicant himself purported to hold elections on 23rd May 2015 and make returns even after the lapse of the said order of 10th November 2014, by obtaining orders from a subordinate court in Thika CMCC ELC 30/2015 which, in my humble view, was a mischievous venture on the part of the applicant and more so, an abuse of the court process.

24. The Registrar of Companies in their several correspondences with the applicant and the 2nd respondent clearly shows that the elections could not be held by 2nd February 2015 as per the orders of Honourable Mutungi J because the company did not have a proper register of shareholders and their respective shares, and that as soon as that was availed to the Registrar, which was well after the elapse of the 90 days, a go ahead was given to the bona fide faction by the Registrar (according to the records held by the Registrar) to issue notice for the holding of an Annual General Meeting wherein elections were conducted on

25. From the grounds of opposition filed by the 1st respondent Registrar dated 8th February 2016 in opposition to the chamber summons dated 22nd December 2015, it is clear that the issue of orders of Honourable Mutungi J made on 10th November 2014 were brought to the attention of the court by the respondent and not the applicant herein and therefore the applicant cannot ride on that evidence which he failed to disclose to the court, and on which evidence the learned Honourable Korir J did make a finding on, to allege that there was an error apparent on the face of the record.

26. I am persuaded that the issue of the orders of 10th November 2014 was placed before the Honourable Korir J as evidence for the respondents and if the learned judge committed an error by making an erroneous finding based on that evidence, then the correct forum for ventilating the misapprehension of that part of the evidence, lies with the Court of Appeal and not with the High Court.

27. In addition, it is clear that an Annual General Meeting could not have been held within the 90 days as ordered by Honourable Mutungi J, bearing in mind the order No. 4 that the representative of the Registrar General will in consultation with the respondents certify the shareholders register to be used during the Annual General Meeting. This court does not phantom how elections could have been held within the 90 days in the absence of the shareholders register to be used during the

Annual General Meeting, which issue the Registrar took into account in her several correspondence with the two factions of the company.

28. Indeed, that issue of whether or not elections could be held after the lapse of the order of 10th November 2014 by Honourable Mutungi J is a hotly contested issue and since the same was canvassed before Honourable Korir J which arguments the learned Judge took into account in his judgment, this court cannot review that issue as the issue was adjudicated upon by the same court (judge). To find otherwise would be sitting on the judgment of my brother judge of concurrent jurisdiction which is not permissible in law.

29. Further, the applicant herein having omitted the issue of the lapse of the orders of 10th November 2014 when the elections were being held on 17th December 2015 as one of his grounds relied upon in seeking leave to apply for Judicial Review orders, he could not without leave of court, purport to expect the learned justice Honourable Korir J to rely on that ground to determine the application in his favour.

30. What the applicant is attempting to do, in my view, is to litigate by installments through review process. Section 9(1) (c) of the Law Reform Act Cap 26 Laws of Kenya provides that where leave is obtained, no relief shall be granted and no ground relied upon, except with the leave of the court, other than the relief and grounds specified when the application for leave was made.

31. The other question is whether this court has jurisdiction to determine an application for review, which was in fact filed simultaneous with a Notice of appeal dated 2nd June 2016 and received in the Court of Appeal Registry, Nairobi on 8th June 2016. In other words, can the applicant decided to pursue both an appeal and at the same time seek for review?

32. The answer lies in the express provisions of Section 80 of the Civil Procedure Act, Order 45(1) of the Civil Procedure Rules and Order 42 Rule 6(4) of the Civil Procedure Rules. Order 42 Rule 6(4) of the Civil Procedure Rules concerns stay of execution of decree or order pending appeal. It follows that one cannot apply for stay of execution pending appeal while at the same time file an application for review of the same order for which a notice of appeal and therefore an appeal has been lodged.

33. Order 42 Rule 6(4) of the Civil procedure Rules provides as follows regarding the effect of a Notice of Appeal once filed:

“for the purposes of this Rule, an appeal to the Court of appeal shall be deemed to have been filed when under the Rules of that court Notice of Appeal has been given.”

34. Under Order 45 Rule 1 and 2 of the Civil Procedure Rules.

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 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 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 made, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2. 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 review.

35. From the above provisions which are a replica of Section 80 of the Parent Act, the Civil Procedure Act, it is clear that the applicant can bring an application for review of the order or judgment provided that they have not preferred any appeal against the order at the time of making an application for review.

36. In this case, the application for review and Notice of Appeal were filed on the same day 2nd June 2016 hence, concurrently. The receipt for court fees for the application is No. 7533873 whereas the receipt for court filing fees for the Notice of Appeal is 7533860 dated the same day. The Notice of Appeal was filed before the application for review but on the same day. The applicant's counsel did not respond to this serious point of law raised by the respondent's counsels. Clearly, this is a situation where the applicant wants to have it both ways by filing a Notice of Appeal and an application for review of the same judgment that he has preferred an appeal against, at the same time. That manner of challenging the judgment through a dual process is expressly detested by the provisions of Section 80 of the Civil Procedure Act and Order 45 Rule 1 and 2 of the Civil Procedure Rules. To that extend, I have no doubt that this application is not only incompetent but an abuse of the court process. It must be dismissed. I am fortified by the decisions in **Julia Njunge Macharia Vs Housing Finance Ltd [2005] e KLR** where Honourable Okwengu J (as she then was) found an application for review which was filed simultaneous with a Notice of Appeal incompetent for reasons that Section 80 of the Civil Procedure Act and the old Order 44 Rules 1 and 2 of the old Civil Procedure Rules prohibit such action of filing Notice of Appeal (which for purposes of Order 42 Rule 6(4) of the Civil Procedure Rules and Rule 74 of the Appellate Jurisdiction Rules is an Appeal); and an application for review simultaneously. Thus, one has to choose one remedy, either an appeal or a review in the matter.

37. In the **Estate of Allan Ngugi Muchai (deceased) [2006] e KLR** The court held that:

“.....On the issue of whether the applicant can file an application for review notwithstanding the Notice of Appeal, in my humble understanding of the provisions of Order XLIV Rule 1, the applicant cannot file an appeal and at the same time pursue an application for review, he has to choose to file an appeal, the avenue for review should not be available to him.....”

38. **The Court of Appeal in the case of Francis Origo & Others Vs Jacob Kumali Mungala [2005] e KLR** observed that:

“.....in the present appeal, the appellant preferred an appeal first from the magistrates court to the High Court and then to the Court of Appeal by filing a Notice of Appeal.

In essence, the court considered the Notice of Appeal to the Court of Appeal as an appeal and the court dismissed the application for review on inter alia that the applicant had preferred an appeal not to mention that the same had been struck out and thus the option of review was not available to the appellant.”

39. In **Kisya Investments Ltd Vs Attorney General & Another CA 31/95** the court held that a party who has filed a Notice of Appeal cannot apply for review but if an application for review is filed first, the party is not prevented from filing an appeal subsequently even if a review is pending.

40. In **Republic Vs Cabinet Secretary for Transport & Infrastructure & 76 Others [2015] e KLR** Odunga J made it clear that:

“ To apply for a review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to

be reviewed (as is the case herein) is an abuse of the process of the court.....”

41. From the above established principles anchored in the substantive and procedural law, it is clear that a party cannot file both a Notice of Appeal and an application for review in the same cause, challenging the same judgment/decree or order. He has only one option. In this case the applicant has gone both ways. Accordingly, I have no difficulty in finding the application for review highly incompetent and a gross abuse of the court process. I proceed and dismiss it. Even if that were not the case, I have already found that the purported error on the face of the record is no error or at all since the learned judge had at his disposal the orders of Honourable Mutungi J in JR ELC 12/2014 and he proceeded to make a finding that in fact, the applicant was guilty of non disclosure, upon which he dismissed the application besides the application lacking merit.

42. Accordingly, I find the application herein as a whole misplaced and on the material available, mischievous. I proceed to dismiss it for lack of merit.

43. From the record which shows that the applicant uses every opportunity available to ventilate in court and as a result abuse the court process, I find him vexatious and order that he shall bear the costs of this application payable to the company - Githunguri Constituency Ranching Company Ltd.

Dated, signed and delivered at Nairobi this 5th day of October 2016.

R.E. ABURILI

JUDGE

In the presence of

Ms Jane Githinji h/b for Prof Kiama Wangai for the applicant

Mr Munene for Respondent

N/A for interested party

CA: Adline