



Republic v Land Registrar Nakuru Land Registry; Ngina & another (Exparte) (Administrators of the Estate of the late Kenneth Kimani Kahura) (Environment and Land Judicial Review Case E3 of 2021) [2023] KEELC 154 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELC 154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E3 OF 2021
FM NJOROGE, J
JANUARY 24, 2023**

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR NAKURU LAND REGISTRY RESPONDENT

AND

HANNAH NGINA EXPARTE

KENNETH KIMANI EXPARTE

**ADMINISTRATORS OF THE ESTATE OF THE LATE KENNETH KIMANI
KAHURA**

RULING

1. This is a ruling in respect of the plaintiffs/applicants notice of motion dated 8/11/2022 which seeks the following orders:
 - a. ...Spent
 - b. That The Ruling and Orders made by Hon. Mwangi Njoroge on October 25, 2022 and all consequential orders be reviewed and/or set aside.
 - c. That upon grant of prayer 2 above, the honourable court be pleased to consider the *ex parte* applicant's substantive motion dated March 29, 2021.
 - d. That costs of this application be provided for.



2. The application is supported by the affidavit sworn by Kenneth Wilson where he deposed that on 8/04/2021 the *ex parte* applicants Advocates filed and served the substantive motion dated March 29, 2021 sent via the official court email address; that on May 12, 2021 parties appeared before Hon. Justice D. Ohungo and he confirmed that the substantive motion had been filed and ordered the respondent to file a response thereto and that parties do exchange written submissions; that the matter was then scheduled for mention on September 20, 2021 to confirm compliance and take a judgment date; that on 8/04/2022 he discovered that the court registry had sent them emails on 5/04/2022 and 6/04/2022 by elcnakuru@gmail.com asking for a copy of the substantive motion; that he responded to the email by forwarding the substantive motion and also confirmed that the *ex-parte* applicants had already complied with the court's orders; that the court delivered its ruling on October 25, 2022; that the said ruling was delivered on the mistaken premise that the *Ex parte* applicants had failed to file a substantive motion to the Judicial Review Application despite leave being granted on March 22, 2021; that the court registry inadvertently failed to place a copy of the substantive motion despite the same having been filed; that unless this court reviews its ruling, the *ex parte* applicants stand to suffer great prejudice as its case would stand dismissed without them being heard on merit; that the same amounts to an error on the face of records hence the court's jurisdiction has been properly invoked.

Response

3. The respondents did not file any response to the application.

Submissions

4. Parties did not file their submissions.

Analysis and Determination

5. This court has considered the Application, and the main issue for determination is whether the court should review its orders made on October 25, 2022.
6. Section 80 of the *Civil Procedure Act* provides 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.”
7. Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows:
 - (1) 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.
 - (2) A party who is not appealing from a decree or order may apply for 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.”

8. The court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR held as follows:

“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.”

9. The court in the case of *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 considered various authorities and set out the following principles:

- 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.
10. The *ex parte* applicants in this matter are seeking that the ruling delivered on October 25, 2022 be reviewed on account of some mistake or error apparent on the face of the record. They contend that the basis of the said ruling was that there was no substantive motion on record for the court to make a determination. They further contend that there is a clear error apparent on the face of records as the *ex parte* applicant had filed the substantive motion via email on 8/04/2021.
11. The court has perused the file. From the annexures to the supporting affidavit the only conclusion this court can arrive at is that the *ex parte* applicants indeed filed their substantive motion dated March 29, 2021 via the official court email address on 8/04/2021. This was after the Covid-19 pandemic lock down. It is not clear why the motion was not downloaded, printed and placed in the court file. The court registry has endeavoured to retrieve the electronic mail used by the applicant then but in vain. It is clear that the email ceased being in use long ago and another email address is in use.
12. I also note that the court on 5/04/2022 requested the *ex parte* applicants via email to forward their substantive application to enable Hon. Ohungo J. make a judgment. The Hon. Judge could however not deliver a judgment upon realizing there was no substantive application on record prompting him to give directions on April 27, 2022.
13. This court proceeded to make a ruling on October 25, 2022 vacating the leave granted to the *ex parte* applicant on March 22, 2021 on the basis that there was no substantive application on record.
14. Having established that the *ex parte* applicants had filed their notice of motion on 8/04/2021, it therefore follows that there was indeed an error on the part of the registry as the same had not been placed in the court file at the time this court made its orders on October 25, 2022.
15. As was held in the case of Republic v Public Procurement Administrative Review Board & 2 others (*supra*), the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
16. Order 45 Rule 1 of the Civil Procedure Rules also provides for the circumstances under which a judgment can be reviewed. I am in agreement with the *ex parte* applicant's counsel that the reasons given in support of their application does fall within the circumstances provided for under Order 45 Rule 1, in that it is by reason of some apparent mistake on the part of the court registry mechanisms which were still new by then, that the motion was not downloaded, printed and brought to the court's attention. Under Order 45 Rule 1, that is a sufficient cause for review. It matters not that the slothfulness of the applicant in assisting the court to obtain a copy of the filed motion led to the Orders issued on October 25, 2022. The applicant therefore have only themselves to blame for that eventuality.
17. In the upshot, I find that the *ex parte* applicant's application dated 8/11/2022 is merited and allow the same.
18. The orders issued on October 25, 2022 by this honourable court are hereby set aside. The parties are directed to attend a mention on 8/2/2023 for directions on the hearing of the substantive Notice of Motion dated March 29, 2021.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 24TH DAY OF JANUARY 2023.



MWANGI NJOROGE
JUDGE, ELC, NAKURU

