Mbugua v Hiram (Environment and Land Appeal 39 of 2020)
[2024] KEELC 13945 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13945 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL 39 OF 2020

BM EBOSO, J

DECEMBER 9, 2024

BETWEEN

TERESIA WANJIRU MBUGUA ..... APPELLANT

AND

MOSES GIKONYO HIRAM ..... RESPONDENT

(Being an Appeal against the Ruling of Hon A. M Maina, Senior Principal Magistrate, delivered on 15/9/2020 in Thika Chief Magistrate Court MCL & E Case No 336 of 2012)

RULING

1. This Court [Gacheru J] rendered a Judgment disposing this appeal on 8/10/2021. On or about 15/6/2023, the respondent brought a notice of motion dated 17/1/2023 seeking an order reviewing / vacating/setting aside the said Judgment under Order 45 of the *Civil Procedure Rules*. The said application is the subject of this ruling. The single issue to be determined in the ruling is whether the criteria for setting aside a judgment under Order 45 of the *Civil Procedure Rules* has been satisfied.

2. The application is premised on the grounds outlined in the motion; in the applicant's supporting affidavit; and in the applicant's written submissions dated 31/7/2024. In summary, the applicant's case is that this Court [Gacheru J] made an error in holding that the lower court lacked jurisdiction to cancel a title under the law. It is the position of the applicant that the lower court had jurisdiction to entertain the claim for cancellation of title. The applicant adds that there is an error apparent on the face of the record.

3. The appellant opposed the application through her replying affidavit dated 30/4/2024. Her case is that the applicant pursued the option of an appeal to the Court of Appeal by filing an application for extension of time for the purpose of lodging an appeal against the Judgment of Gacheru J. It is the case of the appellant that through a ruling rendered by Ngenye Macharia JA on 16/12/2022 in Court of Appeal (Nairobi) Civil Application No E355 of 2022, the Court of Appeal dismissed the applicant's

plea for an order enlarging the time within which to lodge an appeal against the impugned Judgment. The appellant contends that the applicant is inviting this Court to exercise appellate jurisdiction over its own Judgment and terms the instant application an abuse of the process of the court. She urges the court to dismiss the application.

4. The Court has considered the application, the response to the application, and the written submissions that were tendered on the application. As observed in the opening paragraph of this ruling, the single issue to be determined in this ruling is whether the application meets the criteria upon which this court exercises jurisdiction to review its own judgments under Order 45 of the *Civil Procedure Rules*.

5. The above jurisdiction is donated by Section 80 of the *Civil Procedure Act* which provides 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."

6. The legislative principle that guides the exercise of the above jurisdiction is contained in Order 45 rule 1 of the *Civil Procedure Rules* which 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
>
> (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 a 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."

7. Over the years, our superior courts have developed clear principles that guide courts when exercising jurisdiction to review judgments or rulings under Order 45 of the *Civil Procedure Rules*. The court distilled the following relevant principle in *Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya* [2019] eKLR :

   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 the 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 detailed examination.

8. In *Sanitam Services (E.A.) Limited v Rentokil (K) Limited & another* [2019] eKLR the Court of Appeal outlined the following principle:

> "Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay."

9. In *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR the Court of Appeal emphasized the principle in the following words:

> "Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated, this discretion should be exercised judiciously and not capriciously....."
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> '.....The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay."

10. Does the present application meet the criteria for review under Order 45 of the *Civil Procedure Rules*? The gist of the applicant's case is contained in his supporting affidavit and in his written submissions. The applicant deposed as follows at paragraph 5, 6, 7 and 8 of his supporting affidavit.

> "5. That the judgment is riddled with errors in that in setting aside the judgment of the lower court on the grounds that the said court had no jurisdiction to entertain the suit filed by the appellant in the lower court which position is

untenable in law as the lower court has powers to cancel titles under the laws and statutes.

6. That I swear this affidavit in support of the application filed herein.

7. That the issues in this case were adequately articulated during the hearing.

8. That there is therefore an error apparent on the face of the record which necessitates a review in my favour."

11. The gist of the applicant's argument is to be found in part (v) (sic) of his written submissions dated 31/7/2024 which reads as follows:

> " The court failed to find that the respondent acquired title deed and should be protected under Section 25 & 26 of the *Land Registration Act*. The appellant's title was under challenge and they alleged existence of fraud in cancellation of title.
>
> That the Judgment in riddled with errors in that in setting aside the judgment of the lower court on the grounds that the said court had no jurisdiction to entertain the suit filed by the appellant in the lower court which position is untenable in law as the lower court has powers to cancel titles under the laws and statutes.
>
> It is therefore clear that the superior court erred in every material respect as captured in the grounds of appeal the lower court has powers to cancel titles under the laws and statutes and therefore the appellant failed to lead evidence as to why her title should be declared the valid one."

12. It is clear from the above excepts that through the present application, the applicant challenges Judge Gacheru's interpretation of the law in relation to the jurisdiction of the magistrate courts to adjudicate claims for cancellation of titles. Gacheru J found that the lower court did not have jurisdiction to adjudicate a claim for cancellation of title. She issued an order striking out the suit in the lower court on the ground of want of jurisdiction. It is clear from the supporting affidavit and from the written submissions presented by the applicant that he is challenging the merits of the Judgment rendered by Gacheru J. The application is not about an error on the face of the record.

13. For good reasons, the *Constitution* and the relevant statutes have an elaborate architecture of the Civil Courts, with a clear appellate mechanism through which questions relating to the merits of court decisions are to be ventilated. The mechanism for challenging the merits of the findings and decisions of this Court [Gacheru J] is through an appeal to the Court of Appeal. This Court [Eboso J] has no jurisdiction to review the merits of a Judgment rendered by the Court [Gacheru J]. Put differently, even if Eboso J does not agree with the merit findings of Gacheru J on the question of jurisdiction of the magistrate courts, he cannot purport to exercise review jurisdiction on the merits of the findings and the decision of Gacheru J. The proper court to exercise that jurisdiction is the Court of Appeal.

14. Secondly, it is not lost on this court that having failed to exercise the right of appeal within 30 days, the applicant presented an application to the Court of Appeal, seeking an order enlarging the time within which to lodge an appeal against the merits of the impugned Judgment. A single Judge of the Court of Appeal [Ngenye JA] heard and disposed the application. The single Judge did not find merit in the application. At that point, the applicant had the right to renew the plea for consideration by a bench of three Judges of the Court of Appeal. He elected not to exercise that right. He instead purported to invoke jurisdiction that this court does not have.

15. For the above reasons, it is the finding of this Court [Eboso J] that the application dated 17/1/2023 challenges the merits of the Judgment of this Court rendered by Gacheru J on 8/10/2021. It is the further finding of this court that it does not have jurisdiction to review the merits of the said Judgment. Lastly, it is the finding of the Court that the application dated 17/1/2023 does not meet the criteria for review of a court's own judgment under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

16. The result is that the application dated 17/1/2023 is rejected and dismissed for lack of merit.

17. On costs, there is no proper basis for departing from the general principle that costs follow the event. For this reason, the applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF DECEMBER 2024

B M EBOSO

JUDGE

In the presence of: -

Mr Matio for the Respodent

Court Assistant: Hinga