



REPUBLIC OF KENYA



KENYA LAW
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**Okumu v Okoth (Environment and Land Appeal E037 of 2022)
[2024] KEELC 3397 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3397 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E037 OF 2022**

AY KOROSS, J

APRIL 25, 2024

BETWEEN

DISMAS MBUNDO OKUMU APPELLANT

AND

ALOISE ODUOR OKOTH RESPONDENT

RULING

1. The notice of motion dated 28/08/2023 that is the subject of this ruling is filed by the appellant and in it, this court is moved under several provisions of law and the appellant has sought several reliefs from this court. Some of the reliefs are spent and the residual reliefs are: -
 - a. That the honourable court be pleased to set aside, vacate, review, or vary the ex parte orders issued on 9/11/2022 by Hon. Lady Justice A. Y. Koross dismissing the appeal for non-observance of requisite timelines.
 - b. That the annexed record of appeal be deemed as duly filed upon payment of requisite fees.
 - c. That the appeal be reinstated for directions and admission.
 - d. That costs of the application be provided for.
2. The motion is based on the grounds set out on its face and on the supporting affidavit of the appellant's counsel on record Mr. George M. Mbeya which is deposed on even date.
3. According to counsel, being aggrieved by the lower court decision which was rendered on 28/09/2022, the appellant filed a memorandum of appeal on 1/11/2022.
4. However, with no fault being inputted on the appellant, but rather on the court's administrative mechanisms, the court's official receipt was issued late which culminated to dismissal of the appeal.



According to counsel, this was an error apparent on the face of the record. It is counsel's averment that the appellant has compiled his record of appeal and he is not guilty of delay.

5. It is noted the appellant's counsel Mr. Mbeya filed a supplementary affidavit which he deposed on 5/10/2023 without being granted leave as is required by Order 19 Rule 1 of the *Civil Procedure Rules*. On that basis and considering Article 50 of *the Constitution* which grants both parties a right to fair hearing, this affidavit is expunged from the court record.

Respondent's case

6. The motion is strongly opposed by the respondent's replying affidavit which she deposed on 22/09/2023. She contends there is no error apparent on the face of the record since the memorandum of appeal contravened Sections 16A of the *Environment and Land Court Act* and 79G of the *Civil Procedure Act* as it was filed outside the requisite statutory period of 30 days without first seeking leave of the court.
7. According to the respondent, the memorandum of appeal that was struck out was incompetent *ab initio* and could not be admitted by the court. Further, she asserts the motion cannot cure the insufficiency of the memorandum of appeal and urges this court to dismiss the motion.

Appellant's submissions

8. The appeal is canvassed by written submissions. The appellant's counsel on record M/s. Mugoye & Associates filed written submissions dated 6/11/2023.
9. In them, counsel recognizes 3 issues as arising for determination which are whether the orders issued by this court can be set aside, reviewed or vacated, whether the appeal should be reinstated and whether the appellant is entitled to costs.
10. On these issues, counsel submits the legal framework for review of court orders is encapsulated in Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. In relying on Section 79G of the *Civil Procedure Act*, counsel submits the appeal was filed timeously.
11. Counsel further submits that pursuant to Order 42 Rule 21 of the *Civil Procedure Rules*, a dismissed appeal can be re-admitted and that this court has power to enlarge time as laid down in Section 95 of the *Civil Procedure Act* and relies on the decision of *Bernard Muthee & another v Anita Kamba Mwiti* [2021] eKLR.
12. Counsel argues that on application of Order 42 Rule 35 of the *Civil Procedure Rules*, the appeal was not ripe for admission or rejection as directions had not been given yet this court went ahead and dismissed it in limine.
13. According to counsel, an appeal could only be dismissed if directions had been issued and the appellant had failed to set it down for hearing or upon notice being issued to him. Therefore, counsel argues there is an error apparent on the face of the record. To buttress his argument, counsel relies on the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR.
14. Counsel submits the procedure for dismissing an appeal is clear and is articulated in the case of *John Njagi Karua v Njiru Gatumu* [2021] eKLR which cited with approval the case of *Pinpoint Solutions Limited and Another v Lucy Waithegeni Wanderi (as the Legal Administrator of the Estate of James Nyanga Muchangi)* [2020].



Respondent's submissions

15. The respondent's counsel on record Mr. Donex Juma filed written submissions dated 24/11/2023. In arguing his submissions on the singular issue of whether the appellant has met the threshold for review and relying on Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, counsel submits the appellant fell short.
16. It is counsel's argument that the appellant should have filed his memorandum of appeal within the statutory period of 30 days and that the provision of Order 50 Rule 2 of the Civil Procedure Rules is inapplicable in the circumstances of this case.
17. Counsel submits the Supreme Court of Kenya in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR when confronted with similar circumstances obtaining in this case held thus: -

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do.

To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court's Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court's perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court's Record.”

18. Therefore, counsel urges this court to adopt the position taken in this case and dismiss the motion.

Issues for determination, Analysis and Determination

19. Having carefully considered the motion, affidavits and rival submissions, the issue that falls for determination is whether this court should grant the orders sought.
20. As rightfully submitted by both counsels, the applicable provisions that govern review of court orders are encapsulated by Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. Section 80 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.”
21. The salient conditions brought out in Order 45 Rule 1 (1) of the *Civil Procedure Rules* such as discovery of new and important matter, mistake and sufficient cause have to be proved by an applicant in this case, the appellant.



22. I also associate myself with the principles outlined in the case of *Republic v Advocates Disciplinary Tribunal* (Supra) where the court on analysis of law and jurisprudence on review of court decisions summarized the guiding principles for review of a court decision thus: -

- 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."

23. Having outlined the law and jurisprudence on the grounds for revision, I will juxtapose the appellant's singular ground for review; dismissal of the appeal by the court was caused by an administrative error of late production of a court receipt.



24. This court notes the appellant's submissions introduces a new ground by stating this court's order contravened Order 42 Rule 35 of the *Civil Procedure Rules*. Parties are reminded submissions are arguments and this limb of the appellant's submissions are disregarded.
25. In addition, I must mention the appeal was never admitted as contemplated by Order 42 Rule 12 of the *Civil Procedure Rules* for it to trigger issuance of directions on its disposal as contemplated in the Rules including this Order 42 Rule 35 that was relied upon by the appellant's counsel.
26. Instead, this court in declining to admit the appeal on 9/11/2022, suo moto struck out the appeal by stating thus: -

“The appeal has been filed outside the requisite statutory period of 30 days as espoused by Section 79G of the *Civil Procedure Act* and the appellant has not sought leave to appeal out of time. The appeal is hereby struck out for being filed outside the statutory timelines without leave.”
27. I shall come back to this order later in the ruling. Now, turning to the ground for review, the onus was on the appellant to prove to this court that there was an error on the face of the record.
28. However, I am unable to establish the nexus between the late issuance of the court receipt, the order of this court and error apparent on the face of the record. Put another way, the error is not self-evident or prima facie as the appellant has not been able to point out any error apparent on the face of the record other than stating the court issued a court receipt late in the day. See *Republic v Advocates Disciplinary Tribunal* (Supra). On this basis, I find the motion is not merited.
29. For the benefit of both parties, the memorandum of appeal was date-stamped on the date it was presented to the registry which was on 1/11/2022 and this was in light of Order 42 Rule 10 of the *Civil Procedure Rules*.
30. The issuance of the court receipt on 8/11/2022 had no relationship whatsoever with the issuance of the court order as this court only considered the date of 1/11/2022 which was the date of presentation of the memorandum of appeal by the appellant's counsel and not 8/11/2022 which was the date the receipt was issued. On striking out the appeal, the court registry duly remitted the court order to the appellant's counsel on 11/11/2022.
31. As rightfully submitted by the respondent's counsel, Section 16A of the *Environment and Land Court Act* which mirrors Section 79G of the *Civil Procedure Act* sets out the statutory timeline of 30 days upon which an aggrieved party can file an appeal to the ELC.
32. In arriving at its decision, this court considered the date of the impugned judgment as stated in the memorandum of appeal which was indicated as 28/09/2022.
33. Looking at the calendar for the year 2022 for purposes of calculating the 30-day period, the 30th day takes us to 28/10/2022 which was a Friday and offices were not closed as envisaged by Order 50 Rule 3 of the *Civil Procedure Rules*. Yet the appeal was filed on 1/11/2022 which was a Tuesday. Obviously, this was outside the statutory period.
34. Having filed the appeal out of time without first seeking leave to file it out of time or seek its admission out of time as envisaged by Section 16A of the *Environment and Land Court Act*, this court was bereft of jurisdiction to entertain the appeal as it was a nullity and the court could not move one step further other than to strike it out. See *Nicholas Kiptoo Arap Korir Salat* (Supra). Accordingly, I must conclude, find and hold the prayers sought are not merited.



35. For the foregoing reasons, I ultimately find the notice of motion dated 28/08/2023 is unmerited and it is hereby dismissed with costs to the respondent.

It is ordered.

DELIVERED AND DATED AT SIAYA THIS 25TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

25/4/2024

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

N/A for the appellant.

Mr. Mayonge h/b for Mr. Juma for the respondent

Court assistant: Ishmael Orwa

