Reuben v Ngiroo & another (Environment & Land Case 75 of 2015) [2024] KEELC 63 (KLR) (22 January 2024) (Ruling)

Neutral citation: [2024] KEELC 63 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 75 OF 2015

FO NYAGAKA, J

JANUARY 22, 2024

BETWEEN

ALEXANDER REUBEN .... PLAINTIFF

AND

NGURIATUDO NGIROO .... 1ST DEFENDANT

JOSEPH NGIROO CHACHAKIN .... 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 28/09/2023 brought under Article 50 of *the Constitution*, Order 9 Rule 9, Order 45 Rule 1, Order 50 Rule 6 and Order 51 of the *Civil Procedure Rules, 2010* the Applicants sought the following orders:-
    1. ...spent
    2. The firm of Omollo Rotich Barasa & Company Advocates be granted leave to come on record for the defendants/applicants.
    3. ... spent
    4. The ruling and order issued on 26th January, 2021 be reviewed.
    5. The time given for deposit of the security for costs be enlarged.
    6. Costs be provided for.
2. It was supported by the Affidavit of Nguriatudo Ngiroo and a number of grounds which were to the effect that judgment herein was delivered via electronic mail on 30/07/202; the applicants applied for stay of execution pending appeal on 22/10/2020; on 26/01/2021 the court, due to Covid-19 pandemic delivered via electronic mail a Ruling which was conditional; the applicant's learned counsel did not advise on the conditions for stay of execution and the time frame given by the Court lapsed; the

applicants were willing and able to abide by the terms and conditions for stay of execution; there is a live appeal in the Court of Appeal being Eldoret Appeal No. 41/2020; the appeal will be rendered nugatory and a mere academic exercise if the application was disallowed; and it was in the interest of justice that the application be allowed.

3. In addition to the content of the grounds of the application which he put in deposition form, the deponent swore in the supporting Affidavit that they had a right to fair hearing under Article 50 of *the Constitution*; that the suit was filed on 07/11/2006; they instructed M/s Kaosa & Company Advocates to represent them and on 27/07/2018 the said lawyers filed a Defence and Counterclaim then the matter proceeded to hearing on various dates. After judgment they filed a Notice of Appeal. He annexed a copy of the Notice of Appeal as NN-1. After filing an application for stay of execution the court delivered a conditional Ruling a copy of which he annexed as NN-2. He deposed that the Advocates did not advise them on the conditions the court gave. That the deponent only became aware of the order of the Court in September, 2023 when the Respondent commenced eviction. It was upon that that he sought legal advice from the current advocates whom they instructed to file the instant application to protect their interests.

4. He deponed further that the miscommunication "can be attributed to the prevailing Covid-19 Pandemic conditions" prevailing at the time of which included limited travel due to curfew and travel restrictions as well as restricted court operations. He deponed that he had been advised by his current legal counsel that the circumstances prevailing during Covid-19 Pandemic can be attributed to "an act of God" since they were out of control. Further, that the mistakes of learned counsel of not informing the deponent and his other party of the conditions of stay should not be visited on an innocent litigant. He then annexed as NN-3 a copy of an extract of the Record of Appeal in the Court of Appeal. He urged the court to exercise its discretion in their favour in the interest of justice and that the Respondents will not be prejudiced in any way if the application was granted.

5. The Respondent opposed the application through a Replying Affidavit sworn on 10/10/2023. He deponed that the Application was an outright abuse of the process of Court, fatally defective and without merits. He swore that the Application was brought two years and seven months after the Ruling was delivered. That the applicants only made the application upon being hit with the reality of implementation of the eviction orders. That the applicants were aware of the conditions of stay but chose to ignore and refuse to obey them.

6. He deponed further that in the Applicant's own annexture of the copy of the Ruling it was shown that the applicants were given a copy of the Ruling by their former advocates and informed of the condition of stay and payment of Advocates' fees. That the Applicants were now accusing their former advocates falsely of failing to inform them of the Ruling when the former advocates acted diligently.

7. He deposed further that the conditions of limiting travels due to Covid-19 Pandemic could not have occasioned failure of the applicants to be informed of the conditions of stay of execution because persons communicated at the time using phones. He deponed further that a Ruling can only be reviewed upon discovery of new and important, an error apparent on record or on account of a mistake and none of these existed in the instant application. That in any event the appeal will not be rendered nugatory if eviction proceeded because the Applicants would be put into possession in case the appeal succeeds.

8. He deponed that the right to fair hearing is available to a party who abides by court orders hence where a party chooses to ignore court orders he cannot fault it. Then he deponed that the instant application has been brought with undue delay. He stated that he shall be unduly prejudiced if the application was allowed.

9. The parties submitted on the application. The Respondent summarized the prayers sought and the one that the impugned order granted. Then he argued that the Applicants neglected and/or refused to comply with the order and only woke up after noting the looking evictions. They stated that this did not entitle the applicants to the grant of the orders. He relied on the Court of Appeal decision of Nairobi Civil Application No. 240 of 2016, *Patriotic Guards Limited vs. Kipchirchir Sambu*.

10. The Applicants summarized the prayers they sought. They argued that they wished the Court to review the orders of 26/01/2021 and enlarge time for compliance. They cited Order 45 which is on review and Order 50 of the *Civil Procedure Rules* and Section 95 of the *Civil Procedure Act*. They stated that the reason for failure to perform the condition was due to lack of communication between them and the previous learned counsel due to Covid-19 Pandemic. They said they only became aware of the Ruling in September, 2023 hence there was no delay in bringing the application. They repeated their depositions on willingness to comply, the existence of an appeal and the absence of prejudice to the respondent if application was allowed, and that the prayers sought were discretionary.

Issue, Analysis and Determination

11. I have considered the Application, the law and the rival submissions. I am of the view that only two issues lie before me for determination:

    a. Whether the application is merited

    b. Who to bear the costs of the Application

12. I will embark on analyzing the issues this Court identified in this matter for determination.

(a) Whether the Application for Review is Merited

13. The Applicants did not cite Section 80 of the *Civil Procedure Act* but they did of Order 45 Rule 1 of the *Civil Procedure Rules, 2010*. The law on review of a judgment, ruling, decree or order of a court is now settled. Section 80 of the *Act* provides that:

    " 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."

14. Order 45 Rule 1 proceeds to provide the details of the basis for an application under Section 80 of the *Act*. What is import of Order 45 Rule 1? The provision reads as follows:-

    " (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 a 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 judgement to the court which passed the decree or made the order without unreasonable delay."

15. From it flow there conditions that a successful applicant must fulfil. These are:

    a. Discovery of new and important matter or evidence,

    b. Some mistake or error apparent on the face of the record or,

    c. Any other sufficient reason

16. The fourth condition which an applicant must discharge its obligation is that the Application must be made without unreasonable delay. It is understandable that the fourth condition ought to be observed at all times because the applicant cannot move the court as and when he pleases even to the inconvenience of other parties and the court merely grants the prayers he seeks, without any justification. To do so would amount abusing the Court process or using it as a rubber stamp and a stumbling block to other processes. It is unacceptable. Equity calls on everyone to be vigilant in everything. For that reason, Equity can and will only aid only the vigilant hence the maxim Vigilantibus non dormientibus aequitas subvenit is applicable.

17. If there is any delay is a matter of fact which the Court must examine in order to consider whether it is unreasonable. Thus, it is to be considered on a case by case basis. Whichever the length of the delay, it must be sufficiently explained. Therefore, in *Jaber Mohsen Ali & Another vs. Priscillah Boit & Another* E&L No. 200 of 2012[2014] eKLR, the Court stated that

    > " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case."

18. As to explanations for the delay it is obligatory that the Applicant must explain to the satisfaction of the Court why he delayed. Thus, in *Vincent Narisia Krop & 3 others v Martin Semero Limakou & 12 others* [2021] eKLR, this Court stated as follows:

    > " The Rule then imposes a further (fourth) condition which embraces and applies to the three above: that the application be made without unreasonable delay. It goes without saying that the Applicant must satisfactorily explain the delay however small it may be besides, it not being unreasonable. That is to say, he ought to give convincing reasons as to why he delayed in bringing the application."

19. I have considered the instant application. The Applicants argue that they came to know of the Ruling in September, 2023 when the issue of eviction was communicated to them through the area chief. In essence they are stating that after they made the application for stay of execution they went to sleep and waited for a miraculous communication about the outcome of their case. Moreover, they attributed the delay to lack of communication between them and their previous lawyers.

20. While I would appreciate that Covid-19 pandemic disrupted the court processes, it did not disrupt them forever until a time when the Applicants would be awakened from slumber in the unknown future. Normal Court operations resumed a long time ago: almost two years now. Even then the disruption did not completely cripple the court processes, and on this I agree with the respondents that there were other communication channels such as mobile phones and others. Besides I have noted that

the Bill of Costs which led to the execution which is finally being challenged was taxed inter partes on 27/07/2021 in the presence of learned counsel who held brief for the one previously on record. That was two years before the Application herein was presented. At the time of taxation learned counsel did not indicate to the Court that they were not in touch with their clients, the applicants herein. That was over six months after the delivery of the impugned Ruling. Does it mean that learned counsel acted without instructions and communication with the Applicants? Only learned counsel would have demystified this important question by way of an affidavit. It is not enough for the Applicants who were ably represented all along to state on oath without independent deposition from counsel that indeed they had never been in touch. This is in view of the further information revealed by the annexture NN-2, the copy of the Ruling, at page 7 thereof where it is clearly indicated in a handwritten summary at the end about the condition of depositing the money and also paying the advocate fees amounting to Kshs. 400,000/=. These to me were instructions given to the applicants in time but they chose to ignore them. Thus, when the taxation was made, the applicants were already aware of the condition. From the totality of the circumstances of the delivery of the Ruling and the filing of the instant application, I do not find any reason for the delay in bringing the instant application, leave alone the existence of the inordinate delay.

21. Turning to the other limbs under Section 80 of the [*Act*] and Order 45 Rule 1 of the [*Civil Procedure Rules*], it is important to first set out the definition of "any other sufficient reason." In [*Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya*] [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 Mativo J. (as he then was) outlined the following principles he pulled from a number of authorities. He stated that: -

    i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

    ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

    iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

    iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

    v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

    vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

    vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

    viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

22. That said, the Applicants herein started by arguing that the mistake of learned counsel should not be visited on them. I agree that in certain instances where it is clear that learned counsel made an error that may be the basis excusing a mistake and not visiting it on a client. But it must be clearly demonstrated that learned counsel made error and if not by that demonstration, then it should be admitted on oath by learned counsel that indeed he/she committed the error. In the instant case I see neither a demonstration of an error on the part of learned counsel not an admission to that effect. In fact, the Applicants depone to possibilities and not facts. The deponent of the supporting affidavit having made an assumption that there was miscommunication swore at paragraph 12 as follows,

> " the miscommunication can be attributed to the prevailing Covid-19 conditions..."

23. Clearly, the Deponent did not know why there was miscommunication if any. That was not a fact. This is the more reason there was need for the previous learned counsel to swear an affidavit to support the allegation that he did not communicate to the applicants. I am not prepared to find that there was a mistake by learned counsel.

24. Moreover, the Applicants did not bring themselves within the ambit of the Order 45 Rule 1 of the *Civil Procedure Rules* as highlighted above, specifically, with regard to the other limbs which would entitle them to apply for review. They did not aver that there was an error apparent on the record, a mistake or discovery of a new an important matter, leave alone the existence of a sufficient reason analogous to the three limbs. That being so, there is no reason to grant the prayer for review.

25. With regard to enlargement of time. Indeed, the Applicants would have moved this Court properly on this prayer under the provisions cited and to the exclusion of the prayers for review. But even if they did, it is my finding that the reasons they gave for the extension of time or for failure to comply with the condition for stay of execution are neither meritorious nor convincing.

26. The upshot is that I find no merit in the Application dated 28/09/2023 and I hereby dismiss it with costs to the Respondent.

27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF JANUARY, 2024.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE.