Multipurpose Co-operative Society Ltd v Serser & 3 others (Civil Appeal 160 of 2018) [2023] KECA 441 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 441 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 160 OF 2018

F SICHALE, FA OCHIENG & WK KORIR, JJA

APRIL 14, 2023

BETWEEN

BOROP MULTIPURPOSE CO-OPERATIVE SOCIETY LTD ..... APPELLANT

AND

SONOIYA ARAP SERSER ..... 1ST RESPONDENT

MOSES KIPKEMOI SIONGOK ..... 2ND RESPONDENT

JOEL KIPKEMOI YEGON ..... 3RD RESPONDENT

LEAH CHESANG KORIR ..... 4TH RESPONDENT

(An appeal from the Ruling of the Environment and Land Court of Kenya at Nakuru (D. O. Ohungo, J.) delivered on 31st July, 2017 in ELC Case No. 102 of 2004 Consolidated with HCCC No. 41 of 2006)

JUDGMENT

1. This is an appeal from a ruling of the Environment and Land Court at Nakuru (D. O. Ohungo, J.) delivered on July 31, 2017 in which the appellant's application for review was dismissed with costs.

2. Being dissatisfied with the judgment by the trial court, the appellant moved the said court seeking orders to review the judgment and decree rendered by Hon. L. N. Waithaka J. on the November 14, 2014 and to reinstate the appellant's suit for re- hearing before another judge.

3. The main ground in support of the application was that there was an error apparent on the face of the record. The error was that the learned judge did not consider the question of the alleged breach or violation of the appellant's by-laws.

4. The respondents contended that there was delay in filing the application and that the applicant had filed a Notice of Appeal on November 27, 2014 against the judgment sought to be reviewed.

5. In his determination, the learned Judge held that the contents of the by-laws and the nature of breach of the said by-laws were all matters of evidence. That the applicant was urging the court to review the evidence on the issues so as to arrive at a different conclusion from that of the learned Judge.

6. Guided by the reasoning in *Jameny Mudaki Asava v Brown Odengo Asava & Another* [2015] eKLR, the learned Judge made a finding that the alleged error apparent on the face of the record was not such as would warrant a review of the learned judge's findings. It would have perhaps been a point that could be taken on appeal to the Court of Appeal.

7. On the issue of delay, the learned Judge held that the delay was unreasonable as no reason had been offered for the 14 months' delay in filing the application.

8. The learned Judge further held that at the time application for review was filed, the notice of appeal was on record contrary to the provisions of Order 45 rule 1(1)(a).

9. Consequently, the appellant's application was dismissed with costs, leading to the present appeal.

10. The appellant through a record of appeal dated September 7, 2018 moved this Court on nine grounds of appeal. However, grounds 1, 2 and 3 were abandoned and the remaining grounds were condensed into one ground; to wit that: the learned Judge erred in law and in fact in not reviewing a judgement that had for all purposes sanitized a manifest illegality.

11. The appeal was canvassed by written submissions.

12. The appellant faulted the trial court for dwelling on the issue of service of a court order which was a consent order issued by the Tribunal in the presence of counsel for both parties. The court was further faulted for failing to hold that parties were bound by their consent order and instead held that the collection of titles by the respondents was legal.

13. The appellant contended that the respondents proceeded to collect titles eight days after the consent order was adopted by the tribunal when the only bit remaining in the process was the adoption of the said order by the court. The consent was later adopted by the court on October 8, 2002.

14. The appellant maintained that the consent order was a self-executing document and faulted the learned Judge for dismissing the application for review when it was clear that there was an error on a substantive point of law.

15. Relying on the decisions in the cases of *Birket v Arcon Business Machines Ltd* [1999] 2 All ER 429 and *Makula International Ltd v His Eminence Cardinal Nsubuga & Another* [1982] HCB II, the appellant argued that a court of law cannot sanction what is illegal; and particularly after the illegality was brought to the attention of the court.

16. The appellant further submitted that the grounds raised in the application were good grounds for review. The appellant maintained that the error on the face of the record was on a substantial point of law and that that was the reason why it opted to have the judgment reviewed. The appellant cited various authorities to buttress this submission including the case of *Nyamogo & Nyamogo Advocates v Kogo* [2001] EA 170.

17. The appellant stated that at the time of filing the application for review, a notice of withdrawal of the notice of appeal had been filed and the withdrawal effected on May 24, 2017.

18. With regard to delay, the appellant placed reliance on the fact that parties had freely entered into a consent, which the respondents chose to breach.

19. The appellant asked that the impugned ruling be set aside and the appeal be allowed with costs.

20. In opposing the appeal, the respondents submitted that the learned Judge exercised his discretion correctly, in dismissing the application for review. They contended that the ground raised by the appellant for review was on a question of evidence and as such could only be a perfect ground for appeal. They maintained that had the learned Judge allowed the application for review he would have been sitting on an appeal from the decision of a judge of similar rank.

21. The respondents contended that the delay of over two years was never explained and therefore, the learned Judge could not be faulted for exercising his discretion in dismissing the application. In that respect, the respondents relied on *Benjoh Amalgamated Limited v Kenya Commercial Bank* [2014] eKLR.

22. The respondents further contended that the appellant's option for review was lost the moment they preferred an appeal against the disputed judgment.

23. They submitted that the appeal be dismissed with costs as the application for review was an afterthought, meant to defeat the respondents' application for contempt of court.

24. This being a first appeal, the duty of this Court is as was stated in the case of Abok *James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where it was held in part that:

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

25. We have carefully perused the record, rival submissions by counsel, authorities cited and the law. The issues for determination are whether the Notice of Appeal lodged by the appellant barred it from filing an application for review; whether the appellant satisfied the conditions for grant of an order for review; and whether there was inordinate delay.

26. The appeal arises from a decision of the High Court made by the learned Judge in exercise of his judicial discretion. It is trite that the circumstances in which this Court can interfere with the exercise of discretion by a lower court are circumscribed. This Court may only interfere with the exercise of such discretion when, in the words of the predecessor of this Court in *Mbogo and Another v Shah* [1968] EA 93, it is satisfied that the decision of the lower court was clearly wrong:

> "...because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

27. It is well settled that where a party is aggrieved by the judgment, ruling or order of the court, such a party can either file an appeal or apply for review. In the instant case, the appellant filed a Notice of Appeal which was later withdrawn during the pendency of the application for review.

28. The respondents contended that since the appellant had filed a Notice of Appeal, it did not have the option for pursuing an application for review. The appellant contended that the notice had been

withdrawn and as such there was no appeal preferred against the impugned judgment. In the case of *Yani Haryanto v E. D. & F. Man. (Sugar) Limited*, Civil Appeal No. 122 of 1992 this Court stated:

> " The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore, despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal."

29. As stated in that decision, for purposes of Order 41 Rule 4, an appeal is deemed to have been filed when a Notice of Appeal is filed. Nonetheless, in that case the Court held that the party who has filed a notice of appeal may seek review, provided that if he chooses to do so, he would thereafter be barred from canvassing an appeal.

30. Similarly, in The *Chairman Board of Governors Highway Secondary School v William Mmosi Moi*, Civil Application No. 277 of 2005 the Court stated:

> " The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular, the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed. An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where "no appeal has been preferred" or where "no appeal is allowed". An appeal is allowed on orders made under Order 9A rule 2 Civil procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved party has "preferred" an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal in Yani Haryanto Vs. E.D. & F. Man (Sugar) Ltd Civil Appeal No. 122 Of 1992 (UR)... The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However, upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other."

31. We have given anxious consideration to that decision. It appears to suggest that even though an appellant had filed a Notice of Appeal, it would still be open to him to file an application for review, provided that he had not yet pursued the option of the appeal to its logical conclusion.

32. To our minds, that implies that it is open to the appellant to commence the process of appeal, and then take a pause, so that he could pursue the option of a review first. That would imply that the appellant had the two options (of review and of an appeal) running concurrently. Yet the court did not conclude that both options cannot be pursued concurrently or one after the other.

33. In the case of *Otieno, Ragot & Company Advocates vs National Bank of Kenya Limited* [2020] eKLR, this Court expressed itself thus;

> " Even though the substantive appeal had not been filed, the respondent had filed a notice of appeal. At the time the application for review was made, the notice of appeal was in place. In effect, it was pursuing the relief of review while keeping open its option to appeal against the same ruling. It probably hoped that if the application for review failed it would then pursue the appeal. It was gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing a notice of appeal. (See: Kamalakshi Amma vs A. Karthayani [2001] AIHC 2264)

The respondent's application for review was thus incompetent, hence the court did not have jurisdiction to grant the orders sought under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules."

34. We are persuaded that this is the correct position in law. We say so because a party who had filed a notice of appeal is permitted to invoke the provisions of Rule 5(2)b of the *Court of Appeal Rules*; the reason for that is that the said party is deemed to have lodged an appeal.

35. Conversely, a party who had not yet lodged a notice of appeal cannot seek an order either for stay of execution or an injunction, pending the hearing of his appeal, because he would not have instituted the appeal.

36. Accordingly, when the appellant filed a notice of appeal, it is deemed to have instituted an appeal: and as soon as that happened, it was not open to the appellant to seek review of the judgment from which the appeal or the intended appeal accrued from.

37. It is therefore, our finding that the learned Judge cannot be faulted for dismissing the appellant's application for review, on the grounds that the same was not available, since it was filed in contravention of Order 45 rule 1(a).

38. The applicable law for review is Section 80 of the *Civil Procedure Act*, Order 45 of the *Civil Procedure Rules* and Rules 85 and 87 of the Court of Appeal Rules.

39. It is trite that not all cases qualify for review. The grounds for review are narrower in scope compared to an appeal. The main grounds for review are; discovery of new and important matter of evidence; mistake or error apparent on the face of the record; and any other sufficient reason and most importantly, the application has to be made without unreasonable delay. See this Court's decision in *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020]eKLR.

40. Section 80 of the *Civil Procedure Act* states 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."

41. Order 45 Rule 1 of the *Civil Procedure Rules* states that:

> "(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay." (Emphasis ours)

42. It is not in dispute that the ground that the appellant relies on to implore us to allow this appeal is that there was an error apparent on the face of the record where the impugned ruling was concerned. What then constitutes an error apparent on the face of the record? In *Nyamogo & Nyamogo v Kogo* (supra), this Court addressed that question as follows:

> "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 a 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 on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

43. Sir Dinshah Fardunj Mulla in Mulla, *The Code of Civil Procedure*, 18th Edition at page 3665 had this to say:

> "An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review.....error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The scope of the power of review as envisaged under 0 47, r 1, Code

of Civil Procedure (India's equivalent of our Order 45 of the Rules) is very limited and the review must be confined strictly only to the errors apparent on the face of the record. A re-appraisal of the evidence on the record for finding out the error would amount to an exercise of appellate jurisdiction, which is not permissible by the statute. ..."

44. The appellant claimed the error was that the learned judge did not consider the question of the alleged breach or violation of the appellant's by-laws. It is evident from the record that the appellant sued the respondents for trespass. The suit was dismissed as the appellant had failed to prove fraud against the respondents. The error alluded to goes to the manner in which the learned Judge arrived at her decision. To our minds, the same cannot be properly classified as an error apparent on the face of the record. In the case of in *Pancras T. Swai vs. Kenya Breweries Limited* [2014] eKLR the court held as follows:

> "The appellant's right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all."

45. Similarly, in the case of *National Bank of Kenya Ltd v Ndungu Njau* [1997]eKLR this Court stated thus:

> "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."

46. The appellant is appealing against the dismissal of the application for review. However, the submissions by counsel for the appellant attack the substance of the judgment which was the subject of the application for review. In its application, the appellant alleged that the error necessitating the review was the breach of its by- laws by the respondents. However, in the submissions before this court, the appellant has heavily submitted on the illegality occasioned when the respondents failed to honour the terms of the consent and proceeded to collect the titles. Was the consent part of the by-laws? The answer is in the negative. If anything, it would appear that the appellant was seeking to introduce new evidence, without seeking leave from the court.

47. When we are called upon to ask whether the consent referred to formed part of the appellant's By-laws or not, we are invited to analyse the evidence adduced, to ascertain whether or not there was a breach. It is trite that an error apparent must be an obvious and patent error and not something which can only be established by a long drawn process of interrogating the findings which are sought to be reviewed.

48. This to our minds, cannot be said to be an error apparent on the face of the record.

However, it could have been a ground to be determined on appeal. In that regard, we are guided by the case of *Mary Wambui Njuguna v William Ole Nabala & 9 others* [2018] eKLR where this Court addressed itself on the issue as follows:

> "We also need to underscore the fact that when a court is sitting on review, it is not sitting on appeal of its own decision. It is for that reason that the alleged errors must be apparent on the face of the record without inviting any interrogation or protracted arguments thereon."

49. Similarly, in the case of *Abasi Belinda v Frederick Kangwamu & Another* [1963] E.A. 557 Bennett, J. stated that:

> " A point which may be a good ground of appeal may not be a good ground for 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 for appeal."

50. From the foregoing, we find that the appellant has not established that there was an error apparent on the face of the record. We are not persuaded that the reason advanced by the appellant amounts to an error apparent on the face of the record within the meaning of the rules cited nor is it analogous to the other reasons stipulated in Order 45 Rule 1.

51. As regards delay, the respondents contended that there was a delay of over 2 years in filing the application for review. The appellant on the other hand stated that there was delay as a result of the consent on record. They believed that the respondents would honour the consent. The impugned judgment was dated 14th November, 2014 while the application for review was dated 27th January, 2016. There was a delay of 1 year, 2 months. In our view, it was not enough for the appellant to just state that there was a consent on record. The delay in the circumstances of this case, and without a satisfactory explanation was inordinate. We therefore, hold that the delay was unreasonable. In the case of *Daphene Parry v Murray Alexander Carson* [1963] E.A. 546 the court had the following to say:

> " If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy."

52. Similarly, this court in the case of *Richard Nchapai Leiyang v IEBC & 2 others*, Civil Appeal No. 18 of 2013 observed as follows:

> " We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

53. In the end, we find no reason to interfere with the learned Judge's exercise of his discretion in dismissing the application for review. As a result, we find that the appeal lacks merit and is hereby dismissed with costs to the respondents.

DATED AND DELIVERED AT NAKURU THIS 14TH DAY OF APRIL, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR