Nthiga v Stower (Environment & Land Case 933 of 2002)
[2024] KEELC 5514 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5514 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 933 OF 2002

OA ANGOTE, J

JULY 18, 2024

(FORMERLY NAIROBI HIGH COURT CIVIL CASE NO. 933 OF 2002)

BETWEEN

AUGUSTINE KIMENTERIA NTHIGA ..... PLAINTIFF

AND

DAVID NDUBI STOWER ..... DEFENDANT

RULING

1. The Defendant in this suit has filed a Notice of Motion dated 13th June 2023 under Section 20 and 8 of the *Civil Procedure Act*, and Orders 45 and 51 Rule (1) of the *Civil Procedure Rules* 2010. The Defendant has sought for the following orders:

    a. That the judgement of this court dated 5th September 2013 and the decree given on 5th September 2013 be reviewed and reversed.

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

2. The application is based on the grounds and the Affidavit sworn in support by the Defendant, in which he has deposed that Judgment was delivered in this suit in 2013; that being aggrieved by the Judgement, he filed a Notice of Appeal and applied for proceedings to enable him to lodge the appeal in the Court of Appeal; that for several years, advocates for both parties have endeavoured to obtain the court file without success, and that eventually, the court file was reconstructed on 28th February 2023.

3. The Defendant deponed that this case lapsed and ceased to exist in law in 2003, after the expiry of one year from the date when it commenced in 2002. Further, that the Plaintiff chose or elected not to notify the Defendant of the existence of the court file or to serve summons to enter appearance upon the Defendant.

4. The Defendant deponed that after the suit abated, for a continuous period of five years, the Plaintiff did not file any interlocutory application to either revive the case or otherwise; that he only came to learn of the existence of the suit five years and three months from the date when the suit was commenced, in 2007, when the summons to enter appearance were served on him and that the suit abated and therefore the said judgement and decree was a nullity in law.

5. The Plaintiff opposed the application on the ground that there has been inordinate and inexcusable delay in filing this application; that having initiated an appeal to the Court of Appeal, the Defendant cannot turn around to apply for review of the same judgement he is appealing against and that the suit was heard and judgement was delivered by the High Court, which then had jurisdiction to hear environment and land matters.

6. It is the Defendant's case that this court does not have jurisdiction to hear and determine the application; that the application has not met any of the conditions required for review of a judgement and that the application is meant to delay the taxation of the Plaintiff's bill of costs. The application was canvassed by way of submissions which I have considered.

Analysis and Determination

7. The issues for determination before this court are as follows:

   a. Whether this court has jurisdiction to determine this application

   b. Whether there has been inordinate and inexcusable delay in filing this application

   c. Whether the applicant has satisfied the grounds for review.

8. It is trite that jurisdiction is everything, and without it, this court cannot make a step. This was aptly stated by the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR, which stated as follows:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

9. The Plaintiff has asserted that this court lacks the jurisdiction to determine this application on the basis that the Defendant has filed a Notice of Appeal against the Judgement dated 5th September 2013 and cannot thereafter seek a review against the same judgement. They additionally assert that this is not the court that heard and delivered the judgement sought to be reviewed, and therefore lacks the jurisdiction to review the same.

10. The jurisdiction of this court to issue the remedy of review is provided in Section 80 of the *Civil Procedure Act* as follows:

> " Any person who considers himself aggrieved-
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> 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. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 similarly provides as follows:

> "(1) Any person considering himself aggrieved—
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> a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> 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."

12. From these provisions, the grounds for review which a party may prove are three: (a) discovery of new and important evidence which was not within the knowledge of the applicant or could not be produced at the time the orders were passed; (b) on account of a mistake or error apparent on the face of the record or (c) for any other sufficient reason. This was upheld in *Republic vs Public Procurement Administrative Review Board & 2 others* [2018] eKLR:-

> "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."

13. As submitted by the Plaintiff, courts have held that the remedies of appeal and review are mutually exclusive and can neither be pursued concurrently or sequentially. The Court of Appeal in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR addressing itself on the provisions of review under Order 45 of the *Civil Procedure Act* stated that:

> "It has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal. It is now an accepted view that both the Civil Procedure Rules and the Court of Appeal Rules did not contemplate the simultaneous proceedings of review and appeal before two different courts at the same time. Where a party has filed an appeal but subsequently wishes to apply to the court from which the appeal came to review the decision impugned, that party must, in the first place withdraw the appeal."

14. The Court of Appeal in William Karani & 47 others vs Wamalwa Kijana & 2 Others [1987] eKLR reached a similar finding, and stated that:

> " Both section 80 and order XLIV commence by explaining the fundamental nature of review. It is to be a means of curing gross or obvious errors when an appeal is allowed by the Act, from a decree or order, but no appeal has been preferred; and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and order XLIV both procedures cannot be adopted at once. Hence, supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."

15. In this case, it is not disputed that the Plaintiff filed a Notice of Appeal in 2013, following the delivery of the Judgement in the same year. The Plaintiff has asserted that the Notice of Appeal does not amount to an appeal while the Defendant has claimed that under Rule 61 of the Court of Appeal Rules 2022, a Notice of Appeal is an appeal.

16. A law cannot, however, apply retrospectively, unless it expressly provides so. The Court of Appeal Rules 2022 are not applicable to the circumstances that arose in the year 2013. Rather, the rules in application at that time were the Court of Appeal Rules, 2010.

17. Rule 77(1) of these rules prescribe that an intended appellant shall, before or within seven days after lodging a notice of appeal, serve copies thereof on all persons directly affected by the appeal. The Court of Appeal has in several instances held that this law did not intend for a Notice of Appeal to be equated to an Appeal.

18. On the question of whether a review application can be filed after a Notice of Appeal has been filed, the Court of Appeal in Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992 held that where a Notice of Appeal has been filed, the court has jurisdiction to consider an application for review. The above case was quoted in HA v LB [2022] eKLR 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. The Court of Appeal in Kisya Investments Ltd. vs Attorney General and R.L. Odupoy Civil Appeal No. 31 of 1995 conversely held that a court may not consider an application for review which is filed after a Notice of Appeal has been filed. In this case, the court held that:

> "The principal and the only ground of appeal urged before us was that the first defendant having filed a Notice of Appeal which was struck out it cannot by a subsequent application made thereafter proceed by way of a review. We accept this is a sound proposition of law. The correct position appears to us to be as set out by Sarkar on the Law of Civil Procedure, 8th Edition, where at page 1592 it is stated as follows: The crucial date for determining whether or not the term of 0.47 r. 1 are satisfied is the date when the application for review is filed. If on that date no appeal has been filed, it is competent for the Court to dispose of the application for review on the merits notwithstanding of the pendency of the appeal subject only to this that if before the application for review is finally decided, the appeal itself has been disposed of, the jurisdiction of the court hearing the review would come to an end ..... Review application should be filed before the appeal is lodged. It is presented before the appeal is preferred, court has jurisdiction to hear it although the appeal is pending. Jurisdiction of court to hear review is not taken away if after the review petition, an appeal is filed by any party. An appeal may be filed after an application for review, but once the appeal is heard, the review cannot be proceeded with ..... A review application is incompetent after appeal is preferred."

20. In appreciating the conflicting opinions of the Court of Appeal on this issue, Odunga J in Christopher Musyoka Musau vs Daly & Figgis, Nairobi High Court Civil Division Civil Case No. 1100 of 2003 aligned with the decision in Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992, on the following basis:

> "In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the Haryanto Case reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review"

21. More recently, in Multichoice (Kenya) Ltd vs Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR, the Court of Appeal upheld its finding in Yani Haryanto vs E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992. The Appellate court stated as follows:

> "While it cannot be denied that Kisya Investments (supra) case has been followed in some cases, it is equally true that the predominant position by the courts is that the mere filing of the notice of appeal will not bar a party from taking out an application for review. I endorse that as the correct position.
>
> ...

> In concluding this limb of the judgment, it has to be stressed that the legal policy of Order 45 is to prevent a party, against whom judgment has been passed, from availing himself of two remedies at one and the same time; to apply for a review in the court below while his appeal (not notice of appeal) is pending in the Court of Appeal."

22. This court is guided by the above decisions. The Court of Appeal has affirmatively held that filing of a Notice of Appeal will not bar a party from taking out an application for review. In this matter, it is not disputed that the Defendant only filed a Notice of Appeal and was prevented from filing a substantive appeal because the trial court file could not be traced.

23. The Defendant has also alleged that this court lacks jurisdiction because it is not the court that entered Judgement. The facts herein are that the impugned Judgement was entered in 2013 by Justice H.P Waweru, a judge of the High Court.

24. In accordance with the Practice Directions on Proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other courts, published as Gazette Notice No.13573 of 2012, this suit was transferred to the Environment and Land Court.

25. At the time the Judgement was entered, the Environment and Land Court, was already established under the *Constitution*. However, in accordance with the Practice Directions above, which were transitional provisions, the matter was heard and determined by the High Court.

26. Noting that this suit concerns ownership of land, in accordance with Article 162(2)(b) of the *Constitution* and Section 13(2) of the *Environment and Land Court Act*, it is the Environment and Land Court that has jurisdiction to deal with post Judgment applications.

27. The Plaintiff has propounded that only a judge that delivered Judgement can review his/her own decision. This court is guided by Order 45, Rule 2 of the *Civil Procedure Rules* which stipulates as follows:

> "(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
>
> (2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
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> (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate."

28. Sub rule 2 above clearly contemplates that a Judgement or order may be reviewed by another Judge in case of death or where the Judge is no longer attached to the court.

29. While the Plaintiff has asserted that this court is not a High Court and therefore cannot review the determination, this interpretation would result in an unjust and absurd situation that would leave the Defendant without a remedy in law. In view of the establishment of the Environment and Land Court,

the High Court no longer has jurisdiction to hear and determine disputes relating to ownership of land. It is this court that has jurisdiction to deal with the application.

30. The Plaintiff contends that there has been inordinate and inexcusable delay in filing this application. He submits that from the date of delivery of judgement on 5th September 2013 to the filing of this application on 14th June 2023, there has been a delay of nine years and nine months, which is an inordinately a long period of time which has not been explained.

31. The reason for the delay is however apparently clear, as it is not disputed that after Judgement was entered in 2013, in the course of the transfer of this matter to the Environment and Land Court, the file was misplaced, and was only reconstructed in February 2023. This application was filed on 13th June 2023. The gap of about four months is neither inordinate nor inexcusable.

32. It is trite that a party seeking extension of time must show sufficient cause for the delay. 'Sufficient cause' was defined in the Indian case of *Parimal vs Veena* [2011] 3 SCC 545 which was cited with approval by the Court of Appeal in *BML vs WM* [2020] eKLR as follows:

> "Sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough" in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive" However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

33. In the circumstances of this case, the Defendant has established sufficient cause. The delay in this suit was not due to his negligence or any laches on his part.

34. As highlighted above, the grounds for review are three:

    a. discovery of new and important evidence which was not within the knowledge of the applicant or could not be produced at the time the orders were passed;

    b. on account of a mistake or error apparent on the face of the record or

    c. for any other sufficient reason.

35. The Defendant in this case has averred that there is an error on the face of the record. He claims that the Judge erred in his determination that the Plaintiff filed his Plaint together with summons to enter appearance, which were subsequently lost, making it necessary for fresh summons to be prepared and issued. He urges that the finding was made without any evidence to prove or establish the facts.

36. Further, it is the Defendant's case that this suit lapsed twelve months after it was filed in 2002; that they were not served with summons in 2002 when the suit was filed, rather, summons were issued and served upon him 5 years later on 2nd August 2009 and that the Plaintiff failed to apply for enlargement of time prior to service, rendering the said summons invalid, null and void.

37. In *Muyodi vs Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> "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 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. This laid down principle of law is indeed applicable in the matter before us."

38. The definition of an error on the face of the record is that the error should not require detailed examination or elucidation of facts or legal position. This was held in *Alvin Mbae & 2 Others vs Edwin Nyaga Mukatha & 2 Others* [2022] eKLR as follows:

> "The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the *Civil Procedure Rules* and Section 80 of the *Act*. Put differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision."

39. The reasons given by the Defendant for review of the Judgment of the court would require an investigation into facts and consideration of the law on issuance of summons. This therefore does not fit the description of an error on the face of the record, as the same is not self-evident.

40. The Defendant's application has therefore not satisfied the grounds for review as established in law. The Defendant is at liberty to seek relief from the Court of Appeal.

41. In conclusion, this court finds that the Defendant's application dated 13th June 2023 for review is not merited and the same is dismissed.

42. Each party to cater for his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Otieno for Oyatsi for Applicant/Defendant

Mr. Kitheka for Plaintiff

Court Assistant: Tracy