Ola Energy Kenya Limited v Nyiro & 5 others (Environment and Land Appeal 33 of 2023) [2025] KEELC 5798 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5798 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 33 OF 2023

YM ANGIMA, J

JULY 31, 2025

BETWEEN

OLA ENERGY KENYA LIMITED ..... APPELLANT

AND

RAPHAEL MWANDOE NYIRO ..... 1ST RESPONDENT

ATHMAN MZEE HAJI ..... 2ND RESPONDENT

OSBORN AMULIODO ASENA ..... 3RD RESPONDENT

MWIMA KOMORO MORRIS ..... 4TH RESPONDENT

BRIAN OTIENO OMONDI ..... 5TH RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 6TH RESPONDENT

RULING

A. Introduction

1. The material on record shows that vide a judgment dated 19.10.2022 the National Environment Tribunal in NET Tribunal Case No.19 of 2021 allowed the respondents' appeal against the decision of the National Environmental Management Authority (NEMA) to revoke an Environmental Impact Assessment (EIA) Licence dated 31.05.2021 issued to the appellant.

2. Being aggrieved by the said decision the appellant filed the instant appeal against the decision of the Tribunal vide a memorandum of appeal dated 18.11.2022 seeking, inter alia, the setting aside of the said judgment and the reinstatement of its EIA licence.

3. The record shows that upon the appeal being canvassed through written submissions, which were highlighted by the parties, the court (Hon. Justice N. A. Matheka) delivered a judgment dated 24.07.2024 dismissing the appeal with costs to the respondents

4. The record further shows that upon dismissal of the appeal the appellant filed a notice of appeal dated 02.08.2024 intimating its intention to appeal against the whole of the said judgment. It would appear, however, that upon the appellant realizing that it has no further right of appeal it decided to abandon the appeal and instead pursue a review before this court.

B. Appellant's application

5. Vide a notice of motion dated 14.10.2024 expressed to be based upon Order 45 rules 1, 2 and 3 of the Civil Procedure Rules, Articles 50, 60. 69 and 165(b) of the *Constitution* 2010, Sections 1A, 1B and 3A and 80 of the *Civil Procedure Act*, and all other enabling provisions of the law, the appellant sought the review, variation or setting aside of the judgment on account of an alleged error apparent on the face of the record. The application was supported by a detailed supporting affidavit sworn by Thomas Odhiambo Abale on even date. The deponent went to great length in his bid to demonstrate that the appellate Judge had misapprehended various aspects of the appeal. In particular, the deponent contended that there was no need to involve NGOS and the community groups in the area as they had previously been engaged in public participation.

6. The appellant also sought to demonstrate that the appellate court had misapprehended the nature of LPG storage infrastructure it intended to put. It was contended that there was no need of taking additional precautionary measures since the appellant intended to use what it called a mounded sphere vessel which was not prone to explosions as it was intended to sink in the event of an imminent explosion or accident.

C. Respondents' response

7. The respondents filed a notice of preliminary objection dated 10.02.2025, grounds of opposition dated 15.02.2025 and replying affidavit sworn by Jackson Muchiri-Advocate on 15.02.2025. In a nutshell, it was contended that the appellant was not entitled to pursue a review of the impugned judgment because it had already filed a notice of appeal with a view to lodging an appeal against the judgment. It was further contended that the application for review was incompetent and unfounded in law as it sought to overturn the entire judgment of the appellate court.

8. The respondents contended that there was no error apparent of the face of the record hence the application was an appeal on the merits of the judgment which was disguised as a review. It was contended that any alleged misapprehension of the facts and the law by the appellate court could not be remedied by way of a review. As a result, the court was urged to dismiss the applications with costs.

D. Appellant's reply

9. The appellant filed a supplementary affidavit sworn by Benedicta Karimi on 10.02.2025 in reply to the respondents' replying affidavit. It was asserted that the notice of appeal was withdrawn vide a notice dated 02.08.2024 under Rule 83(1) of the Court of Appeal Rules. It was contended that there was no pending appeal since the appellant had not complied with Rule 84 of the Court of Appeal Rules by inter alia, filing a memorandum of appeal and record of appeal.

E. Issues for determination

10. The court has perused the notice of motion dated 14.10.2024, the respondents' notice of preliminary objection, grounds of opposition and replying affidavit, as well as the appellant's supplementary affidavit. The court is of the view that the following are the main issues which arise for determination herein;

    a. Whether the appellant's application is incompetent and bad in law.

    b. Whether the appellant has satisfied the principles for review of the impugned judgement.

    c. Whether the appellant is entitled to the orders sought in the application.

    d. Who shall bear costs of the application.

F. Analysis and determination

a. Whether the appellant's application is incompetent and bad in law

11. The court has considered the material and submissions on record on this issue. The respondents took the view that the appellant was precluded from seeking a review because it had opted to pursue an appeal by filing a notice of appeal. The appellant contended that there was no pending appeal as the notice had been withdrawn in accordance with the Court of Appeal Rules.

12. The court takes the view that having withdrawn the notice of appeal pursuant to Rule 83(1) of the Court of Appeal Rules, the appellant cannot be precluded from seeking a review of the decree since there is no pending appeal before the Court of Appeal. In the premises, the court finds that the application for review does not contravene Order 45 rule 1 of the Civil Procedure Rules, hence it is not incompetent or bad in law.

b. Whether the appellant has satisfied the principles for review of the impugned judgment

13. The court has considered the material and submissions on record on the issue. The meaning of an error apparent on the face of the record was considered in the case of Multichoice Kenya) Ltd vs Mwarandu Group (Kenya) Ltd & 2 others [2000] eKLR which has cited by the appellant as follows;

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition page 2335-36 as follows;
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> > " The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that

is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions"

14. The court has noted from both the appellant's supporting affidavit and its written submissions that it has gone into great detail and elaborate arguments in a bid to demonstrated the alleged errors apparent on the face of the record. However, the bottom-line is that the appellant is aggrieved because its appeal was dismissed on merit hence it is seeking a way of overturning the entire decision so that the dismissal order is converted into a favourable order allowing the appeal and reinstating its EIA licence.

15. It must be remembered that the Tribunal allowed the appeal before it because it was of the opinion that National Environment Management Authority erred in granting the EIA licence without requiring the appellant to undertake a fresh Environmental and Social Impact Assessment (EISA) study because it considered the earlier one to be grossly inadequate. In allowing the appeal, the Tribunal reasoned as follows;

> "24. An ESIA Study Report that does not objectively apply itself to risk identification, ranking, and mitigation is not one that the 1st Respondent should have cleared. The overall contention of the Report across its various sections is that the impacts related to the project are site specific and are unlikely to result in permanently damaging the environment and social structures was not advanced in a compelling way by the Report.
>
> 25. Our holistic appraisal of the Report leads us to conclude that in terms of environmental and social risks the Report worked backwards from a preconceived position that the proposed project was safe and low risk and must be implemented at that particular location rather than arriving at that position organically and objectively.
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> 26. The gaps and overall slant of the Report should have led to the 1st Respondent calling for a fresh objective Report to be compiled and submitted to it by the project proponent. Section 63 of EMCA provides that:
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> > "The Authority may require any proponent of a project to carry out at his own expense further evaluation or environmental impact assessment study, review or submit additional information for the purposes of ensuring that the environmental impact assessment study, review or evaluation report is as accurate and exhaustive as possible."
>
> 27. Considering the foregoing, we find that the 1st Respondent erred in granting the EIA Licence to the 2nd Respondent without subjecting the proposed project to a fresh and objective ESIA Study Report. It therefore follows that the Appeal herein must succeed. The potential for harm to the environment by the project and population surrounding the project site were not adequately addressed." (underlining added)

16. The court is thus of the view that by dismissing the appellant's appeal this court simply agreed with the decision of the Tribunal as well as its reasoning. In the premises, this court cannot lawfully reconsider its judgment dated 24.07.20924 and arrive at a different conclusion without sitting on appeal over its

own decision. If this court previously decided that a fresh ESIA report was required for NEMA to legitimately issue a licence, it cannot hold otherwise in a review application.

17. It may well be the case that the appellate court erred in law in considering the issue of public participation in the judgment but that is not the kind of error which can be corrected by way of review otherwise this court would be sitting on appeal over its own decision or a decision rendered by a judge of coordinate jurisdiction. The court takes a similar view on the alleged misapprehension of the nature of storage vessels the appellant intended to install. If there was any misapprehension of some important facts by the appellate court, then one would not expect the same court to analyze or reconsider the same facts and come to a different decision or conclusion. That would be sitting on appeal over one's decision.

18. The court is thus far from satisfied that the appellant has made out a case for review of the impugned judgment. The appellant itself must have considered that any errors made by the appellate court could only be overturned on appeal hence the reason for filing the notice of appeal dated 02.08.2024. The appellant only changed tact upon realizing that it had no right of further appeal to the Court of Appeal. In the event, the court is not inclined to overturn the judgment dated 24.07.2024 through a 'review'.

c. Whether the appellant is entitled to the orders sought in the application

19. The court has already found that the appellant has failed to demonstrate a case for review, variation or setting aside of the judgment of the appellate court. It would follow that the appellant is not entitled to the orders sought in the application.

c. Who shall bear the costs of the application

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287.

Conclusion and disposal orders

21. The upshot of the foregoing is that the court finds no merit in the appellant's application for review of the decree. As a consequence, the court makes the following orders;

    a. The appellant's notice of motion dated 14.10.2024 is hereby dismissed.

    b. The 1st to 5th respondents are hereby awarded costs of the application to be borne by the appellants.

    It is so ordered.

RULING DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 31ST DAY OF JULY, 2025.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Ms. Victoria Okata for the appellants

Mr. Muchiri for the 1st – 5th respondents

No appearance for the 6th respondent