**Matoi v Kimau & another (Environment & Land Case E014 of 2021)**
**[2025] KEELC 712 (KLR) (19 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 712 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ENVIRONMENT & LAND CASE E014 OF 2021**

**TW MURIGI, J**

**FEBRUARY 19, 2025**

**BETWEEN**

**JUMA MATOI ..... PLAINTIFF**

**AND**

**KILEI KIMAU ..... 1ST DEFENDANT**

**MANTHI NTHIA ..... 2ND DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 6th May, 2024 brought under Articles 159 (2) of *the Constitution*, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act* in addition to Order 18 Rule 10, 11 and Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules in which the Applicants seek the following orders: -

    a. Spent.

    b. That the Honourable Court be pleased to review and set aside its ruling delivered on 29/04/2024 and open up the case for the Applicants to respond to the application by the Respondent herein which gave rise to the ruling delivered on 29/04/2024.

    c. That the Respondent be ordered to serve the Applicants herein with the application which gave rise to a ruling dated 29/04/2024 which gave orders to re-open the case.

    d. That costs of this application be borne by the Respondent.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Manthi Nthia sworn on even date.

**The Applicant's Case**

3. The deponent averred that on 06/02/2024 the Plaintiff's suit was dismissed for want of prosecution. That consequently, they filed and served a bill of costs upon the Respondent which was scheduled for hearing on 29/4/2024.

4. That when he attended court on 29/4/2024 for the hearing of the taxation, he was advised that there was another application that was coming up for hearing on the same day. He went on to state that through their Advocate, they logged into the ELC portal and found that the court was not in session. That it was not until the 2/5/2024 when they learnt that the Respondent's application was heard and a ruling delivered in their absence.

5. The Applicants denied having been served with the application and asserted that the Respondent misled the court to believe that service had been effected upon them. In conclusion, he urged the court to allow the application as prayed.

**The Plaintiff/respondent's Case**

6. The Respondent filed a replying affidavit sworn on 14th May, 2024 in opposition to the application. He averred that the application is an abuse of the court process and ought to be dismissed with costs. He contended that the allegations by the Applicants are misplaced and untruthful as their Counsel admitted having been served with the hearing notice but failed to attend court.

7. He further contended that he filed his application on 6/1/2024 prior to the Defendants application and the hearing date was captured by the e filing system. According to the Respondent, this matter involves weight issues which should be heard on merit. He urged the court to dismiss the application with costs.

**The Applicants Submissions**

8. The Applicants filed their submissions dated 22nd July 2024.

9. On their behalf, Counsel identified the following issues for the court's determination:-

    a. Whether the Defendant/Applicant was given an opportunity to be heard.

    b. Whether the ruling of the court should be reviewed.

10. On the first issue, Counsel submitted that the Applicants were never served with the application seeking to reinstate the suit and hence it proceeded for hearing ex parte. Counsel argued that the hearing notice served on 18/4/2024 did not specify whether the hearing was with regards to the application or the bill of costs. Counsel further submitted that the Respondent was aware that the matter was coming up for hearing before the taxing officer on 29/04/2024 but chose to mislead the court into believing that the application was unopposed. Counsel contended that the Applicants are aggrieved because they were not accorded an opportunity to be heard.

11. On the second issue, Counsel submitted that the ruling of 29/042024 should be set aside as Applicants were not served with the application seeking to reinstate the suit for hearing. Counsel submitted that the Applicants have an inalienable right to be heard. To buttress this point, Counsel relied on the case of Mulatya &Another v Kyalo & another (suing as the legal representative of the Estate of Wycliff John Syengo (Deceased)(2022) eKLR.

12. Concluding his submissions Counsel urged the court to allow the application as prayed.

**THE RESPONDENT'S SUBMISSION**

13. The Respondent filed his submissions dated 4th October, 2024.

14. On his behalf, Counsel submitted that the only issue for determination is whether the Applicant has met the threshold for the grant of the orders sought. Counsel cited Section 80 of the *Civil Procedure Act* as read together with Order 45 Rule 1 of the Civil Procedure Rules to submit on the law governing review of court orders.

15. Counsel submitted that the right to be heard should not be exercised carelessly. Counsel further submitted that the application is fatally defective and ought to be dismissed with costs. Counsel contended that the Applicants have not shown new and important evidence they have discovered or shown that there was an error apparent on the face of the record. In summary, Counsel submitted that the application does not meet the threshold for the grant of the orders sought.

16. Concluding his submissions, Counsel urged the court to dismiss the application with costs.

17. To buttress his submissions, Counsel relied on the case of In re Estate of Alphonse Liyayi (Deceased) (Succession Cause E085 of 2022)92024) KEHC 6889(KLR).

**Analysis And Determination**

18. Having considered the application in light of the pleadings, the respective affidavits and the rival submissions, the only issue that arises for determination is whether the ruling delivered on 29th April, 2022 should be reviewed and/or set aside.

19. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the Civil Procedure Rules.

20. Section 80 of the *Civil Procedure Act* provides 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. Order 45 Rule 1 of the Civil Procedure Rules provides that: -

    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 the judgment to the court which passed the decree or made the order without unreasonable delay.

22. The provisions of Order 45 were restated by the Court of Appeal in the case of Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR where the Court held that:-

> " In the High Court both the *Civil Procedure Act* in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review. Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High court greater amplitude for review."

23. Similarly, in Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR the court held that: -

> " Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review."

24. As regards the first requirement, the Applicants must show that there is discovery of new or important matter of evidence which after due diligence was not within their knowledge or could not be produced at that time.

25. The Applicants have not shown that there is discovery of new or important matter of evidence that they could not have produced before during the hearing of the application.

26. With regards to the second requirement, the Applicants must establish that there is an error apparent on the face of the record. In the case of Nyamogo & Nyamogo vs Kogo (2001) EA 170 the court held that;

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 a long drawn process of reasoning where there may be 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 apparent on the face of the record even though another view was possible. Mere error or wrong is certainly no ground for review though it may be one for appeal."

27. Similarly, in the case of Timber Manufacturers and Dealers Vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992, Emukule J held that:-

> " For it to be said that there is an error apparent on the face of the record, it must be obvious and self- evident and does not require an elaborate argument to be established."

28. The Applicants have not pin pointed the errors that are apparent on the face of the record.

29. The Court is also mandated to consider if there are sufficient reasons to review the Court's ruling.

30. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000) eKLR stated that:-

> " These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record."

31. The Applicants contended that they were not granted an opportunity to be heard since they were not served with the application seeking to reinstate the suit. Although the Applicants admitted that they were served with a hearing notice, they denied having been served with the application seeking to reinstate the suit for hearing. Article 50 of *the Constitution* guarantees every person the right to a fair hearing. The rules of natural justice provide that no man shall be condemned unheard. It is clear that the right to fair hearing is a fundamental human right.

32. From the foregoing, I find that no prejudice will be occasioned to the Respondent if the application is heard on merit. It would be unjust and indeed a miscarriage of justice to deny a party who has expressed the desire to be heard the opportunity to defend his case.

33. From the foregoing, I find that the Applicants have demonstrated sufficient reason to warrant a review of the Court's ruling.

34. Finally, the Applicants must demonstrate that the application has been made without unreasonable delay.

35. The ruling sought to be reviewed was delivered on 29/04/2024. The instant application was filed on 8th May, 2024 I find that the application was filed without unreasonable delay.

36. In the end, I find that the application 6th May 2024 is merited and the same is hereby allowed in the following terms:-

    a. The ruling delivered on 29/04/204 be and is hereby set aside.

    b. The Respondent is hereby directed to serve upon the Applicants the application which gave rise to the ruling dated 29/04/204

    c. Costs in the cause.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF FEBRUARY, 2025.**

**HON. T. MURIGI**

**JUDGE**

In The Presence Of:

Kisui holding brief for Mutua Makau for the Defendants/Applicants