Kruse v Chege & 3 others (Civil Suit E108 of 2021)
[2024] KEHC 6258 (KLR) (24 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6258 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E108 OF 2021

DKN MAGARE, J

MAY 24, 2024

BETWEEN

HANS-JURGEN KRUSE ..... PLAINTIFF

AND

JOYCE WAIRIMU CHEGE ..... 1ST DEFENDANT

STANDARD INVESTIMENT BANK ..... 2ND DEFENDANT

STANBIC BANK LIMITED ..... 3RD DEFENDANT

KENYA COMMERCIAL BANK LIMITED ..... 4TH DEFENDANT

RULING

1. This is a Ruling on an Application dated 14h December 2023 seeking the review of the Ruling of this Court on account of error on the face of the record.

2. The Application is brought under the provisions of Order 45 of the *Civil Procedure Rules* and is materially based on the ground of an error apparent on the face of the record.

3. The 4th Defendant who is the Applicant in the Application contend that the court indicated that there was no Defence filed by the 4th Defendant on record.

4. In material, the Application posits that there is an error apparent as the becasie the 4th Defendant filed a Defence dated 30th November 2021 on 8th December 2021.

5. The Plaintiff, in response to the Application filed the Replying Affidavit sworn by Carolne W. Thuo on 16th January 2024.

6. The Replying Affidavit contended that no Defence was ever served upon the Plaintiff by the 4th Defendant.

7. Further, that the copy of the said Defence was never availed to the court.

Submissions

8. The Applicant submitted that this is was a proper Application for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* since there was an error Apparent on the face of the record.

9. The Plaintiff on the other hand submitted that this was not a proper Application for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* since there was an error Apparent on the face of the record.

Analysis

12. I have perused the Application and the response thereto as well as the filed submissions. The single issue for my determination is whether the Applicant has met the legal threshold for an Order of review. It is noted that the Application is filed under the provisions of Sections 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

13. Section 80 of the *Civil Procedure Act* states that:

> " 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
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> (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".
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> Section 63 (e) of the *Civil Procedure Act* states that:
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> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

14. Order 45 of the *Civil Procedure Rules* provides for Review and it states 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
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> (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.
>
> (2) A party who is not appealing from a decree or order may apply for a 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"

15. I also associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 where he opined that:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

16. I am thus required to determine whether there is an error apparent on the face of the Judgement that is subject to review in the Application. The Applicant annexed the Ruling. I have perused it.

17. From the face of the Ruling, there is nothing to review in the manner stated in the Application. Whereas the Application calls for this Court to review the Judgement on an alleged omission of a material fact, I note the same amounts to an assertion review the meritorious finding of the court in the impugned Judgement. Like submitted by the Plaintiff, the 4th Defendant's Defence was indeed not on the court record or e-filing platform.

18. The Court of Appeal in *Mahinda v Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

> " The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

19. Consequently, the Respondent would better be placed in law to challenge the order by way of an appeal as opposed to review. The jurisdiction of this Court to review its orders is limited under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The Application does not fall within the stated provisions of the law.

20. In the case of *Dock Workers Union & 2 others v Attorney General & another Kenya Ports Authority & 4 others (Interested Party)* [2019] eKLR it was therefore held that: -

> " In this regard, for a Court to review its own orders, it must be demonstrated that there is discovery of new and important matter or evidence. It must also be shown that the new evidence was not within the knowledge of the party seeking review or could not be produced at the time the orders were made. Such party must also satisfy the Court that this was the case even after exercise of due diligence. A Court will also review its orders if it is demonstrated that there is some mistake or error apparent on the face of the record, or for any other sufficient reason. The error must be evident on the face of the record and should not require much labour in explanation. An application for review must also be made without unreasonable delay."

21. The Code of Civil Procedure, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla states:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of *Civil Procedure*...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

22. The exercise of my unfettered discretion does not give the Applicant the basis for reviewing. The court noted that the 4th defendant may not have filed defence. Nevertheless, the costs were awarded on the based of discretion and the subject matter of the 4th Defendant's defence.

23. It will be capricious and whimsical and defeat the very purpose of serving justice that the law is set to achieve, if courts have to second guest each and every decision made.

24. Therefore, I find no legal basis on which to exercise my discretion in favour of the Applicant. In the case of *Ramakant Rai v Madan* Rai, Cr LJ 2004 SC 36, the Supreme Court of India rendered itself thus on the issue of judicial discretion:

> " Judicial discretion is canalized authority not arbitrary eccentricity. Cardozo, with elegant accuracy, has observed:
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> > " The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He s not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not a yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains".

25. In the circumstances, I am inclined to dismiss the Application.

Determination

i. The upshot of the foregoing is that the Notice of Motion dated 14th December 2023 does not meet the threshold for an order of review and is hereby dismissed.

ii. In the circumstances of this concluded case, I however make no order as to the costs.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for parties

Court Assistant - Barile

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