Nderitu & 6 others v Assests Recovery Agency (Civil Appeal E321 of 2020) [2024] KECA 1612 (KLR) (8 November 2024) (Judgment)

Neutral citation: [2024] KECA 1612 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E321 OF 2020

MSA MAKHANDIA, SG KAIRU & LA ACHODE, JJA

NOVEMBER 8, 2024

BETWEEN

JAMES THUITA NDERITU .... 1ST APPELLANT

FLAGSTONE MERCHANTS .... 2ND APPELLANT

FIRSTLING SUPPLIES LIMITED .... 3RD APPELLANT

EXCELLA SUPPLIES LIMITED .... 4TH APPELLANT

BETTY MARTHA WAJEWA OMONDI .... 5TH APPELLANT

FLAGSTONE CO LIMITED .... 6TH APPELLANT

INTERSCOPE TECH & SERVICES .... 7TH APPELLANT

AND

ASSESTS RECOVERY AGENCY .... RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (Mumbi Ngugi, J.) dated 21st August 2020 in HC. ACEC Civil Case No. 2 of 2019)

JUDGMENT

1. This is an appeal by James Thuita Nderitu & 6 Others (“the appellants”), against the ruling of Mumbi Ngugi, J. (as she then was) in High Court ACEC Civil Case No. 2 of 2019 delivered on 21st August 2020 dismissing their application dated 30th April 2020 seeking review and setting aside of a judgment given on 22nd April 2020. By that judgment, the trial court determined that the appellants had failed to address the issue of legitimacy of the source of funds held in their various accounts and which assets, the Assets Recovery Agency sought to be forfeited to the State. That the said funds were therefore unexplained assets and consequently, ordered the same to be forfeited to the State.

2. The facts of the case leading to this appeal from the record are that by an application dated 12th March 2019, brought under the provisions of sections 81, 82, 90, and 92 of the *Proceeds of Crime and Anti-Money Laundering Act* (POCAMLA) and Order 51 rule 1 of the Civil Procedure Rules, the respondent sought orders that the trial court declare funds held in the following specific accounts of the appellants as proceeds of crime, making them liable for forfeiture to the Government under POCAMLA:

    a. Kshs. 2,981,067 in Account No. 015124764xxxx held at Standard Chartered Bank Ruaraka Branch; and Kshs 217,598.25 in Account No. 0180198054920 held at Equity Bank, Ruaraka Branch in the name of James Thuita Nderitu;

    b. Kshs. 1,088,065.20 in Account No. 010203193xxxx held at Standard Chartered Bank Ruaraka Branch; and Kshs. 182,463.85 in Account No. 067100xxxx held at Barclays Bank Ruaraka Branch in the name of Flagstone Merchants Ltd;

    c. Kshs. 3,124,964 in Account No. 0102201031xxxx and Kshs. 3,160.584.30 in Account No. 010201031xxxx held at Standard Chartered Bank Ruaraka Branch in the name of Firstling Supplies Ltd;

    d. Kshs. 22,700,580.70 in Account No. 010244766xxxx held at Standard Chartered Bank Ruaraka Branch in the name of Excella Supplies Ltd;

    e. Kshs 1,708,290.35 in Account No. 010031485xxxx held at Standard Chartered Bank Nakuru Branch in the name of Betty Martha Wajewa Omondi;

    f. Kshs. 27,890.70 in Account No. 134026630xxxx held at Equity Bank Ridgeways Branch in the name of Flagstone Co. Ltd;

    g. Kshs. 434,619.63 in Account No. 018029028xxxx held at Equity Bank, Ruaraka Branch in the name of Interscope Tech & Services.

3. Additionally, they prayed for the court to issue any ancillary orders necessary for the proper, fair, and effective execution of the orders, and to provide for the costs of the application. The application was based on eight grounds; to wit that: the respondent on or about 26th April 2018, received information regarding ongoing criminal investigations by the Directorate of Criminal Investigations (DCI) into fraud and economic crimes committed at the National Youth Service, (NYS) some of the suspects being the appellants. On 29th May 2018, following the conclusion of investigations several suspects, including the 1st, 2nd, and 3rd appellants, were charged with conspiracy to commit an economic crime and fraudulent acquisition of public property in Criminal Case No. ACEC 12 of 2018. Subsequent thereto, the respondent obtained court orders on 30th May, 6th June, and 25th June 2018 freezing the appellants' aforesaid accounts for further investigations. That the analysis of the appellants' bank statements revealed that they had received funds fraudulently from the National Youth Service (NYS), which were then transferred to accounts owned by their family members and associates. That therefore, these accounts held funds suspected to be proceeds of crime and were therefore liable for forfeiture.

4. The application was supported by an affidavit sworn by Senior Sergeant Fredrick Musyoki, who was part of the investigation team. The depositions merely reiterated and expounded on the grounds aforesaid and we need not rehash them. The appellants filed a replying affidavit sworn by, the 1st appellant, on 4th April 2019. In the affidavit, they argued that the application was misplaced, an abuse of the court process, and intended to vex the appellants. While acknowledging that some of them had been charged as a result of fraudulent acquisition of public property, they contended that the application

was premature as no crime had been proved against them. They asserted that the application was based on mere suspicion that the funds in the accounts were proceeds of crime, without any proof.

5. As already stated after considering the application, the trial court determined that the respondent had established, on a balance of probabilities, that the amounts held in the appellants' accounts were proceeds of crime and should be forfeited to the State. It thus granted the orders as prayed in the application. Following this judgment and decree, the appellants filed an application dated 30th April 2020, seeking stay of execution of the judgment and decree as well as review and setting aside of the same.

6. The application was based on the grounds that the funds were likely to be forfeited and utilized by the state following the judgment, which would cause them hardship: they had demonstrated that the funds were legitimate and not proceeds of crime; that there was sufficient reason to justify a review and setting aside of the judgment; they had provided documentary evidence in support of their business transactions, to their then advocates, M/s Gachie & Mwanzia Advocates and instructed to use them to demonstrate how the funds were transferred from NYS to various accounts and to explain the movement of money to sister companies but they failed to do so on the grounds that they thought it was necessary, as they believed that the suit was premature in any event.

7. The appellants argued that the failure to present the evidence provided was a mistake or lapse on the part of their advocates which should not visited upon them. They contended that this failure constituted sufficient reason for the court to reconsider, review, and set aside its judgment. Additionally, the appellants argued that this new and important evidence could not be produced earlier despite due diligence. That during the investigations leading to the arrest and prosecution of the 1st, 2nd and 3rd appellants, State officials and DCI detectives raided their offices and homes and carted away several documents. That during the hearing of the suit, the 1st appellant tried to trace the documents to support the appellants' business activities but was unable to find them as a consequence of the raids. However, on or about 20th April 2020, while relocating from their business offices, the 1st appellant stumbled upon envelopes containing copies of some of the documentary evidence, they had intended to but were unable to use. This evidence included invoices, contracts, delivery notes, importation documents, and other business transaction records for the 2nd, 3rd, 4th, and 7th appellants, which could not have been obtained earlier despite due diligence. That the new evidence, along with what had been provided to their previous advocates, offered sufficient grounds for the court to review and set aside its decision.

8. The application was supported by the affidavit sworn by the 1st appellant, He deposed that he traded as Flagstone Merchants, and was a Director of the 3rd, 4th, 6th, and 7th appellants. He was also the husband of the 5th appellant, with both being Directors of the 4th appellant. He thereafter reiterated and expounded the grounds in support of the application, and we need not rehash them.

9. The respondent opposed the application in a replying affidavit sworn on 18th June 2020 by Senior Sergeant Fredrick Musyoki, who stated that the preserved funds held by the named banks had already been transferred to the respondent in compliance with the judgment. Therefore, the orders of stay of execution sought could not issue, as they had been overtaken by events. He further deposed, that the appellants had not discharged the burden of proof that the funds sought for forfeiture were acquired legitimately and were involved in complex money laundering schemes. He went on to depose that the appellants had the opportunity to file all necessary documents to defend themselves but chose not to do so. Furthermore, that the documents, the basis of the review sought were in the possession of the appellants or their advocates all the time, as admitted by the appellants. Therefore, these documents

could not be considered as new evidence that could not have been discovered with due diligence or produced during the hearing of the application.

10. He maintained that the discretion to grant an order of review could not be used to assist a party that had shown lack of diligence, as was the case here. He described the correspondence between the appellants' current and former advocates querying why the documents were not tendered in evidence, as, an afterthought and an attempt to strengthen the otherwise weak appellants' case. He disputed and dismissed the claim that the DCI had taken away the appellants' documents as an afterthought, noting that it was not mentioned in the affidavits opposing the forfeiture application. He contended that if an advocate fails to prosecute a case to the client's satisfaction, the client has the option of suing the advocate for professional negligence, but not to seek for a review of the judgment.

11. After reviewing the pleadings and submissions of the parties, the trial court concluded that the appellants' assertion that they only discovered crucial documents later was unconvincing, especially given the significant financial stakes involved. That the evidence was always available in their office, suggesting that they either chose not to present it or lacked credible evidence to justify receiving over a billion shillings in public funds within days. The court viewed their attempt to introduce new evidence after the forfeiture hearing as an effort to re-litigate an already decided matter. Consequently, the application was dismissed with costs to the respondent.

12. Aggrieved by the ruling and order, the appellants are before this court on appeal on six grounds that the learned Judge wrongly dismissed the application; failed to appreciate the reason put forth for review; finding that no new and important evidence was discovered subsequently; the appellants deliberately chose not to present credible evidence regarding the receipt of over a billion shillings in public funds; incorrectly concluded that they were re- litigating a settled matter; and failing to consider relevant laws and factors.

13. The appeal was prosecuted through written submissions with limited oral highlights. During the plenary hearing of the appeal on 16th July 2024, Mr. O'Kubasu, learned counsel represented the appellants, while Miss Muchiri, learned counsel appeared for the respondent.

14. In his oral highlights, counsel for the appellants submitted that the trial court erred in law and fact by not recognizing that counsel's mistake was an excusable error, sufficient to justify the review sought under Order 45 Rule 1 of the Civil Procedure Rules. Counsel cited several authorities to support the proposition, including Savings and Loans Limited vs. Susan Wanjiru Muritu - (Milimani) HCCS No. 397 of 2002, Fredrick Mburu Ndegwa vs. Geoffrey Kinya Waruhiu [2015] eKLR; Auto Selection (Kenya) Limited vs. Ann Cherono Cheruiyot & 2 Others [2020] eKLR; Phillip Chemwolo & Another vs. Augustine Kubede [1986] eKLR and Belinda Murai & 9 Others vs. Amos Wainaina [1979] eKLR.

15. That while it might be suggested that they could pursue a professional negligence claim against their former advocates, the appellants contended that the advocate's mistake did not meet the threshold for such a claim. Therefore, their only remedy would be through the review application. It was submitted that new and important evidence was indeed discovered. That in his affidavit supporting the application, the 1st appellant had explained in detail the circumstances leading to the unavailability of the documents at the time of the hearing of the application and could not therefore have been obtained despite due diligence. The appellants contended that the High Court's finding that this did not constitute sufficient reason for review was therefore erroneous. That the trial court failed to address the validity of the explanation for not presenting the evidence discovered, instead dismissing it as possible concealment of material facts by the appellants. Counsel pleaded with us to reject the trial court's finding that the appellants had failed to exercise due diligence. In the ultimate, counsel urged us to allow the appeal with costs.

16. The respondents, through their submissions dated 20th May 2024, contended that the trial court's finding of non-discovery of new and important evidence was proper. It was submitted that the documents the appellants sought to introduce did not qualify as new evidence that could not have been produced during the initial trial following due diligence. It was noted that the appellants admitted to having had the evidence but were advised by their previous advocate not to present it. Therefore, the purported evidence could not be considered as new. The respondents asserted that the appellants' application did not meet the criteria under Order 45 of the Civil Procedure Rules to warrant the orders sought. Citing the case of Christopher Musyoka Musau vs. N.P.G Warren & 8 Others [2017] eKLR, counsel submitted that the trial court correctly analyzed the appellants' pleadings and evidence in concluding that there was no discovery of new and important evidence to warrant an order of review.

17. Counsel contended that the appellants' allegations that the trial court erred in finding that the appellants deliberately chose not to present credible evidence explaining the receipt of public funds was unfounded. The appellants had the opportunity to present all necessary evidence to substantiate that the funds held in their accounts, which were subject to forfeiture, were legitimately acquired, but they failed to do so. The respondent further submitted that it had demonstrated in the trial court the chronology of events as to how the appellants received colossal amounts of money from NYS under suspicious circumstances. That the intra-transfer of funds by the appellants was a money laundering scheme designed to disguise the illegitimately acquired funds, which were proceeds of crime. Citing the cases of Civil Application No. E006 of 2022 Assets Recovery Agency vs. Felista Nyamathira Njoroge & Another and Assets Recovery Agency vs. Lillian Wanja Muthoni Mbozo & Others [2020] eKLR, the respondent submitted that the appellants bore the evidential burden to substantiate their case in the trial court. Instead, the appellants focused on arguing that the forfeiture application was premature.

18. As beneficiaries of funds illegitimately acquired from the NYS, the appellants did not counter the evidence presented by the respondents in the trial court. Having failed to prove their case, which resulted in the issuance of forfeiture orders for the funds in their accounts, the appellants attempted to introduce purported new evidence via an application dated 30th April 2020. The respondents contended that this evidence did not meet the threshold under Order 45 of the Civil Procedure Rules. Thus, the trial court's finding that the appellants were re-litigating a previously determined matter was accurate.

19. Regarding failure of the appellants' previous advocate to adduce evidence presented to them by the appellants; counsel submitted that the appellants had admitted in the trial court that they possessed the evidence to support the legitimate source of the funds in their accounts. However, their previous advocate had advised them that it was unnecessary and premature to present such evidence, absence of conviction. The appellants presented two pieces of correspondence between their previous and current advocates. One letter, dated 29th April 2020, from the current firm, requesting an explanation from the previous firm for not presenting the evidence. Notably, the previous firm's response was dated 27th April 2020, preceding the request letter, casting doubt on the appellants' credibility regarding the purported new and important evidence. This inconsistency suggested that the appellants' claim was not genuine and was based on invented evidence intended to mislead the court.

20. Citing cases such as Director of Assets Recovery and Others vs. Green & Others [2005] EWHC 3168 and Teckla Nandiila Lameck vs. President of Namibia 2012 (1) NR 255 (HC), the respondent submitted that the trial court correctly found that, pursuant to section 92(4) of POCAMLA, a conviction is not required as a condition precedent to a suit for the recovery of proceeds of crime. It concluded that the trial court's finding that the failure of the appellants' previous advocate to adduce evidence was not sufficient reason for review was correct and should be upheld.

21. We have considered the record of appeal, the rival submissions and the principles of law applicable and in our view, the only issue that falls for our determination is whether the appellants had made a case for the trial court to review its earlier judgment. The issue of stay of execution seems to have fallen by the wayside since none of the parties addressed it in their lengthy submissions. The main reasons advanced by the appellants in seeking review of the earlier ruling and order were the discovery of new evidence and the failure by their previous advocates to present the evidence they had handed to them.

22. Order 45 rule 1(b) of the Civil Procedure Rules, 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
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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.
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> (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."

23. The foregoing provisions are based on section 80 of the *Civil Procedure Act* which 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."

The above provisions permit the review of court judgments and rulings under specific circumstances to ensure that justice is not only done but also seen to be done. This rule allows the court to revisit its decisions in light of new and significant evidence that was not available during the original proceedings despite due diligence. It serves as an essential tool for ensuring that justice is not compromised by the unavailability of crucial evidence during the original trial despite due diligence. The primary ground for review under the said Order is the discovery of new and important evidence that could not have been presented earlier despite due diligence.

24. For the applicant, however, to benefit from this provision of the law, she or he must demonstrate that they exercised due diligence in trying to obtain the evidence during the original proceedings, meaning the evidence was genuinely not within their knowledge, grasp and or reach or could not be

produced despite reasonable efforts. The court scrutinizes the applicant's efforts to ensure that the claim of new evidence is legitimate and not a result of negligence or lack of effort. Additionally, the new evidence must be significant enough to potentially alter the outcome of the case, not trivial or merely corroborative of existing evidence. The court further considers whether the new evidence could have led to a different judgment outcome, if it had been presented initially. See generally National Bank of Kenya Ltd vs. Ndungu Njau [1997] eKLR, Francis Origo & Another vs. Jacob Kumali Mungala [2005] eKLR and Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014] eKLR.

25. To successfully apply for a review, the applicant must clearly specify the new evidence and how it was discovered, demonstrate its significance and potential to alter the outcome and provide proof that the evidence was not available at the time of the original proceedings despite reasonable efforts to obtain it. From the record, it is clear that the evidence being sought to be introduced was available during the trial but the advocate and the appellants agreed that the same should not be availed as it was not necessary, was premature and or since the appellants had not been convicted of any relevant offence. In our view, this blame game does not stand up to scrutiny. Blaming their previous advocates for not having the documents produced and at the same time telling the trial court that the documents could not be produced as they were not available having been lost and or misplaced when their offices were raided by State officers and DCI detectives and documents carted away smacks of want of candidness. We accordingly decline to buy that explanation as is farfetched, self-serving, illogical leave alone being oxymoronic. In our view, the evidence was always available and for reasons best known to the appellants they declined to avail it. The so-called correspondence between the appellants' earlier advocates and new advocates over the issue as to why the evidence was not tendered speaks to our aforesaid conclusion and to the fact that it was self-generated to make the case for review given that the response by the appellants' former advocates' letter to the current advocate's inquiry comes slightly earlier than the letter of inquiry.

26. Indeed, the court rightly found that the correspondence presented by the applicants appeared somewhat contrived to support the application before the court. Despite this, the correspondence indicates that the appellants' previous advocate, based on his understanding of the law, chose not to present any evidence during the hearing of the forfeiture application. The reasoning provided by the appellants' current advocates is that the law on asset forfeiture is still evolving, and thus, the previous advocate should be excused for making an incorrect decision. We find this submission surprising and absurd, to say the least. As correctly put by the trial court, POCAMLA which governs civil claims for the forfeiture of assets believed to be proceeds of crime, has been in force since June 28, 2010. The provisions on civil forfeiture in Part VIII of the Act are explicit, with section 92(4) clearly stating that a conviction is not required as a prerequisite for a suit to recover funds reasonably believed to be proceeds of crime. It is not a sufficient ground for review that the applicants and their counsel chose a defence strategy that completely ignored existing statutory provisions. The fact that the applicants' previous advocate adopted one line of argument, believed it to be correct, and did not consider presenting an alternative argument cannot serve as a basis for review. In any event, a misunderstanding, misinterpretation or misapplication of the law by counsel cannot be a basis for review.

27. In the case of Belinda Murai & Others vs. Amos Wainaina, (supra) this Court emphasized that not all mistakes by counsel qualify as excusable errors. For an error to be considered excusable, the party must demonstrate that the mistake was genuine and that they acted with due diligence. The court must be satisfied that the error was not a result of negligence or a deliberate attempt to mislead the court. Similarly, in the case of Phillip Chemwolo & Another vs. Augustine Kubede (supra), the court held that a mistake by counsel could be excused if it was not due to gross negligence or a deliberate attempt to mislead the court.

28. In Ketterman & Others vs. Hansel Properties Ltd [1988] 1 All ER 38, the court, however, stated thus:

> " Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in the more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of lawyers to fall on their own heads......"

Yet again, in the case of Tana and Athi Rivers Development Authority vs. Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR, this Court offered insight on the effect of mistakes by counsel and stated:

> " From past decisions of this Court, it is without doubt that the courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client, he has a corresponding duty to the court in which he practices and even to the other side"

29. In this case, however, the advocate's failure to present evidence was not a minor procedural lapse, infraction or a genuine mistake. It was a strategic decision that ignored the clear statutory requirements. Therefore, the appellants' reasoning that their advocate's failure to produce documents was excusable is not valid. The applicants must bear the consequences of their advocate's strategic choices. The court must uphold the integrity of the judicial process by ensuring that statutory provisions are adhered to and that strategic decisions by counsel are not used to circumvent established legal procedures.

30. We also note and as correctly observed by counsel for the respondent that the issue of vital documents being spirited away by State officials and DCI detectives was never raised during the hearing of the forfeiture application. It was raised for the first time during the hearing of the review application. If this assertion was true, it would definitely have been put forward as a defence for the appellants in the proceedings. However, it beats logic that it was not adverted to raising the possibility that the same was contrived.

31. It is also not lost on us that in declining the application for the trial court was exercising discretion. Such exercise can only be impugned if it is demonstrated that the decision was clearly wrong, because it misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters, which it should have taken into consideration and in doing so arrived at a wrong conclusion. Further, it would be wrong for the appellate court to interfere with the exercise of the trial court's discretion merely because such Court's decision would have been different. See Mbogo vs. Shah [1968] EA 93. None of the above have been demonstrated to our satisfaction in this appeal.

32. Given all the foregoing, we come to the irresistible conclusion that the appeal lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF NOVEMBER 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR