Chepkaitany v Kaimugul (Enviromental and Land Originating Summons 9 of 2021) [2025] KEELC 677 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 677 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 9 OF 2021

JM ONYANGO, J

FEBRUARY 20, 2025

BETWEEN

TAMUREI KOBILO CHEPKAITANY ..... PLAINTIFF

AND

CHEPKAITANY KAIMUGUL ..... DEFENDANT

RULING

1. By Notice of Motion dated 21st October, 2024, the Defendant/ Applicant filed an application seeking the following orders: -

    a. Spent.

    b. That this Honourable Court grant leave to the Applicant to act in person in place of Warigi & Co. Advocates

    c. That the Honourable court be pleased to review/vary the ruling given on 23rd January, 2024 and any subsequent order thereto.

    d. That the costs of this application be provided for.

2. The application is premised on the 11 grounds on its face and supported by the affidavit sworn by the Applicant on even date. He avers that he has since discovered new, important and compelling evidence which was not at his disposal at the time of the previous application and the subject ruling. Owing to the availability of the said new important evidence, there is an error on the face of the record.

3. That from the said new evidence, it is clear that the said M/S J.K. Birir was not qualified to act as an advocate at the time of recording the consent and further that he did not seek his instructions to enter into the said consent giving rise to the impugned consent judgment/order. That the matter was also reported to the police at the DCI Office, Eldoret East and they recorded their statements.

4. It is his claim that the impugned consent and the subsequent order was obtained fraudulently and through misrepresentation of facts and as a result he has suffered irreparably.

5. He argues that the application has been brought in good faith and maintained that he stands to suffer irreparable loss and damage unless the orders sought are granted.

6. The application was opposed. The Plaintiff/Respondent filed a Replying Affidavit dated 13th November, 2024. In his Replying Affidavit, he dismissed the application as being an afterthought, devoid of merit, an abuse of the court process and urged the court to dismiss the same with costs.

7. He averred that the Applicant filed a Notice of Appeal against the ruling dated 23/1/2024 and he annexed a copy of the said notice. He dismissed the issues raised in the application as not being new since the same were available to the Applicant long before the ruling dated 23/1/2024. That the report to the DCI was made prior to the delivery of the ruling and nothing prevented the Applicant from raising the issue in their earlier application dated 7/6/2023.

8. It was his contention that the claim that the previous counsel was not qualified to act as an advocate is not a sufficient reason to grant the prayers for review sought.

9. It is further his claim that the application has been overtaken by events since the decree has already been executed and is thus spent. He annexed a copy of the Certificate of Official Search, showing the registration status of the suit land.

10. The application was canvassed by way of written submissions. However, on perusal of the court record and the CTS platform, I have not seen any submissions by either party. Be that as it may, I will proceed to render my decision as hereunder.

Analysis and Determination

11. Having carefully considered the application, the response thereto and the various annexures; the sole issue arising for determination is whether the Applicant has made out a case for review of the ruling delivered on 23.1.2024 to warrant the grant of the orders sought;

12. The law on review of an order of the court is provided under section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the *Civil Procedure Rules*. The said provisions state as follows: -

Section 80 of the *Civil Procedure Act*;

> 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.

Order 45 Rule 1(b) of the *Civil Procedure Rules*;

(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.

13. It is clear from the foregoing that there are 3 grounds or elements to be proved in an application for review;

    i. 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

    ii. order made, or on account of some mistake or error apparent on the face of the record

    iii. any other sufficient reason

14. This position was restated in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR where it was held that: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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 and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

15. Before dealing with the merits of the application, I wish to deal with the issue of whether the filing of this application amounts to an abuse of the court process and whether the orders sought are tenable. It is not in dispute that the Applicant herein, after the adoption of the consent as an order of the court on 21st December, 2021, applied for the review of the said consent order vide an application dated 7/6/2023. The said application was heard and dismissed by this court vide the ruling delivered on 23rd January, 2024.

16. The Applicant in the present application is seeking orders of review of the ruling which dismissed his previous application seeking review. Ideally, this is an application seeking the review of an order/ruling on review. In my view, this is a backdoor appeal disguised as an application for review and is akin to the Applicant having a second bite at the cherry. The Applicant exhausted the process of review under section 80 and Order 45 Rule 1 upon the delivery of the ruling dated 23/1/2024 and now wishes to go back to the same issue of the consent order after he sought an order of review and failed. This is a clear abuse of the court process.

17. It is also the Respondent's contention that the orders sought are untenable for the reason that the Applicant has since lodged an appeal and he annexed a copy of the notice of appeal dated 6/2/2024. He thus sought the dismissal of the application on this basis.

18. In considering the effect of filing a Notice of Appeal to an application for review by a party; the Court of Appeal in the case of *Yani Haryanto v E. D. & F. Man. (Sugar) Limited* Civil Appeal No 122 of 1992 expressed itself as follows: -

> " 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."

19. Guided by the above authority, it is my finding that even though a Notice of Appeal was lodged by the firm of Warigi and Company Advocates, the same was just a formal notification of the intention to file an appeal and does not in itself amount to an appeal. Thus, it cannot be said that the Applicant has preferred an appeal and is therefore precluded from exercising the option of review.

20. Without prejudice to the foregoing, I will proceed to analyse and address the merits of the application.

21. The Applicant contends that he has since discovered new, important and compelling evidence which was not at his disposal at the time of the previous application and the subject ruling, that M/S J.K. Birir was not qualified to act as an advocate at the time of recording the consent. Thus, as a result of the said new important evidence, there is an error on the face of the record.

22. The Respondent on the other hand maintained that the issues raised are not new since the same were available long before the ruling and nothing prevented the Applicant from raising the issue in their earlier application.

23. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, J.M. Mativo J. (as he then was) summarized the following principles to be considered in an application for review from a number of authorities: -

> " 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. The question that follows is whether the Applicant has sufficiently proved, to the satisfaction of this court, that there was an error on the face of the record and demonstrated that the new evidence discovered was not within his knowledge.

24. Guided by the above decision and the statutory provision; I have looked at the Applicant's annexures marked CK 2(a) - (f). I note that annexures (a) – (c) are statements recorded at the DCI Office on 5/11/22, 1/11/22 and 6/11/22 respectively. These documents were evidently available at the time of filing the earlier application dated 7/6/2023 and the Applicant was at liberty to use the same in support of their application but he did not.

25. Annexures (d) and (f), a letter from the Law Society of Kenya dated 20.3.2024 and an extract from the Advocates search engine, are documents confirming the practice status of their previous advocate. Again, this is information which was readily available and accessible to the public. As stated by Mativo J. (as he then was) in the case above; it is not enough to merely state that a new and important evidence has been discovered, the onus is on the Applicant to demonstrate that the said evidence or information was not within his knowledge and could not be produced in court earlier after the exercise of due diligence. To this end, I agree with the Respondent that the said material was available long before the impugned ruling.

26. I find no material before this court to demonstrate the steps taken or effort made by the Applicant in the exercise of his due diligence in trying to avail or obtain the said evidence which he alleges was not within his knowledge.

27. In the circumstances, it is the finding of this court that the Applicant has failed to satisfy the necessary elements for the grant of an order of review to the required standard.

28. Accordingly I find that the application dated 21st October, 2024 is not merited and it is hereby dismissed with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF FEBRUARY, 2025.

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J. ONYANGO

JUDGE

Ruling delivered in the presence of: -

Mr Kipnyekwei for the Respondent

No appearance for the Applicant

Court Assistant – Hinga