



REPUBLIC OF KENYA



Kuya & another v Washiko & another (Environmental and Land Originating Summons E004 of 2020) [2024] KEELC 4792 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2020
EC CHERONO, J
JUNE 13, 2024**

BETWEEN

RICHARD MALABA KUYA 1ST APPLICANT

PATRICK WANJALA MALABA 2ND APPLICANT

AND

SERAPHINE KUTONDO WASHIKO 1ST RESPONDENT

CHRISTOPHER NYONGESA WANJALA 2ND RESPONDENT

RULING

1. What is before me for determination is the Notice of Motion dated the 11th March, 2024 brought pursuant to Section 1A, 1B & 3,3A& 63 of the [Civil Procedure Act](#) and Order 45 Rule 1 and Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010, Article 159(2) of the [Constitution](#) of Kenya the Applicant seeks for the following orders:
 1. Spent
 2. Spent
 3. That pending hearing and determination of this application inter parte, the court be pleased to review its orders directing that the hearing of the matter had been closed and judgment in the current suit would be delivered on 14/03/2024.
 4. That the Honourable Court be pleased to arrest its judgment in the current suit slated for 14/03/2024 pending hearing and determination of this application.
 5. That the Honourable Court be pleased to issue further or alternative orders as shall meet the ends of justice.
 6. That costs of this application be provided for.



2. The application is premised on ten (10) grounds set out on the face of the application supported by the affidavit of Seraphine Kutondo Washiko-the 1st Respondent/Applicant sworn on 11th March, 2024. For the purposes of this ruling and for clarity, the applicants are Seraphine Kutondo Washiko And Christopher Nyongesa Wanjala while the respondents are Richard Malaba Kuya And Patrick Wanjala Kuya.
3. It is the 1st applicant's case that she had been unwell for sometime and had lost contact with her advocate and upon being served with his application to cease acting, she visited his office and instructed him to proceed with the matter. She stated that her advocate in turn directed her to attend court on November 1, 2023 in order to explain her position. It is her contention that on the mention date, she was not given an opportunity to speak and her advocate who was away attending the Court of Appeal in Kisumu was unreachable. She stated that the court closed both the plaintiff and the defendant's case without giving her the opportunity to present her evidence in court. She stated that she instructed her advocate to prefer an appeal against the court's decision to close her case and delaying to supply her certified copies of proceedings for purposes of lodging an appeal. She urged the court to grant the orders sought in the application.

In opposition to the said application, the Respondents filed a replying affidavit dated 18th March, 2024 and stated that the current application is a sham and an abuse of the court process. He stated that the applicants were given numerous opportunities to comply with order 11 of the Civil Procedure Rules before the matter was finally set down for hearing on 1st November, 2023. He stated that when this case came up for hearing, the matter was called out and the respondents confirmed that they were ready to proceed with their witnesses. Counsel holding brief for M/S Masengeli for the applicant stated his instructions were to withdraw an application to cease acting by M/S J.O Makali & Co. Advocates for the applicant to cease acting dated 24/5/2024. In his reply, the respondents argued that he had not been served with such an application. Upon perusing the court record and confirming that the he court having noted that the defendant had previously been directed to appear before the Deputy Registrar to confirm compliance and after the defendant/applicant failed to appear, the Deputy Registrar therefor fixed this case for hearing. During the hearing date, one Mr Oira H/B for M/S Masengeli sought for adjournment arguing that what was coming up for hearing was a chamber summons application dated 24/8/2023 and not the hearing of the main suit. Upon checking the court record, this Court confirmed that this case was coming up for the hearing of the main suit and disallowed the application for adjournment and confirmed the hearing of the main suit. The respondent argued that the applicants had not filed any statements and thus had no witnesses to call. It was their contention that the applicant preferred an appeal against this court's decision to the court of appeal and at the same time filed the current application for review which is an abuse of the court process. It was argued that the applicant has not satisfied the requirements of Order 45 of the Civil Procedure Rules. The respondents asked the court to dismiss the application.

4. The applicant filed a supplementary affidavit sworn on 2nd April, 2024 where he reiterated the statements in the application. She further deposed that the application to cease acting was erroneously served upon the firm of Were & Associates.
5. The court directed the said interlocutory application be dealt with first and further directed the same be canvassed by way of written submissions. The respondent filed submissions dated 7th May, 2024 in opposition to the application. At the time of preparing this ruling, the applicants had not filed their submissions.
6. It was submitted that the applicants have not demonstrated that they are deserving the orders sought. The learned counsel also submitted that the applicant had not filed any witness statement and granting



the orders sought would be a waste of judicial time as the same would be in vain. It was further argued that the orders sought cannot issue as the applicant has not established the requirements under order 45 Rule 1 of the *Civil Procedure Rules*. The applicants equally contend that the application which was filed 5 months after the court issued the impugned order was filed with inordinate delay. The respondents also submitted that when the applicants preferred an appeal against the impugned order, it ousted its right to file an application for review. Reliance was placed in the case of *Otieno Ragot & Company Advocates v National Bank of Kenya* (2020) eKLR and *Chalicha FC v Odhiambo & 9 Others* (1987) eKLR.

Legal Analysis And Decision

7. I have considered application herein, the replying affidavit and the annexures thereto as well as the submissions by the Respondent herein.
8. From the proceedings of this Honourable Court, this matter was mentioned for compliance and directions under Order 11 *CPR* as follow; on 2nd February, 2023, 22nd March, 2023, 4th May, 2023, 8th June, 2023 and 23rd August, 2023. It was on the said 23rd August, 2023 that a hearing date was set for 1st November, 2023. When the matter came up for hearing on 1st November, 2023 Mr. Oira Advocate who was holding brief for M/S Masengeli for the defendant stated that his instructions were that the matter was coming up for the hearing of an application to cease acting which he had instructions to withdraw. On the other hand, Mr. Wamalwa R. for the respondent stated that contrary to the averments by counsel for the plaintiff, the matter was indeed coming up for the main hearing and that his elderly witnesses were present in court and that he was ready to proceed. He further argued that he was not served with the purported application by the firm of J.O. Makali & Company Advocates to cease from acting. The court having considered submissions by both parties confirmed the matter for hearing later in the day when the plaintiff and his witnesses testified and the defence case closed and a date to confirm filing of submissions given for 28th November, 2023. On the said date, the applicant's counsel indicated that she was not filing submissions and that an appeal had been preferred against the proceedings of 1st November, 2023. The court on confirming the respondent's submissions went ahead and slated the matter for judgment on 14th March, 2024. The current application which now seeks to arrest the said judgment and for review of the orders of 1st November, 2023 was filed on 11th March 2024, just 3 days to the judgment date. The court on 12th March, 2024 granted the prayer arresting the judgment as it considers the application for review.
9. The applicant has invoked the provisions of Order 45 rule 1(b) of the *Civil Procedure Rules* which states as follows:
 - “(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.



- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

10. The foregoing provisions are based on section 80 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya which states 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.”

11. It is clear from the foregoing provisions of the law that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time. See [Orero v Seko](#) [1984] KLR 238.

12. Turning to the facts of this case, the applicant herein states that she has filed a Notice of Appeal dated 7th November, 2023 against the orders of 1st November, 2023. It is stated that she has been pursuing for typed proceedings to enable her compile her record of appeal and that she opted to file this application since the judgment date was soon approaching and proceedings have not yet been availed to her.

13. The respondent herein argued that having filed a notice of appeal, the applicant was precluded from filing for review. This then begs the question what constitutes an appeal. The court of appeal has delivered two contradicting judgments on this issue. In *Kisya Investments Ltd v Attorney General and Another* Civil Appeal No. 31 of 1995 the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However, in *Yani Haryanto v E. D. & F. Man. (Sugar) Limited* Civil Appeal No. 122 of 1992 the Court of Appeal was of the following view:

“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”.

14. Further in the case of *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* Civil Application No. 277 of 2005 ‘the court held that ‘...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”.
15. Therefore, by filing the current application, the applicant rendered the notice of appeal purposeless and can therefore not pursue the same after this application for review is determined. Having stated as above, I now proceed to determine the application for review. As earlier mentioned, a party can apply for review on the following grounds; the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason. From the reading of the provisions of the *Civil Procedure Act* and rules made thereunder, it is clear that while Section 80 of the *Civil Procedure Act* gives the court the power to make orders for review, Order 45 sets out the conditions to be met in a review.
16. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held: -

“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.”
17. Further, while Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”
18. Therefore, before the order for review sought in the application is granted, the applicants must establish on a balance of probabilities the existence of the conditions set out under the law.
19. The substantive ground that emerges from the Notice of Motion and the Supporting Affidavit is that there was an error apparent on the face of the record and more specifically that the matter was on the



1st November, 2023 coming up for hearing of the application by the applicant’s counsel to cease acting and not the hearing of the main suit.

20. In *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal described an error apparent on the face of the record in the following terms:

“...in *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this Court said that 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 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 or wrong view is certainly no ground for a review although it may be for an appeal...”

21. From the holding in the above decision, it is trite that an error apparent on the face of record must be one that is obvious to the eye, and it must be one which when looked at does not yield two results. An error is one that shows itself to the ordinary reader of the record and not the one looking for something hidden or obscure: yeah, “...an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions.” (See *Chandrakant Joshibhai Patel v R* [2004] TLR, 218).

22. Looking at the court record and as summarized elsewhere in this ruling, this suit was set down for hearing of the main suit on 1st November, 2023. The applicant herein filed an application dated 24th August, 2023. The said application was not issued with a hearing date and as admitted by the applicants, was not served upon the respondent herein. My analysis of the record as shown above does not disclose any error worth granting the orders sought in this application.

23. The up-shot of the foregoing therefore, is that the Notice of motion dated 11th March, 2024 is devoid of merit and the same is hereby dismissed with costs to the respondents.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 13TH DAY OF JUNE, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. M/s. Masengeli for defendant/applicant
2. Mr. Wamalwa R for plaintiff/respondent
3. Bett C/A

