Kipsang & 2 others v Ego (Miscellaneous Application E003 of 2024)
[2025] KEELC 922 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEELC 922 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ITEN

MISCELLANEOUS APPLICATION E003 OF 2024

L WAITHAKA, J

FEBRUARY 26, 2025

BETWEEN

WILSON KIPSANG ..... 1ST APPLICANT

ELIZABETH CHEPKIYENG ..... 2ND APPLICANT

JEREMIAH KIPTUGENY ..... 3RD APPLICANT

AND

JOSEPH KURUME EGO ..... RESPONDENT

RULING

1. By a ruling delivered on 29th October, 2024 this court dismissed the applicants' notice of motion application dated 5th July, 2024 on the grounds that:-

> " The Applicants had not annexed any Memorandum of Appeal to their supporting affidavit or provided any other evidence capable of demonstrating to the court that they had filed an appeal to the court, on which the application could hinge; that the order of stay sought cannot issue for want of substratum; and that concerning the prayer for an order setting aside the proceedings of 19th June 2024 for alleged denial of fair hearing, no evidence of denial of hearing has been demonstrated or is otherwise deduceable from the proceedings of 19th June 2024. As a matter of fact, no hearing occured on 19th June 2024. On that day, 19th June 2024, the court merely delivered a ruling in respect of the Applicants' application dated 17th April 2024. Hearing in respect of the Applicants' application dated 17th April, 2024, as can be gleaned from the ruling of the trial court annexed to the Applicants' supporting affidavit, occured on 3rd April 2024. It is the proceedings of 3rd April, 2024 which the Applicants should have moved the court to set aside and not those of 19th June 2024. Be that as it may, as pointed out herein above, the Applicants have not, through evidence, demonstrated that they were denied a fair hearing to warrant setting aside the proceedings

which culminated in the impugned ruling. Further that other than the alleged denial of fair hearing, which has not been proved, no other reason/ground has been given and proven to warrant issuance of an order of transfer of the case to another court for hearing and determination."

2. Claiming that this court misdirected itself into believing that the appeal was on the whole case as opposed to the ruling of the trial court (Hon. C. Kutwa) that was delivered on 19th June, 2024, the applicants argue that there is an error apparent on the court record which warrants review, variation and/or substitution of this court's ruling delivered on 29th October, 2024 dismissing their application dated 5th July, 2024.

3. According to the applicants, this court dismissed the application on technicalities arising out of dates cited in the application, which dates if overlooked, the court would have arrived at a different decision.

4. The applicants acknowledge that they had hinged their application on the proceedings of 19th June, 2024 but point out that the appeal was entirely premised on the proceedings of 3rd April, 2024 when the defence case was closed without the applicants being afforded an opportunity to defend or prosecute their defence.

5. Lamenting that unless the orders sought are granted they will suffer irreparable loss, the applicant contend that it is in the interest of justice and fairness that this court allows the application.

6. In reply and opposition to the application, the respondent filed the replying affidavit he swore on 18th July, 2024 in which he has inter alia deponed that the applicants have not demonstrated existence of an appeal, whether actual or intended, to warrant granting the orders sought.

7. Terming the application misconceived and devoid of merits, the respondent urges this court to dismiss the application with costs to her.

8. When the application came up for hearing, on 30th January 2025, counsel for the applicants informed the court that they made a mistake in their application dated 5th July 2024 by indicating that the order that formed the subject matter of the application was made on 17th April, 2024 when in actual fact the order was made on 3rd April 2024.

9. Terming the said error a good and sufficient cause for review, counsel for the applicants urged the court to allow the application as prayed.

10. Counsel for the respondent relied on the replying affidavit of the respondent mentioned herein above and submitted that the applicants have not met the conditions set out in Order 45 Rule 1 of the Civil Procedure Rules, 2010. Based on the decisions in the cases of Paul Mwaniki vs. The NHIF Board of Management (2020) e KLR and Muyondi vs. Industrial Commercial Development & another (2006) EA 243, the respondent's counsel urged the court to dismiss the application with costs to him because the applicants have not demonstrated existence of an appeal on which the orders can hinge and that the purported error does not emanate from the court record but an error in the applicants' pleadings.

Analysis and determination

11. I have carefully read and considered the application herein. From the grounds taken up and advanced in support of the application, I gather that the application is premised on the ground that there was an error on the applicants' pleadings regarding the date and proceedings on which the application dated 5th July, 2024 was premised.

12. Concerning that ground, it is noteworthy that in the ruling sought to be reviewed, varied or set aside, this court discovered the error and addressed itself to the issues arising from the application as regards stay and the other orders sought. This court did find that the order of stay could not issue because the applicants did not demonstrate that they had filed an appeal on which the order for stay of execution could hinge. In the instant application, other than indicating that the application was premised on the proceedings of 3rd April 2024 and not the proceedings of 17th July 2024 as alluded in the application dated 5th July 2025, the applicants have not demonstrated existence of any appeal in respect of the proceedings of 3rd April 2024 to warrant review of the decision of this court concerning the prayer for stay pending appeal.

13. Regarding the other prayers, this court did make a decision based on the merits of the case. In that regard, this court found that no evidence of unfairness was produced to warrant granting the orders sought. That was a substantive finding, which cannot be termed an error apparent on the face of the record to warrant granting the applicants the orders sought. If the applicants were dissatisfied with that determination they ought to appealed. An order of review is not available in the circumstances.

14. The upshot of the foregoing is that the application is ill-advised, misconceived and lacking in merits. Consequently, I dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED, AT ITEN THIS 26TH DAY OF FEBRUARY 2025.

L. N. WAITHAKA

JUDGE

Ruling read virtually in the presence of:

Mr. Mutai holding brief for Ms. Cheruiyot for the applicant

Ms. Lugwe for the respondent

Christine Towett: Court Assistant