Mursal & another v Ministry of Interior & Coordination of National Government & 3 others; Aress & 2 others (Intended Interested Party) (Petition E022 of 2023) [2024] KEHC 6775 (KLR) (27 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6775 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

PETITION E022 OF 2023

JN ONYIEGO, J

MAY 27, 2024

IN THE MATTER OF ARTICLES 3(1),10 (2),22,23,27,35,47,165 AND 258(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT, NO. 4 OF 2015

AND

IN THE MATTER OF THE NATIONAL GOVERNMENT COORDINATION ACT NO. 1 OF 2013

BETWEEN

ISSACK MOHAMED MURSAL ..... 1ST PETITIONER

HUSSEIN SULTAN FARAH ..... 2ND PETITIONER

AND

MINISTRY OF INTERIOR & COORDINATION OF NATIONAL GOVERNMENT ..... 1ST RESPONDENT

COUNTY COMMISSIONER, GARISSA COUNTY ..... 2ND RESPONDENT

DEPUTY COUNTY COMMISSIONER, GARISSA TOWNSHIP .... 3RD RESPONDENT

ATTORNEY GENERAL ..... 4TH RESPONDENT

AND

JIBRIL YARROW ARESS ..... INTENDED INTERESTED PARTY

MOHAMED ADEN OMAR ..... INTENDED INTERESTED PARTY

HASSAN OMAR IBRAHIM ..... INTENDED INTERESTED PARTY

RULING

1. The applicants moved this court via a notice of motion dated March 21, 2024 seeking orders that they be enjoined in the suit herein as interested parties. The court after carefully considering their application, reached a determination via a ruling delivered on May 3, 2024 dismissing the said application on grounds that their interest was well represented by the existing respondents.

2. Being dissatisfied with the said ruling, the applicants once again moved this court via a notice of motion dated May 6, 2024 pursuant to articles 22,23,50(1), 159 (2) (a) (b) (d) and (e) of the *Constitution* and sections 1A,1B and 3A of the *Civil Procedure Act*, Orders 45 Rule 1, Order 51 Rule 1 and 4 of the *Civil Procedure Rules* seeking orders as follows:

    i. Spent.

    ii. That pending the hearing and determination of this application interpartes, the Honourable Court be pleased to review, vary and/set aside its orders of May 3, 2024 directing that the intended interested parties are not joined as parties to the suit and directed that the hearing in the current suit would be on May 30, 2024.

    iii. That the court be pleased to join the applicants in the current suit as parties for them to be heard on merit on May 30, 2024 pending the hearing and determination of the application interpartes.

    iv. That the replying affidavit sworn by Jibril Yarrow Arress dated March 21, 2024 be deemed as duly filed in response to the supporting affidavit dated December 19, 2023 sworn by Issack Mohamed Mursal.

    v. That the Honourable Court be pleased to issue further or better orders as shall meet the ends of justice.

3. The application is grounded on the facts on its face and further amplified by the annexed supporting affidavit of Jibril Yarrow Aress sworn on May 6, 2024. It was deposed that the petitioners initiated the present suit seeking inter alia an order quashing the establishment of Sankuri Sub County and an order quashing the establishment of Shimbirey as the headquarters of Sankuri Sub County. That the intended interested parties as residents of Sankuri Sub County will be affected should the orders sought by the petitioners be granted.

4. It was averred that the intended interested parties are actively involved in community engagement and activities within Sankuri Sub County and can therefore, provide this court with pertinent information on the establishment of Sankuri Sub County and the designation of the sub county headquarters.

5. It was averred that the respondents being public officials, may not be directly affected by the outcome of this petition unlike the intended interested parties who are residents in the administrative areas whose creation is in challenge and will therefore be directly affected by the decision of this court. This court was therefore urged to allow the prayers sought.

6. Isaack Mohamed on his behalf and his co-petitioner opposed the application via a replying affidavit sworn on May 15, 2024. It was deponed that the court pronounced itself via the impugned ruling stating why the applicants could not be joined in the suit. That the instant application does not meet the provisions for review and therefore the same ought to be dismissed. It was averred that nothing has been demonstrated as new or an error that warrants this court to review its orders. It was urged that

the application as framed is misconceived, bad in law, vexatious and a non-starter and therefore, ought to be dismissed with costs.

7. I have carefully considered the application herein, the response thereof and oral submissions by both parties. The only issue seeking determination is; whether the application has met the criteria for grant of the orders of review sought.

8. This court has been moved to review its orders dismissing the prayer for the joinder of the applicants as interested parties in this suit. The provisions governing issuance of review orders can be traced to order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows;

   (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, 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

9. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They thus limit review 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 been made without un reasonable delay.

10. On whether the applicants had established the grounds for review, one has to disjunctively prove either of the stated grounds. There is however no doubt that the application herein was filed within reasonable time. It is trite that where an error or mistake apparent on the face of the record within the meaning of Section 80 and Order 45 of the *Civil Procedure Rules* is alleged, it must be demonstrated. In the case of *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, the Court of Appeal held thus: -

> "A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law".

11. As indicated above, an application for review is also permissible on the grounds of discovery by the applicants of some new and important matter or evidence which, after exercise of due diligence, was not within their knowledge or could not be produced by them at the time when the decree or order was passed; The underlying object of this provision is neither to enable the court to write a second judgment nor to give a second innings to

the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review order must show that there was no remiss on their part in adducing all possible evidence at the trial.

12. Where an applicant in an application for review seeks to rely on the ground that there was discovery of new and important evidence, one has to strictly prove the same. In the case of *Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another* (2018) eKLR the Court of Appeal stated as follows:

> "We emphasize that an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

13. In the same breadth, the Court of Appeal in the case of *Rose Kaiza v Angelo Mpanju Kaiza* (2009) eKLR held that not every new fact will qualify for interference of the judgment.

14. Besides, if a party is not able to prove the afore stated conventional grounds for review, he can for any other sufficient cause persuade the court to grant the orders sought. In the case of *Wangechi Kimata & Another v Charan Singh* (C.A. No. 80 of 1985) (unreported) the Court of appeal held that: "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

15. In the instant case, the applicants urged that the respondents herein have displayed a cavalier attitude towards this matter by failing to file a response to the petitioners' application in good time and further, despite being served, have failed to attend court. That the respondents being public officials, may not be directly affected by the outcome of this petition unlike the intended interested parties who are residents in the administrative areas whose creation is in challenge and will therefore be directly affected by the decision of this court hence a sufficient cause to have them joined in the suit.

16. The other reason advanced by the applicants for review was that the court was wrong in arriving at a determination that they were not necessary parties a finding they disagree with. Further, it was their contention that the court had denied them the right to be heard. In my view, these grounds do not support the prayer for review but rather are grounds for appeal as they are challenging the merits of the ruling in question.

17. Having read and understood the application for review by the applicants herein, no sufficient cause, error or mistake apparent on the face of the record has been pointed out save for the allegations of being in possession of valuable information that might be of great help to this court.

18. In my considered view, the applicants' application is intended to appeal against the ruling of this court delivered on May 3, 2024 through the back door. It is trite that the same is improper for the law makes provisions on how the same can be achieved. The Court of Appeal in the case of *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR stated that:

> "...It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in

the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction".

19. As a consequence of the above holding, it is my view that the application herein is in want of merit as the grounds advanced can only support an appeal and not review orders. Accordingly, the same is dismissed with costs to the petitioners.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF MAY 2024

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J.N.ONYIEGO

JUDGE