Koros (Suing as the Legal Administrator ad litem of the Estate of Lemitei Ole Koros) & another v Attorney General & 3 others (Environment & Land Case 41 of 2017) [2023] KEELC 367 (KLR) (31 January 2023) (Ruling)

Neutral citation: [2023] KEELC 367 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT & LAND CASE 41 OF 2017

CG MBOGO, J

JANUARY 31, 2023

BETWEEN

AMOS KOROS (SUING AS THE LEGAL ADMINISTRATOR AD LITEM OF THE ESTATE OF LEMITEI OLE KOROS) .... 1ST PLAINTIFF

KEPELA OLE SETEK (SUING AS THE LEGAL ADMINISTRATOR AD LITEM OF THE ESTATE OF PARIT OLE SETEK) .... 2ND PLAINTIFF

AND

ATTORNEY GENERAL .... 1ST DEFENDANT

KIPIRA OLE SANTAI .... 2ND DEFENDANT

TULASHA ENOLE NYAMO & PETER KESUE NYAMO (AS ADMINISTRATORS OF THE ESTATE OF MEMUSI NYAMO) .... 3RD DEFENDANT

OLOTUEK NYAMO & KAMINGIINA NYAMO (AS ADMINISTRATORS OF THE ESTATE OF KINGORE OLE NYAMO) .... 4TH DEFENDANT

RULING

1. Before this court for determination is a notice of motion application dated April 28, 2022 filed in court on May 8, 2022 by the 2nd applicant and which is expressed to be brought under Article 50 (1) of the Constitution, Sections 3A and 80 of the *Civil Procedure Act* and Order 45 (1) and Order 50 (5) of the *Civil Procedure Rules* seeking the following orders: -
    1. Spent.
    2. That pending inter partes hearing and determination of this application there be a stay of execution of the decree herein plus all consequential orders.

3. That the honourable court be pleased to review the ruling delivered on the November 30, 2021 and its consequential orders hence reinstate this suit and hear it on priority basis for the interest of justice.

4. That the cost of this application be in the cause.

2. The application is premised on the grounds inter alia that the 1st plaintiff had an out of court settlement on account of the 2nd defendant and which claim was marked as settled. Also, that they were aware of the hearing date for the November 5, 2020 which they attended as required but due to the covid 19 pandemic protocols, they kept distance awaiting to be called but the 2nd applicant was surprised to learn that the suit had been struck out for non-attendance. Further, that the 2nd applicant engaged his counsel who filed an application for reinstatement and was surprised to learn that the same had been dismissed as well.

3. The application is supported by the affidavit of the 2nd applicant sworn on even date. The 2nd applicant deposed that on the date of the hearing which was on November 5, 2020, together with his witnesses, they were present in court and were asked to stay outside due to the covid 19 protocol. Further, that they knew that their advocate was to be in court having communicated the hearing date to them and as such, they were outside waiting for directions. The 2nd applicant further deposed that afterwards, they learnt that their suit had been dismissed for want of prosecution. Thereafter, they instructed counsel to file an application to set aside the order but they realised that the same was dismissed on November 30, 2021 whereas their advocate indicated that the ruling was still pending. Further, that their advocate on record had neglected their case which led to the dismissal for non-attendance.

4. The 1st respondent filed grounds of opposition dated May 30, 2022 in opposition to the application on the following grounds: -

    1. That the application is frivolous and an abuse of the court process and the same ought to be dismissed with costs to the 1st respondent.

    2. That no valid grounds have been advanced to review the orders of dismissal made by the honourable judge.

    3. That the orders sought cannot be granted as the court is now functus officio having pronounced its decision twice over the same subject matter.

    4. That the applicants are completely disinterested in the prosecution of this suit and the explanation offered is not plausible thus the application should be dismissed.

    5. That the applicant is guilty of laches as there has been inordinate delay in bringing the application to court.

    6. That reinstatement of the suit will prejudice the 1st respondent as the applicants have failed to prosecute their suit since it was filed before this court and the same contravenes the 1st respondent right for a fair trial under Article 50 of the Constitution.

5. The 3rd and 4th respondents filed a replying affidavit in opposition to the application which was sworn on September 19, 2022 by Mayiani Sankale-Advocate. The counsel deposed that the instant application is res judicata which has been fully heard and determined vide a ruling delivered on November 30, 2021 and is bad in law, vexatious and an abuse of the court process. The counsel further deposed that the hearing date for November 5, 2020 was taken by consent and on the said date, the applicants and their advocates were not present in court. Further, that the applicants had a duty to communicate with his advocate and if he was willing and ready to prosecute his case, he would have

been vigilant and ensured that there was attendance on his part on the day of the hearing. As such, the suit was properly dismissed and the court acted within the law in dismissing the suit for non-attendance. The counsel further deposed that there is evidently no mistake or error on the face of the record to warrant review of the ruling delivered on November 30, 2021.

6. This court directed parties to file written submissions to dispose off the application. The 2nd applicant filed written submissions dated November 15, 2022.The 2nd applicant raised one issue for determination which is whether the instant application meets the legal threshold for an application to reinstate a suit. The 2nd applicant submitted that by dint of Order 12 Rule 7 of the *Civil Procedure Rules*, this court is clothed with sufficient jurisdiction to set aside the order dismissing the applicants' suit. Further that the said power is discretionary but must be exercised in favour of substantive justice rather than procedural technicalities that would serve to drive a litigant out of the seat of justice as proposed by the 3rd and 4th respondents.

7. The 2nd applicant further submitted that the applicants' counsel was unable to reach them to make the necessary arrangements to facilitate the travelling and attendance to court of counsel and the expected witnesses for hearing which was an unfortunate circumstance and the consequences of the same should not be visited upon an innocent client. Further that the reasons adduced constitute an excusable explanation as to non-attendance by counsel as well as the applicant's who were within the court's premises but who were subjected to Covid 19 protocols and for this reason, the applicant ought not to be denied an opportunity to have a hearing and a conclusive determination of this matter. The 2nd applicant relied on the cases of *Mbogo & Another versus Shah* EALR 1908, Githere versus Kimungul 1976-1985 EA 101 and *Abdirahman Mohamed Abdi versus Safi Petroleum Products Limited & 6 Others*, Civil Application No Nairobi 173 of 2010 and submitted that it will be an injustice to deny the applicants their opportunity to be heard.

8. The 2nd applicant further submitted that the 3rd and 4th respondents have a biased view of the proceedings whereas the conduct portrayed by the applicants' show that they are indeed interested in prosecuting their suit and that the mistake of counsel cannot be meted out against his client. Reliance was placed in the case of *Philip Chemwolo & Another versus Augustine Kubede* (1982-88) KAR 103.

9. The respondents did not file written submissions. Be that as it may, I have analysed and considered the application, the grounds of opposition, replying affidavit and the written submissions filed by the 2nd applicant and the issue for determination is whether the 2nd applicant is entitled to the orders of review of the ruling delivered on November 30, 2021.

10. Order 45 Rule 1(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 Judgment to the Court which passed the decree or made the order without unreasonable delay." Emphasis added.

11. While Order 45 Rule 1(1) of the Civil Procedure Rules sets out the rules for review, Section 80 of the *Civil Procedure Act* provides for the power of review. It is therefore clear from the above that the Court's jurisdiction in an application for review is circumscribed by the following: -

    1. Discovery of new and important matter or evidence which, even after the exercise of due diligence, was not within the knowledge of the Applicant or could not be produced at the time the decree or order was made.

    2. On account of some mistake or error apparent on the face of the record.

    3. For any other sufficient reason.

    4. The application must be filed without un – reasonable delay.

12. The application at hand is the subject of a ruling delivered by my brother Kullow J on November 30, 2021 in respect of notice of motion application dated November 9, 2020. For the instant application to survive, the 2nd applicant has to demonstrate error apparent on the record, discovery of new or important matter which he could not produce at the time the order was made or any other sufficient reason.

13. In my view, what the applicant has done is to replicate the notice of motion application dated November 9, 2020 and has also adduced to the same in his grounds in the instant application. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR Mativo J (as he then was) culled out the following principles 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."

14. The instant application is similar to the application dated November 9, 2020 and this court has no business interfering with the said decision as there is no discovery of new or important material, or sufficient reason advanced by the applicant for this court to consider otherwise.

15. As such, I find no merit in the notice of motion application dated April 28, 2022, the same is hereby dismissed. Each party to bear its own costs. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 31ST JANUARY, 2023.

MBOGO C.G

JUDGE

31/1/2023.

In the presence of: -

CA: Timothy Chuma