Mukiri (Personal Representative of the Estate of Regina Mweru Njuku - Deceased) v Wandia & 2 others; County Government of Nairobi (Third party) (Environment & Land Case 1049 of 2014) [2024] KEELC 3816 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEELC 3816 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1049 OF 2014

JA MOGENI, J

MAY 9, 2024

BETWEEN

MARK ANTONY MUKIRI (THE PERSONAL REPRESENTATIVE OF THE ESTATE OF REGINA MWERU NJUKU - DECEASED) ..... PLAINTIFF

AND

JANE WANDIA ..... 1ST DEFENDANT

MICHAEL MWANGI KARANJA ..... 2ND DEFENDANT

ALEX NGOTHO ..... 3RD DEFENDANT

AND

COUNTY GOVERNMENT OF NAIROBI ..... THIRD PARTY

RULING

1. What is before the Court is a Chamber Summons Application dated 15/11/2023 by the 2nd and 3rd Defendants brought under Section 1A, 3B, 3A of the *Civil Procedure Act*, Rule 11(2) of the *Advocates (Remuneration) Order* and all other enabling provisions of the law. In the application, the Applicants sought for the following orders: -

    1. Spent.

    2. That this Honourable Court be pleased to enlarge the time fixed by paragraph 11(2) of the Advocates Remuneration Order and have this application deemed as properly filed.

    3. Spent.

4. That The decision of the Taxing Officer delivered on 1/11/2023 be recalled, reviewed and set-aside or quashed with respect to costs of the suit and order that the Bill of Costs be borne solely by the 1st Defendant.

5. That in the alternative, the Judgment of the court delivered on 14/02/2023 by Justice Mogeni be varied to the extent that the costs of the suit be borne solely by the 1st Defendant.

6. That in the alternative, this Honourable Court be pleased to set aside the orders as to costs of the suit and make such other or further orders as may be just and expedient in the circumstances.

7. That the Cost of this Application be provided for.

2. The Application is premised on the grounds as stated in paragraph (a) – (t) on the face of the Application together with the annexed Supporting Affidavit of Alex Ngotho, the 3rd Defendant herein sworn on 15/11/2023. In summary, the Applicants herein, that is the 2nd and 3rd Defendants, seek to vary this Court's order directing them to pay the Plaintiff's costs. They argue that their advocate's failure to present a defence for them and contest the case prejudices them. They assert they were not involved in any trespass or demolition and were unaware of any fraudulent activities. The 3rd Defendant claims to be a bona fide purchaser and he deponed that he relied on representations made by the 1st Defendant regarding the property. The Applicants request the Court to reconsider the cost allocation or make other just orders.

3. The Application is opposed by the Plaintiff/Respondent through a Replying Affidavit sworn by Mark Anthony Mukiri on 01/02/2024. In a nutshell, the Plaintiff/Respondent believes that the Application aims to overturn the decision of the Taxing Officer and review this Court's judgment. Regarding setting aside of the Taxing Officer's decision, the Plaintiff argues that the Applicants failed to comply with procedural rules and did not provide valid reasons for the delay in filing. He deponed that the Taxing Officer correctly ruled on jurisdiction and considered the Applicant's submissions.

4. The Plaintiff contends that the prayer to set aside the decision lacks merit. Regarding the variation of the judgment, the Plaintiff points out an unreasonable delay in bringing the application and notes that the Applicants have already filed a Notice of Appeal. The court lacks jurisdiction to hear the present application, especially considering the dismissal of a previous injunction application by the Appellate court vide their ruling dated 26/05/2023. The Plaintiff disputes the claim of counsel's mistake and asserts that the Applicants actively participated in the suit, with the 2nd and 3rd Defendants being implicated in attempts to demolish the property.

5. On 07/02/2024, the Court directed that the Application be canvassed by way of written submissions. Parties duly submitted and the Court has considered them. The Applicants filed written submissions dated 5/03/2024. The Plaintiff/Respondent filed written submissions dated 21/02/2024.

6. The Court has considered the present Application together with the rival Affidavits, the written submissions and the authorities cited in support of the same. The Court is of the opinion that the following issues arise for determination: -

   i. Whether the firm of M/s Musinga Advocates LLP is properly on record

   ii. Whether the Court can extend time for the Applicants to put in a reference.

   iii. Whether an order for review of the judgment delivered on 14/02/2023/setting aside order of costs ought to issue herein.

iv. Whether the firm of M/s Musinga Advocates LLP is properly onrecord

7. On this issue, the rules and procedure for engagement of an advocate post judgment are set out under Order 9 rule 9 of the *Civil Procedure Rules* which provides as follows: -

> "When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

8. It is not in dispute that the 2nd and 3rd Defendants were at all material times in these proceedings represented by the firm of M/s Gachie Mwanza & Co. Advocates until and even after the delivery of judgment on 14/02/2023. It has now been admitted by the 3rd Defendant that the Applicants have now appointed the firm of M/s Musinga Advocates LLP to represent it in this matter in place of M/s Gachie Mwanza & Co. Advocates. The Applicants filed a letter dated 16/08/2023 addressed to the Registrar, Environment and Land Court purporting to request that the court record the consent order of the change in representation. This letter was filed on 16/08/2023. The said consent has been executed by both law firms. There is no evidence before me that the same was ever adopted as an order of this court.

9. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi v Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

> "...In my view, the essence of the Order 9 Rule 9 of the *CPR* was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

10. There are glaring anomalies in respect of the representation of the Applicants. The Applicants were represented by the firm of M/s Gachie Mwanza & Co. Advocates up and until judgment was entered in favour of the Plaintiff on 14/02/2023. Once judgment was entered, the provisions of Order 9 Rule 9 had to be complied with if the Applicants required to change the advocates representing them. This was not the case. She was variously represented by the firm of M/s Musinga Advocates LLP after judgment. They even filed submission opposing the Plaintiff's bill of costs. The Applicants have filed a notice of appointment of advocates dated 3/08/2023 together with a consent dated 16/08/2023 effecting change of representation. There was no application made to change advocates. The two advocates did not obtain an order of the court to take over the conduct of the Applicants.

11. Under the provisions of Order 9 rule 9 of the *Civil Procedure Rules* leave of Court must be obtained when an advocate seeks to come on record post judgment. The consent that was filed could not effect the change of advocates "without an order of the court." No such order was sought or obtained. It follows, the firm of M/s Musinga Advocates LLP are not properly on record for the Applicants, and therefore the application is incompetent.

Whether the Court can extend time for the Applicants to file a reference

12. The 2nd and 3rd Defendants have sought for the Court to enlarge the time fixed by paragraph 11 (2) of the Advocates Renumeration Order and have the present application deemed as properly filed.

13. The 2nd and 3rd Defendants express grievances regarding the Taxing Officer's ruling, fearing adverse consequences including property attachment. They cite various factors such as the transfer of the taxing officer and the relocation of court files as reasons for their delayed application. However, the Plaintiff/Respondent argues that the Applicants failed to comply with procedural rules and did not adequately justify their delay in filing the reference application. The Plaintiff contends that the application lacks merit as no errors by the Taxing Officer have been identified, and the prayer to set aside the taxed costs is baseless.

14. The procedure of filing a reference to oppose a taxed bill of costs is set out in Paragraph 11 (1) and (2) of the *Advocates Remuneration Order*. Paragraph 11 of *Advocates Remuneration Order* (ARO) provides as follows:

> "(1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection."

15. Paragraph 11(4) of the *ARO*provides that:

> "The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired."

16. From the foregoing, it is clear that the Courts have discretion to enlarge the time for the performance of any action under the above paragraph. It is a principle of law that the applicant must demonstrate good and sufficient reasons why such a party should be allowed to file the reference out of time. See the case of *Republic v. Kenyatta University & another Ex parte Wellington Kihato Wamburu* (2018) eKLR. Upon my perusal of the record, I observed that on the date of delivery of the ruling on 1/11/2023, the learned taxing master indicated that the Court record shows that judgment was delivered on 14/02/2023. She stated that the Court granted the plaintiff the costs of the suit and interest at court rates from the date of filing the suit until payment in full therefore the taxing officer cannot vary the orders of the court on the costs of the suit.

17. Furthermore, I have observed that the Applicants have averred that they are aggrieved with the taxing officer's ruling dated 1/11/2023 as the orders as to costs. The Applicants conceded that the taxing officer held that she had no jurisdiction to vary the orders of the court on the issue of costs of the suit. It is true that no errors by the Taxing Officer have been identified as the issue of order as to costs is seemingly the Applicants main issue. If there are any other grievances with the ruling of 1/11/2023, the same are vague.

18. It is apparent from the law that the above provision of the *ARO* provides for the filing of a reference within 14 days from the date of receiving the reasons for the decision. This continues to apply despite the fact the Taxing Master would often indicate that the reasons are contained in the decision.

19. The Supreme Court in a case pertinent to what is before this court had an occasion to consider the importance of adherence to the laid down procedure in approaching a court of law. This was in an appeal of an election petition that is the case of *Moses Mwicigi & 14 Others v Independent Electoral and Boundaries Commission & 5 Others* [2016] eKLR where the court stated thus:

> "This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases, procedure is so closely intertwined with the substance of a case, that it befits not the attribute of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.
>
> Yet procedure, in general terms, is not an end in itself. In certain cases, insistence on a strict observance of a rule of procedure, could undermine the cause of justice. Hence the pertinence of Article 159(2)(d) of the *constitution*, which proclaims that,
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> > "...courts and tribunals shall be guided by... [the principle that] justice shall be administered without undue regard to procedural technicalities". This provision, however, is not a panacea for all situations befitting judicial intervention; and inevitably, a significant scope for discretion devolves to the courts."

20. The importance of following procedure of paragraph 11 of the *Order*, was underscored by Justice R. E Aburili in the case *Vishisht Talwar v Anthony Thuo Kanai T/a A. Thuo Kanai Advocates* [2014] eKLR where the learned judge stated:

> "The Learned Judge referring to a decision in the Court of Appeal in *Machira & Co. Advocates v Arthur K. Magugu & Another* CA 199/2002[2012] eKLR stated that:
>
> > "Rule 11 thereof provides for ventilation of grievances from such decisions through references to a judge in chambers. The effect may be viewed as an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used. Appeals require the typing of proceedings, compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those in Section 80 of the *Civil Procedure Act* of discovery of new and important matters, errors on the face of the record and so on. In our view the Rules Committee intended to avoid all that and provide for a simple and expeditious mode of dealing with decisions on Advocate's bill of costs through references under Rule 11 to a Judge in chambers."

21. On this aspect, I am not convinced that the Applicants have offered sufficient reasons for enlargement of time in respect to filing of their reference. Consequently, prayers (2) and (4) of the present application lack merit.

Whether the Court can make an order varying the judgment delivered on 14/02/2023 or set aside order for costs.

22. Order 45 of the *Civil Procedure Rules* underpins the matter of review of court judgments and Orders. Of relevance is the Orders of Costs against the Applicants, the 2nd and 3rd Defendants.

23. Section 27 of the *Civil Procedure Act* empowers a court to award and Order Costs by and against parties to a suit. The court is granted discretion to determine what costs and which party bears the same. It is trite that a succeeding party is entitled to receive costs from the losing party. So long as the party against which an order of costs is made, is a party to the suit, the Court has discretion to order costs against it to the succeeding party.

24. M/s Gachie Mwanza & Co. Advocates have all along purported to be representing all the Defendants in the matter. This fact is conceded by the Applicants themselves. To this extent, the 2nd and 3rd Defendants are a party to the suit, and therefore the court was in order, in my view, to make an order of costs against the said Defendants to the Plaintiff, who was the successful party.

25. Under Order 45 *Civil Procedure Rule*, it is explicit that the court may review its orders/judgment if the following grounds exists;

    a. Discovery of new and important matter which after exercise of due diligence, was not within the knowledge of the applicant at the time of the decree was passed or order made, or

    b. There was a mistake or error on the face of the record, or

    c. There were other sufficient reasons, and

    d. The application must have been made without undue delay.

26. In the case *Abasi Belinda v Fredrick Kagwamu & another* (1963) E.A 557, the court held that

> "a point which may be a good ground of appeal may not be a good ground for an application for review though it may be a good ground of appeal" –

27. See also the Court of Appeal decision in *Pancras T. Swai v Kenya Breweries Ltd* (2014) – where court dismissed the application for review because it was not shown that the applicant had made discovery of new and important matter, nor an error on the face of the record.

28. Likewise, in *Francis Njoroge v Stephen Maina Kamore* (2018) eKLR the application was dismissed for lack of discovery of new or important matter.

29. The Applicants hereto have failed to demonstrate to the court what new matter, or error is apparent in the judgment of the court.

30. In arriving at the impugned order on costs against the 2nd and 3rd defendants, the court made a conscious decision on the matters at controversy and exercised its discretion which is the basis of the present application. If indeed the decision on costs was wrong, that could be a good ground for appeal, not for review.

31. Upon thorough interrogation of the reasons for the application, it is apparent that the Applicants' grievous is what it deems to be an erroneous view by the court which cannot be a ground for review but one for appeal, as further stated in *Chittaley & Rao in the Code of Civil Procedure, (4th Edition) Vol.3) Page 3227*. Besides the alleged the issue of the order as to costs, no other reason was advanced, so as to fit in the other arm under Order 45, other sufficient reasons.

32. It is trite that the review remedy is only available to a party who, though has a right to challenge the decision in question by an appeal, is not appealing or to whom there is no right of appeal. In other words, a person cannot exercise both the right of appeal and review at the same time. See *Orero v Seko* [1984] KLR 238. A person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a carte blanche for abuse of the process of the Court. See *Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others* Nairobi (Milimani) HCCC No. 363 of 2009.

33. Section 2(2) of the *Court of Appeal Rules* defines an appeal to include an intended appeal. Evidence before this court has demonstrated that the 2nd and 3rd Defendants have already preferred to appeal the judgment delivered on 14/02/2023. The Defendants have lodged a Notice of Appeal dated 21/02/2023 and filed on 23/02/2023. It has also been demonstrated that the Applicants filed an application for an injunction pending the lodging, hearing and determination of an intended appeal in case number Civil Application E084 of 2023 and a Ruling was delivered on 26/05/2023.

34. It is not permissible to pursue an appeal and an application for review concurrently. If a party chooses to proceed by way of an appeal, he automatically loses the right to ask for a review of the decision sought to be appealed. In the case of *Karani & 47 Others v Kijana & 2 Others* [1987] KLR 557 the court held that:

> "...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal."
>
> (See also: *African Airlines International Limited v Eastern & Southern Africa Trade Bank Limited* [2003] 1 EA 1 (CAK)).

35. Even though the substantive appeal had not been filed, the Defendants had filed a notice of appeal. At the time when the Application for review was made, the notice of appeal was in place. In effect, the Applicants herein were pursuing the relief of review while keeping open its option to appeal against the same judgment.The Applicants were gambling with the law and judicial process. It is precisely to avoid this kind of scenario that the option either to appeal or review was put in place. There can be no place for review once an intention to appeal has been intimated by filing of a notice of appeal. (See: *Kamalakshi Amma v A. Karthayani* [2001] AIHC 2264). The Applicants' application for review is therefore incompetent hence this court does not have jurisdiction to grant the orders of review and/or variation sought.

36. The Applicants have also contended that the previous advocates failed to raise a defense for the 2nd and 3rd Defendants despite entering appearance for all three defendants. That mistakes of their previous advocates should not be visited on them.

37. I agree with the authority cited by the Plaintiff/Respondent which affirms that litigation belongs to a party and not the counsel. I hasten to add that each case must be determined on its own individual circumstances. It is a common excuse for a party to urge the court that mistake of counsel ought not to be visited on him. My view is that the court ought to approach the issue by doing what would achieve best the interest of justice in the case.

38. I find that the Applicants herein had a duty to follow up the progress of the matter and to provide all necessary evidence in good time to their advocate as it is trite law that a case belongs to a litigant and not the advocate. Failure of the Defendants' counsel to file a separate defense for the 2nd and 3rd Defendant as alleged cannot be founded on excusable mistake. It is trite that a case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her case. It is the duty of the

litigant to constantly check with her advocate the progress of her case See *Savings and Loans Limited v Susan Wanjiru Muritu* in Nairobi (Milimani) HCC No.397 of 2002.

39. Having carefully read the application together with the replying affidavit as well as the submissions, my finding is that there is nothing to demonstrate any excusable mistake, inadvertence, accident or error. The Applicants have not set forth any grounds to warrant this court exercise its discretion in their favour.

40. For the above reasons, I find that the application dated 15/11/2023 has not passed the test for grant of an Order of review.

Disposal orders

41. In the end, this Court finds that the firm of M/s Musinga Advocates LLP are not properly on record for the Applicants, and therefore the application is incompetent. Additionally, it follows that the 2nd & 3rd Defendants' Application dated 15/11/2023 is devoid of merit and is hereby dismissed with costs to the Plaintiff/Respondent

42. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY, 2024

MOGENI J

JUDGE

In the virtual presence of

Mr. Mululu for the 2nd and 3rd Defendants

Ms Wangari holding brief for Mr. Mwaiza for the 1st Defendant

Ms Kinoti holding brief for Mr. Githi for Plaintiff

Ms. Naazi holding brief for Mr. Kithinji for 3rd Party

Ms. C. Sagina; Court Assistant

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