Karanja (Suing as the Representative of the Estate of David Karanja Ng'ang'a) v Kiboinet t/a Sweetland Consultant Limited & 2 others (Environment & Land Case 45B of 2021) [2024] KEELC 3654 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3654 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 45B OF 2021

JM ONYANGO, J

APRIL 30, 2024

(FORMERLY HCCC NO. E003 OF 2021)

BETWEEN

FRANCIS NG'ANG'A KARANJA ..... PLAINTIFF

SUING AS THE REPRESENTATIVE OF THE ESTATE OF DAVID KARANJA NG'ANG'A

AND

HILLARY KIPKOECH KIBOINET T/A SWEETLAND CONSULTANT LIMITED ..... 1ST DEFENDANT

SMB BANK KENYA LIMITED ..... 2ND DEFENDANT

WHITE SILVER AUCTIONEERS ..... 3RD DEFENDANT

RULING

1. By an Application dated 25th June, 2023 brought under Certificate of Urgency, the Plaintiff sought the following orders:

   a. Spent

   b. That this Honourable Court be pleased to stay the ruling/orders issued on 25th October, 2022 and all consequential orders pending the hearing and determination of this Application.

   c. That this Honourable Court may be pleased to review, vary, vacate, discharge and/or set aside its ruling/order issued on 25th October, 2022.

   d. That this Honourable Court be pleased to allow the Applicant the opportunity to be heard and matter determined after fair hearing.

e. That costs of this application be provided for.

2. The Application is premised on the grounds adduced therein, where Counsel stated that she was not served. That Counsel for the 1st Defendant as well as Counsel for the 2nd and 3rd Defendants were aware that she was stranded as she waiting online for virtual proceedings in Court 1. The Motion states that Counsel for the Plaintiff attempted to get in touch with both of them through calls and texts but none of them directed her to the right court or indulged her to seek time allocation to allow her attend physical court when she requested them. It was alleged that she attempted to get in touch with the ICT Office, the Court Clerk and the Registry for information but was unable to do so due to system challenges, and contact was only established after the hearing was over and the Ruling delivered.

3. It is also alleged in the Motion that it is not clear from the record whether the court in its ruling took into account the Plaintiff's Replying Affidavit to the impugned Application, which raised serious issues for consideration. It was further alleged that the proceedings of 25th October, 2022 show fundamental anomalies, as itemized in the Motion that must be addressed. That the orders issued are prejudicial to the Plaintiff, as he was not given an opportunity to be heard or submit on his case. In conclusion, Plaintiff states that he is desirous of exercising his right of response to the impugned application and that it is in the interest of justice and fairness that the instant application be allowed.

4. The application is supported by the Affidavit of Francis Ng'ang'a Karanja, the Plaintiff/Applicant herein, sworn 25th June, 2023. In summary, the Plaintiff's case is that they were not served with a Hearing Notice for the impugned application hence the same was heard in the absence of the Plaintiff and/or his Advocate. He deponed that there was a miscommunication, which led to his Advocate not attending physical court, and that his Replying Affidavit to the Defendant's application for stay should have been taken into consideration to ensure due process and a fair hearing, but it was not. Further, that parties were not allowed an opportunity to file submissions before the decision was made thus violating his right to a fair hearing. He deponed that the discretion to stay proceedings should be exercised sparingly and only in exceptional cases as it interferes with a party's right to access justice and the right to be heard.

5. The Plaintiff added that he was advised by from his advocate, that the interests of justice are not served when parties are not allowed to respond to each and every claim before a decision is made. He deponed that litigants should be allowed to present their case and thereafter an informed decision made that considers their right to an expeditious trial.

6. On 26th September, 2023 the 1st Defendant swore a Replying Affidavit which was filed in court on 27th September, 2023 stating that the instant application has no merit, is frivolous and an abuse of the court process and should be dismissed in limine. He deponed that the Plaintiff had not met the threshold for either review or stay orders to be granted. He deponed that Kisumu Civil Appeal No. 090 of 2022 is pending before the Court of Appeal and parties have already filed submissions thereto and they now await a hearing date. That the said Appeal is challenging the authority of the High Court to transfer this matter where it was bereft of jurisdiction, thus should this matter proceed, the Appeal will be rendered nugatory for reason that the issue of jurisdiction would have been overtaken by events. He further stated that the Court's decision was guided by the provisions of Section 1A and 1B of the Civil Procedure Rules (sic) and that there is nothing to be faulted. He pointed out that parties have no control over the speed at which matters are heard at the Court of Appeal, and thus the application was made in bad faith.

7. On 23rd October, 2023 Counsel for the 2nd and 3rd Defendants indicated that they would be relying on the 1st Defendant's Replying Affidavit in response to the application. The court directed that the application be canvassed by way of written submissions.

Plaintiff's Submissions

8. The Plaintiff's Submission in support of the Application are dated 13th December, 2023 and were filed in court on the same date and Counsel identified four issues. The first is; whether the proceedings of 25th October, 2022 constitute proceedings within the meaning of the law and whether therefore there was a hearing capable of producing a ruling or at all. On this point, counsel only indicated that she relied on the proceedings of the subject date annexed to the application. Counsel then submitted that the Defendant ought to have extracted the order in the terms granted and served parties as per the normal practice, but did not do so. Counsel submitted that Order 42 does not render the application fatal for failure to annex the extracted order.

1st Defendant's Submissions

9. The 1st Defendant's submissions were filed on 27th September, 2023. Counsel opined that the main issue for determination was whether the Plaintiff had met the required threshold for reviewing orders of the court. Counsel submitted that Section 80 of the *Civil Procedure Act* provides for review of orders of court whereas Order 45 Rule 1 of the Civil Procedure Rules 2010 sets out the procedure for review. Counsel argued that the Plaintiff had not met any of the conditions set out thereunder. Counsel also submitted that the orders sought to be reviewed were made on 25th October, 2022 and the instant application was made 25th June, 2023 indicating that there was undue delay in making the instant Application and without explaining the reason for the delay.

10. Counsel for the 1st Defendant also submitted that the Plaintiff had not annexed the orders and/or the Ruling he sought to be reviewed in his application thus making the Application fatally defective. He cited the case of Suleiman Murunga vs Nilestar Holdings Limited & Another (2015) eKLR where it was held that:

> " The Plain reading of the above provision (referring to Order 45 Rule 1) is that an Applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an Applicant fails to annex the order sought to be reviewed, an Application is defective. In the present Application, the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's Application was fatally defective. I agree that a formal decree or order is a pre-requisite before an Applicant can bring himself/herself within the ambit of Order 45 of the Civil Procedure Rules as relates to review of the decree or order."

11. Counsel argued that setting aside the orders of stay of proceedings would render the Appeal nugatory since the same challenges the authority of the High Court in transferring the matter where it had no jurisdiction. For this reason, if the hearing proceeds, the Appeal will have been overtaken by events and he relied on Boniface Waweru Mbiyu vs Mary Njeri & Another (2005) eKLR. Counsel urged this court not to set aside or review the orders of stay of proceedings and prayed that the instant Application be dismissed with costs.

12. Counsel also raised the issue of whether there are any errors on the record to invalidate the proceedings and outcome. She submitted that the challenge was not on the merits of the Court's decision but the process as the Plaintiff was not given an opportunity to be heard. Counsel relied on Mbaki & Others

vs Macharia (2005)EA 206 at 207, Benjamin Gathiru Mwangi vs Hon. John Ndirangu Kariuki & Others, HC Constitutional & Human Rights Division Petition Appeal No. 60 of 2017, and Kiptanui vs Delphis Bank Ltd & Another HCC no. 1864 (unreported), on setting aside of an ex parte judgment or a judgment established to have been irregular. Counsel argued that there was no hearing, ex parte or otherwise, on the 25th October, 2022 as the record does not indicate the true representation of the Plaintiff which has been on record since the matter was filed in the High Court. Counsel stated that such an error among others on the record violate the Plaintiff's Constitutional right to a hearing and due process and the rules of an adversarial hearing (Kenya Orient Insurance vs Zachary Nyambane Omwagwa, Civil Appeal No. 19 of 2019 and National Bank of Kenya Limited vs Ndungu Njau (1997) eKLR).

13. Counsel further submitted that the Plaintiff's reply to the impugned Application was on record but there is no indication that the same was taken into consideration in the ruling granting the stay. Counsel cited James Kanyita vs Maries Philotas Ghika & Another (2016) eKLR and Onyango Oloo vs Attorney General (1986-1989) EA 456. Counsel also relied on Order 42 Rule 23 on re-hearing of Appeals on application as well as Section 1A and 1B of the *Civil Procedure Act* to urge the need to give the Plaintiff an opportunity to be heard.

14. Counsel's third argument was on whether the 1st and 3rd Defendant's pleadings met the required threshold in law. On this, she submitted that the 1st Defendant's reply to the instant application, which the 3rd Defendant relies on, does not meet the legal standard for a reply as set out at Order 2 Rule 11 of the Civil Procedure Rules and is thus defective and avoids the issues raised. For this reason, Counsel contended that all the facts pleaded by the Plaintiff were thus admitted and the Court should allow the application. Counsel further submitted that the Court should enforce order 2 Rule 15 and strike out the proceedings and the Defendants' reply as it does not disclose a defence in law and did not address fundamental matters raised.

15. Lastly, Counsel argued on whether a stay of proceedings is automatic pending appeal. Counsel relied on Kenya Wildlife Services vs James Mutembei (2019) eKLR where it was held that:

> " Stay of proceedings should not be confused with stay of execution pending appeal. Stay of Proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right to access to justice, right to be heard without delay and overall, right to a fair trial. Therefore, the test for stay is high and stringent."

16. Counsel added that the proceedings as seen on record do not reflect the position in the above-cited case. Counsel submitted that the Defendants had not itemized or established what particular loss or injury they stand to suffer if the impugned application were to be heard in the normal course of events, whereas the Plaintiff stands to lose his property. Counsel urged that the instant application be allowed with costs.

17. Although Counsel for the 1st Defendant was given leave to file supplementary submissions, Counsel did not file any. Further, on 19th December, 2023 Counsel for the 2nd and 3rd Defendants informed this court that they would be relying on the submissions filed by the 1st Defendant.

Analysis and Determination

18. Upon reading the Application and the response thereto, as well as the submissions of the parties in that regard, what the court needs to determine is:-

    a. Whether the Plaintiff was afforded sufficient opportunity to be heard; and

b. Whether the Application is fatally defective for failure to attach the order/ruling sought to be reviewed

c. Whether the Plaintiff has established a basis for the review of this court's decision.

19. By way of a brief background, this suit was commenced in the High Court, where the Defendants successfully objected to the Jurisdiction of that Court to handle this dispute. The High Court then directed that the matter be transferred to the Environment and Land Court, which had jurisdiction to hear and determine the matter. The 1st Defendant lodged an Appeal being Kisumu Civil Appeal No. 090 of 2022 challenging the authority of the High Court to transfer the matter to this court whilst it had no jurisdiction to hear it.

20. The 1st Defendant then filed the application for stay of proceedings in the Environment and Land Court pending hearing and determination of the Appeal. On 25th October, 2022 the court granted the orders of stay of proceedings ex-parte as the Plaintiff and his Advocate failed to attend court. It is these orders that the Plaintiff seeks by the instant application, to vary, review, set aside/discharge.

a. Whether the Plaintiff was afforded sufficient opportunity to be heard

21. The right to be heard is one of the two cardinal rules established under the principle of natural justice and it is generally expressed as audi alteram partem (that a party should not be condemned unheard). However, this does not mean that a party must be heard in all circumstances or despite the circumstances. It only means that a party ought to be given the opportunity to present their case, and then it is up to that party to either utilise the opportunity or not. Most importantly, a court cannot force a party to actually utilise the opportunity afforded to them to present their case, what is important is that it can be shown that the Party was availed the opportunity to be heard.

22. This was explained in Republic vs Commission on Administrative Justice & 2 others Ex parte Michael Kamau Mubea (2017) eKLR, where Justice Odunga held that:-

> " 131. In this case however, the Respondent has detailed the actions it took before compiling its report. It is clear from the facts placed before me that the applicant was afforded an opportunity of being heard during the process of investigations. It is contended that on occasions the applicant failed to respond to the Respondent's inquiries. As was held in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:
>
> > 'Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on

which the party not utilising the opportunity can be heard is why he did not utilise it'."

23. In the instant Application, the Plaintiff has made several arguments in support of the allegation that this court infringed on his right to be heard. The Plaintiff claims that he was denied an opportunity to be heard for the reason that he was unaware of the date the matter came up for hearing of the impugned Application. That his advocate was not served with a Hearing Notice and thus the decision was made in his absence and in the absence of his Counsel and without the court hearing his case before making its determination. The Plaintiff also alleges that his Replying Affidavit on the application, which was on record as of the date the orders were made, was not taken into consideration yet it raised substantive issues, and further, that he was not afforded an opportunity to file written submissions on the Application.

24. To set the record straight on the allegation that Counsel for the Plaintiff was not served, the court record is clear that the date of 25th October, 2022 was taken in court. Counsel for the Plaintiff, Ms. Ayugi herself, appeared before the court on 2nd June, 2022 when this matter was mentioned by my brother Justice Obaga, on this day Counsel for the Defendants were both absent. Ms. Ayugi indicated to the court that there was a pending application and was given the date of 25th October, 2022 by the court for hearing of the application. Justice Obaga clearly indicated that the application would be heard before ELC Court 2. Being the only Counsel present on that date, she is the one who was obliged to serve the other parties with the date and directions given, but she did not and now blames the Defendants for failure to serve a date that she took in court. Come 25th October, 2022 Counsel for the Plaintiff was absent despite being aware of the date. For this reason, the court proceeded to hear the application ex parte.

25. That a court has powers to hear a suit or an application ex parte as provided under Order 12 of the Civil Procedure Rules is not in dispute. This Court notes that in her address to court on 15th March, 2023 Counsel for the Plaintiff informed the court that she had asked a colleague to hold her brief on the day the orders were made. This is a clear contradiction of her earlier allegation that she was not served with the date, and is proof that she was fully aware of the date. Order 12 Rule 3 is clear on what the Court should do in the circumstances such as those of 25th October, 2022 and this Court cannot be faulted.

26. Ground (ii) on the face of the instant Motion indicates that the Plaintiff's Counsel was stranded online waiting for virtual proceedings in Court 1. Counsel further states at Ground (iii) thereof that she tried to reach the two opposing Counsels for assistance and directions via text message, she has not presented proof of this attempted contact or the alleged text messages. The allegation that she also tried to reach the ICT Office and the Registry but could not do so due to system challenges is also not backed by evidence. There are numerous authorities on this issue, which all conclude that it is not enough for a party to claim that they were not able to access virtual court for any reason, including system challenges in reaching Court staff as alleged. A party is required to provide proof of this allegation. Counsel did not name the specific ICT, Registry Officer or any other court personnel (if any) she contacted to express her predicament. The reasons given therefore remain mere allegations and the court cannot place any probative value on them.

27. Moreover, the directions issued by Justice Obaga were very clear that the application would be heard in Court 2. Counsel was aware having been in court on the day the directions were issued, and she has offered no explanation as to why she opted to go before Court 1 instead of Court 2 as directed. The record therefore speaks for itself that the Plaintiff and his Counsel were well aware of the date given for hearing of the application, however on that day, learned counsel and her client failed to attend Court. No sufficient reason or explanation has been given as to why they did not attend Court. The totality of

the facts and circumstances is that this court is of the opinion that the Plaintiff was accorded a chance to be heard but he chose not to utilise it.

28. As to the filing of submissions, it is common knowledge that applications may be heard orally or be canvassed by way of written submissions, there is no law that limits the hearing if applications only to written submissions. And in fact, the mode of hearing in civil suits is provided for under Order 18 rule 2 of the Civil Procedure Rules as follows:-

> " 2. Unless the court otherwise orders—
>
> (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
>
> (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case.
>
> (3) The party beginning may then reply."

29. The use of the words "Unless the court otherwise Orders..." at Order 18 Rule 2 above gives the Court the discretion to deviate from that prescribed mode of hearing. However, the said rule requires that there must be an order issued by the Court if that is to happen. This is what gives Courts authority to order that an application be canvassed by way of written submissions instead of proceeding orally in the manner outlined above. On perusal of the proceedings herein, it appears that no order was made directing that the impugned application would be canvassed by way of written submissions. In the absence of such orders, it goes without saying that the application would proceed orally in the manner provided for under Order 18 Rule 2.

30. For this reason, the Plaintiff and his advocate can only claim that failure to file submissions denied him an opportunity to be heard if the Court had issued directions that the impugned application would be heard by way of written submissions, and thereafter unjustly locked the Plaintiff out from doing so. Since it is established that no such directions were issued, the contention that failure to issue directions to file submissions denied the Plaintiff the opportunity to be heard is unfounded and unsubstantiated.

31. Furthermore, submissions are not necessarily part of the case, or in this instance the application. Although they may assist parties to bring into focus their respective cases with a view to swaying the court's decision, they are not and can never be the evidence or the basis on which a case or an Application is decided. There are many instances where Courts have rendered their decisions without parties and/or Counsel on record submitting whether orally or filing written submissions. In Ngang'a & Another vs Owiti & Another (2008) 1KLR (EP) 749, the Court held that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

32. The Court was within its rights to determine the application without requiring parties to file submissions and in the words of the Court of Appeal in Ng'an'ga & Another vs Owiti (Supra), the absence of written submissions does not prejudice a party. For the above reason, the Plaintiff's claim that denying him a chance to file submissions resulted into his being denied an opportunity to be heard fails.

33. In conclusion, on whether the Plaintiff was denied a hearing before this Court made its determination on the impugned Application, this court finds that the Plaintiff was in fact given a chance to present its case and failed to utilise it. The claim is therefore without merit.

b. Whether the Application is fatally defective for failure to attach the order/ruling sought to be reviewed

34. As pointed out by the 1st Defendant, an application for review ought to have annexed to it the formal extracted decree or order in respect of which the review is sought. The Defendant relied on Suleiman Murunga vs Nilestar Holdings Limited & Another (2015) eKLR where the court held as follows:

> "The plain reading of the above provision (referring to Order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or order in respect of which the review is sought. In essence, judgment or ruling. Thus, where an applicant fails to annex the order sought to be reviewed, an application is defective. In the present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendant's application was fatally defective. I agree that a formal decree or order is a pre-requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree or order"

35. No such order was attached to the instant application and nothing in Order 42 provides a cure for this defect despite submissions to this effect by the Plaintiff. If anything, Order 42 Rule 6(1) allows a court appealed from discretion to order for a stay of execution or stay of proceedings for sufficient reasons. The Plaintiff tried to lay the blame for failure to extract and serve the order on the Defendants. However, the truth of the matter is that this is the Plaintiff's application; he is the one who sought to rely on it. He should therefore have extracted it to be able to annex it to his application.

36. Although one might argue that the ruling is typed and in the court file, it must be noted that it is not the duty of this court to prepare a party's pleadings or outsource evidence for the litigant's case. Every litigant is duty bound to place before the court all evidence and documents that may be required in support of their case, see Peter Kirika Githaiga & another vs Betty Rashid (2016) eKLR, where the Court of Appeal had this to say:-

> " But from the various decisions rendered by the High Court, the resolution on their part seems unanimous, that an application for review is fatally defective if the order sought to be reviewed is not attached. While no provision of the law makes this a requirement, some of the reasons advanced by the High Court are that inclusion of the order is mandatory so as: to enable the court to determine the impugned point (per Visram, J. as he then was) in Wilson Saina v Joshua Cherutich t/a Chirutich Company Ltd [2003] eKLR; and for there to be clarity as to what "aggrieves the applicant", (Lesiit, J. in Belgo Holdings Limited v Robert Kotich Otach & Another [2009] eKLR). Similar sentiments are expressed in various other cases such as by Mutungi, J. in Suleiman Murunga v Nilestar Holdings Limited & Another [2015] eKLR. However, in the case of Rose Njeri Muiruri v. James Kiiru Chege & Another

[2009] eKLR; Kasango, J. veered off the High Court path and held that failure to attach the order is not fatal at all.

In our view, the position espoused by this Court and by Kasango J., represents the correct position, as they allow for recognition of the fact that while the law does not expressly demand that the order/ decree be attached, it is at times necessary that the same be extracted for purposes of enabling the court have clarity as to the orders complained about."

37. On whether the failure to attach the order/ruling would render the Application fatally defective, this Court notes that there is no requirement under Order 45 of the Civil Procedure Rules for an applicant to annex the order or ruling sought to be reviewed. This requirement appears to have arisen from practice. Being a procedural requirement, it is in some circumstances curable by Article 159 (2)(d) of *the Constitution* of Kenya 2010 and hence, in those rare instances, it is not fatal to the application. The Court of Appeal in Peter Kirika Githaiga & another vs Betty Rashid (Supra), went on to state that:-

> " Of course an order or decree is the formal expression of the decision of the court. An order emanates from a ruling whereas a judgment gives rise to a decree and should ordinarily be extracted. As already stated Order 45 (1) does not expressly provide that an order or decree must be annexed to the application for review. The rule only provides that where a party is aggrieved by an order or decree, he may apply for review. Our understanding is then that, where a formal order or decree has not been extracted or attached to the application for review but a party is able to direct the court's attention to that part of the ruling or judgment which he complains of, since such decision would be on the court file anyway, the application for review cannot be rendered fatally defective."

38. Consequently, even though the Plaintiff herein did not annex the order or Ruling he seeks to have reviewed, this court shall apply the oxygen principles as provided under Article 159 of *the Constitution* of Kenya, as well as various statutory provisions to the effect that "justice shall be administered without undue regard to procedural technicalities". This Court is in agreement with the decision of the Court of Appeal, and in this instance, the failure to annex the order is not fatal to this particular Application because the ruling can easily be accessed on the court file. This is because the Applicant has clearly indicated the date the same was delivered and there is no ambiguity as to which order arising therefrom that the Application relates to.

c. Whether the Plaintiff has established a basis for the review of this court's decision.

39. Section 80 of the *Civil Procedure Act* gives the court unfettered discretion to review of its decision. Section 80 provides as follows: -

> " 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."

40. Order 45 Rule 1(1) of the Civil Procedure Rules, 2010 sets out the grounds for review and provides as follows: -

> " 1.

(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."

41. Section 80 of the *Civil Procedure Act* gives the power of review whereas Order 45 sets out the rules which restricts the grounds for review to the following grounds:

a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

b. On account of some mistake or error apparent on the face of the record; or

c. For any other sufficient reason

42. The ground relied on by the Plaintiff in this application is that there is an error apparent on the face of the record. Time and time again, courts have held that the term "an error on the face of the record" means a mistake or an error, which is prima-facie visible and does not require any detailed examination. In Court of Appeal, National Bank of Kenya vs Ndungu Njau (1997) eKLR, the Court of Appeal held that;

> "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."

43. Counsel argued in support of this ground on two fronts. The first is that there is no indication from the record of the proceedings of 25th October, 2022 that the Plaintiff's replying affidavit to the impugned application which was already on the record was considered before the court rendered its decision.

Although this may be a ground for appeal, in all fairness, it is not listed under Order 45 Rule 1 as one of the grounds for review. Moreover, in its decision as shown on the record, the Court stated that:

> " In view of the fact that there is an Appeal in the Court of Appeal challenging the transfer of the case from the High Court to the Environment and Land Court, I am of the considered view that the interests of justice would be served if the proceedings herein are stayed pending the hearing and determination of Kisumu Civil Appeal No. E090/2022. Consequently, the Application dated 17th August, 2022 is granted in terms of prayer (b) of the Notice of Motion. The costs of the Application shall be in the cause."

44. In ordinary English, the term "considered view" means a view or opinion presented or thought out with care. It is an opinion based on a study, reason or thought. This means that the court took consideration of all facts of the case and the pleadings filed to arrive at their decision, including the Plaintiff's Replying Affidavit to the impugned application and the matters raised therein. The Court then made a conscious decision on the matters in controversy and exercised its discretion in favour of the Applicant therein. Consequently, any reconsideration of the matters in the impugned application would not be a review for reason of error on the face of the record but an appeal by the court that rendered the decision in issue.

45. Secondly, Counsel argued that the coram was not properly recorded to indicate his representation of the Plaintiff yet she has been on record ever since the matter was first filed in the High court. In my opinion, an error on the face of the record would be an error that affects the outcome or the decision and it could be an error of law or fact. The supreme court of Uganda in Edison Kanyabwera vs Pastori Tumwebaze (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows;

> " It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law."

46. An error on the coram as regards representation would not ideally affect the court's decision save to amend it to show the correct position of the parties. The court of appeal in National Bank of Kenya Limited vs Ndungu Njau (Supra) held that 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. In this case, if indeed the failure to indicate that Counsel was on record for the Plaintiff on 25th October, 2022 was the issue, then the review would only be sought to have the court correct the coram and include Counsel's name to indicate that she was on record in this matter. However, the coram is clearly not the issue here because what the Plaintiff seeks is for this court to reconsider its decision with a view to re-opening the impugned Application for re-hearing. This means that if the court relies on this ground to review its orders, it will be sitting in appeal of its own decision, which is not permissible in law.

47. It becomes very clear then, that in the present case, the Plaintiff has not been able to point out any error apparent on the face of the record. Suffice it to say that there is no error apparent on the face of the record as the Plaintiff would like this court to believe. What the Plaintiff seeks is to have is court re-open the application for a fresh hearing which, as already pointed out, is akin to sitting in appeal of its own decision. In the case of Evan Bwire vs Andrew Aginda Civil Appeal No. 147 of 2006 cited in

the case of Stephen Githua Kimani vs Nancy Wanjira Waruingi T/A Providence Auctioneers (2016) eKLR the Court of Appeal held as follows:

> " An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh..."

48. No such strong grounds have been exhibited to warrant a review of the orders issued. Thus, if the review is allowed in the terms sought, it would have the effect of re-opening the application for a fresh hearing. This ground therefore fails.

49. Another requirement in an application for review is that it must be made without undue delay. The decision sought to be reviewed in the instant application was made on 25th October, 2022 yet the application for review was made on 25th June, 2023. The explanation given by Counsel is that she had to seek leave from the court to bring the application for review. Counsel for the Plaintiff was represented in court when the matter next came for mention on 16th February, 2023 indeed, Counsel holding brief for Ms. Ayugi did inform Court of Counsel's intention to file an application for review. On 15th March, 2023 Counsel asked the Court to revisit the issue of stay of proceedings and when the Defendants' Advocate opposed the oral application for stay of the impugned orders, Ms. Ayugi once again repeated her intention to lodge an application for review. Notably, Counsel never indicated that she was seeking leave but only stated her intentions.

50. It is worth nothing that, even though the Court indicated that it had granted the Plaintiff "leave" to file an application for review, for the avoidance of doubt, there is no legal or procedurel requirement that a party who wishes to apply for review must obtain leave of court. The Plaintiff's submission on that point is therefore not only false, but also misleading. The delay of seven months has thus not been explained, contrary to Order 45 Rule 1(1)(b) which requires such an application as this one to be made without unreasonable delay. In Stephen Gathua Kimani (Supra), it was held that:-

> " The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of one year reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant one year to file an application in court. It would require sufficient explanation to justify a delay of one year. To my mind this is a long period, and indeed an unreasonable delay."

51. On what an unreasonable delay is, Justice Mativo in the Stephen Githua Kimani Case (Supra) further held that:-

> " I also find useful guidance in the decision of Mwera J in the case of Godfrey Ajuang Okumuvs Nicholas Odera Opinya (Kisumu High Court Civil Case No. 337 of 1996) where he held inter alia that 'an aggrieved party seeking a review of a decree or order on whatever basis must apply without unreasonable delay.' In the case of Abdulraham Adam Hassan vs National Bank of Kenya Ltd (Kisumu High Court Civil Case No. 446 of 2001), an unexplained delay of three months was found to be unreasonable. Similarly, in the case of Kenfreight (E.A.) Limited vs Star East Africa Company Limited (2002) 2 KLR 783 found a delay of three months to be unreasonable and disallowed an application for review... In Mbogo Gatuiku vs A.G. (HCCC 1983 of 1980, High Court, Nairobi), Mwera J emphasising on the need to file applications for review without delay stated that 'even a delay of a day or two calls for an explanation'."

52. The Plaintiff has relied on Order 42 Rule 23, which provides for rehearing of an appeal where it was heard ex-parte and judgment delivered against the Respondent on application. The said Rule provides that:-

> " 23. Re-hearing on application of respondent against whom ex parte decree made [Order 42, rule 23]
>
> Where an appeal is heard ex parte and judgment is pronounced against the respondent, he may apply to the court to which the appeal is preferred to re-hear the appeal; and if he satisfies the court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the court shall re-hear the appeal on such terms as to costs or otherwise as it deems fit."

53. The above provision deals with Appeals, and this is not an Appeal but an application for review. To say the least, this provision is not applicable in the instant application.

54. The upshot is that this Court agrees with the 1st Defendant that the Plaintiff's application dated 25th June, 2023 has not met the threshold for grant of orders of review. The application thus lacks merit and is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF APRIL, 2024

.....

J. M. ONYANGO

JUDGE

In the presence of;

1. Mr. Mathai for the 1st Defendant/Respondent

2. Miss Ayugi for the Applicant

Court Assistant: Mr. Brian K.