Ribiru v Mwaniki & 2 others (Civil Appeal 37 of 2023)
[2024] KEHC 10417 (KLR) (23 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10417 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL 37 OF 2023

FN MUCHEMI, J

AUGUST 23, 2024

BETWEEN

ELIZABETH WAIRIMU RIBIRU ..... RESPONDENT

AND

JORAM NDUNG'U MWANIKI ..... 1ST APPLICANT

LUCY WANGECHI NDUNG'U ..... 2ND APPLICANT

CIC GENERAL INSURANCE ..... 3RD APPLICANT

RULING

Brief Facts

1. The applications dated 8th February 2024 and 11th March 2024 seek for orders of setting aside, and/ or review of the judgment delivered on 25th January 2024. The 3rd respondent further seeks for orders of costs on appeal.

2. In opposition to the applications, the respondent filed Replying Affidavits dated 5th March 2024 and 5th April 2024.

The 1st & 2nd Applicants' application dated 8th February 2024

3. The 1st & 2nd applicants state that they filed an appeal on 16th June 2022 whereby the appellant was found liable and judgment entered in their favour in the following terms:- general damages Kshs. 500,000/-, pain and suffering Kshs. 100,000/-, loss of expectation Kshs. 100,000/- and special damages Kshs. 123,422/-. Being aggrieved with the decision of the court below, the appellant lodged an appeal and the Honourable court delivered its judgment on 25th January 2024 setting aside the award on the loss of dependency of Kshs. 500,000/-. The 1st & 2nd applicant argue that the court did not factor the

issue of dependency in its judgment despite the appellant having pleaded for a lesser sum of Kshs. 250,000/-.

4. The 1st & 2nd applicants state that the judgment omitted to award them damages under the head of loss of dependency. The 1st & 2nd applicants argue that they realized there was a mistake or error apparent on the face of the record which mistake ought to be reviewed failure to which may lead to a miscarriage of justice.

The Respondent's Case

5. The respondent states that the application has no merits, is null and void, bad in law and is incompetent. The respondent argues that the 1st & 2nd applicants have not met the threshold to warrant the orders sought for review of the judgment entered on 25th January 2024.

6. The respondent avers that the judgment delivered by the court was arrived at judiciously without any mistakes, errors and/or omissions. Indeed, the issue alleged on the award of general damages for loss of dependency was not an omission, mistake and/or an error apparent on the record. Further, the court extensively addressed the issue on the award of general damages for loss of dependency in paragraph 37 to 41 of the judgment before setting aside the said award.

7. The respondent states that the court duly carried out its duty within its mandate as an appellate court to reconsider and re-evaluate the evidence on record before reaching its own conclusion to set aside the award for damages for loss of dependency.

8. The respondent argues that the 1st & 2nd applicants have failed to establish the discovery of any new matter or evidence in the matter, or any suitable reason to warrant the review of the judgment delivered herein.

9. The respondent states that the suit has been pending in court for ten years, all the issues in the suit have been fully addressed in the judgment entered on 25th January 2024 and litigation must come to an end. As such, the respondent states that the application is misplaced, an abuse of the court process and ought to be dismissed with costs.

The 3rd Applicant's Case on the application dated 11th March 2024

10. The 3rd applicant states that prior to this appeal, the suit against it had been dismissed in the lower court and consequently awarded costs of the suit. Having well defended the matter in the lower court it was established that the 3rd applicant was pre-maturely enjoined in the proceedings. Having being dissatisfied with the judgment of the lower court, the appellant lodged an appeal in the current court. Thus, the 3rd applicant defended the appeal successfully.

11. The 3rd applicant states that the court's failure to award costs of the appeal appear to stem from what the court describes as partial success in the appeal yet the said partial success was not against the 3rd applicant whom the appeal was dismissed entirely.

12. The 3rd applicant states that it incurred costs while defending the appeal. The court therefore erred in dismissing the appeal against it with no orders as to costs. The 3rd applicant argues that it deserved costs having been successful in defending the appeal. Further costs follow the event for compensating the successful party for the trouble taken in prosecuting or defending the case.

13. The 3rd applicant states that the court in awarding costs to it will not amount to penalizing the appellant as the appellant ignored well laid principles regarding 3rd party indemnity.

14. The applicant contends that the delay in filing the appeal is due to the mistake of his advocate in failing to inform him of the said judgment.

The Respondent's Case

15. The respondent opposes the application on the premise that it is misconceived, vexatious, frivolous and an abuse of the court process. The respondent states that the 3rd applicant has not met the threshold to warrant the orders sought for review of the judgment delivered on 25th January 2024. Further, the respondent avers that the judgment delivered was arrived at judiciously, without any mistakes, errors, and/or omissions warranting the orders sought for the review of the judgment.

16. The respondent argues that the issue alleged on the award of costs was not an omission, mistake and/or error apparent on the face of the record. The honourable court has the absolute and unfettered discretion to award or not to award costs. Further, the court addressed the issue on the award of costs in paragraph 22 of the judgment holding that each party meets the costs of the appeal.

17. The respondent states that costs follow the event and the appeal was partially successful which means that the appellants and the respondent were successful in prosecuting and defending the appeal respectively. On that basis, the court rightfully exercised its discretion in directing that each party meets the costs of the appeal.

18. Directions were issued that the applications be canvassed by way of written submissions and from the record only the 3rd applicant and respondent complied. On 8th July 2024 and 20th June 2024 respectively. The 1st and 2nd applicants on the other did not file their submissions even by the time of preparing the judgment.

The 3rd Applicant's Submissions

19. The 3rd applicant relies on Section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules and the case of Josiah Mwangi Mutero & Another vs Rachael Wagithi Mutero [2016] eKLR and submits that there was a serious error of law apparent on the face of the record. The 3rd applicant argues that while appreciating that the appeal against the 1st & 2nd applicants was partly successful, the court failed to appreciate and mention that the appeal against the 3rd applicant was totally a fail. If the court had mentioned that fact, it would have considered that the 3rd applicant having been successful in defending the appeal deserved costs.

20. The 3rd applicant relies on the cases of Republic vs Rosemary Wairimu Munene (ex parte applicant) vs Ihururu Dairy Farmers Co-operative Society Ltd Judicial Review Application No. 6 of 2004 and Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another [2016] eKLR and submits that a successful party is entitled to costs unless he/she is guilty of any misconduct or there exists some other good reasons or cause for not awarding costs.

21. The 3rd applicant further relies on the case of DGM vs EWG [2021] eKLR and submits that it appreciates the issue of costs is a discretionary issue however, the discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant costs unless it can be shown that they acted unreasonably. The 3rd applicant submits that the suit against it was dismissed while the appellant succeeded partly in the appeal touching the 1st & 2nd applicants culminating to orders that parties bear their own costs. The 3rd applicant further submits that there was no part success in the appeal against it.

22. Relying on the case of National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR, the 3rd applicant submits that the court rightly addressed itself in paragraph 41 in regard the issue of

dependency and therefore there was no error on the face of the record as alleged by the 1st & 2nd applicants. The 3rd applicant argues that the 1st & 2nd applicants' application is not self-evident to the extent that any reasonable man appraised of the facts shall come to that conclusion. For one to come to a determination on the issue of dependency, he/she must set off on a long laborious exercise to demonstrate an alleged mistake or error apparent on the face of the record. One has to evaluate the evidence on record to ascertain whether the required threshold in proving dependency was met. Thus, the 3rd applicant submits that the ground of error or mistake is not sustainable in the application dated 8th February 2024.

The Respondent's Submissions

23. The respondent relies on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and the cases of Republic vs Cabinet Secretary for Interior and Co-ordination of National Government ex parte Abulahi Said Salad [2019] eKLR; Republic vs Advocates Disciplinary Tribunal ex parte Apollo Mboya [2019] eKLR and submits that an error apparent signifies an error which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of facts or a legal position.

24. Relying on the decisions in Jeremiah Chelanga (Suing as the Guardian ad litem of John Chelanga Chepkonga) vs Board of Management Kamatony Primary School & 3 Others [2021] eKLR; Republic vs Medical Practitioners & Dentists Board & Another; MIO1 on behalf of MIO2 (A Minor) & Another (Interested Party); King'ang'a (ex parte) (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated) [2021] KEHC 298 (KLR) (Judicial Review) (16 November 2021) (Ruling) and submits that a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face and there could reasonably be no two opinions entertained about it.

25. The respondent submits that it urged the court to set aside the lower court's award on loss of dependency at Kshs. 500,000/- or in the alternative to award Kshs. 200,000/-. The court in its judgment at paragraph *10* noted that the 1st & 2nd applicants did not file submissions on the substantive appeal. Further, the 3rd applicant faulted the lower court for not using the global sum approach and proposed an award of Kshs. 250,000/- as sufficient compensation for loss of dependency. The respondent further submits that the court arrived at its decision to set aside the award under loss of dependency judiciously as the 1st applicant did not prove dependency. Thus, the respondent argues that the said order can only be set aside on appeal and not through review since reviewing the said order would amount to this court sitting on its appeal. Additionally, the said order cannot be said to be an omission, mistake or error apparent on the face of the record. The court cannot be faulted for judicial fallibility after having made a determination on lack of proof of dependency.

26. The respondent argues that the 1st & 2nd applicants' application is an appeal in disguise as the order cannot be reviewed without rehearing the case, analyzing the law and making different conclusions on whether dependency was proved. There is no glaring omission or patent mistake on the judgment and the power of review cannot be exercised to substitute the court's view.

27. The respondent further relies on the case of *Omote & Another vs Ogutu (Civil Appeal E005 of 2021)* [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling) and submits that an application for review of an order of costs is akin to asking the court to sit on appeal of its decision and reverse it. The respondent argues that the fact that the 3rd applicant believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal rather than review

which is limited in scope. The error contemplated by Order 45 of the Civil Procedure Rules is self-evident and detectable and therefore does not require long debate and process of reasoning. An order or decision cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court on a point of fact or law.

Issue for determination

28. The main issue for determination is whether the applicants have met the threshold for the grant of orders of setting aside and review.

The Law

Whether the applicants have met the threshold for the grant of orders of setting aside and review.

29. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-

> Rule 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, 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 order made 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 which he applies for the review.

30. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

31. In the instant application, the 1st & 2ndapplicant prays for the setting aside of the orders made on 25/1/2024 on the grounds that there is an error apparent on the face of the record. According to the 1st and 2nd applicants, the error apparent on the face of the record is that the court failed to award damages under the head loss of dependency.

32. It is my considered view that the 1st & 2nd applicants have not met the threshold of orders of review. It has not been demonstrated that any error on the face of the record. Occurred. The so-called errors the 1st & 2nd applicants allude to are not errors on the face of the record. The errors are not self-evident but would require an elaborate argument to be established. This principle was enunciated by the Court of Appeal in *National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996* (UR) where it held:-

> " A review may be granted whenever 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. "

33. Similarly in Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR the court stated:

> A review may be granted whenever 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. Misconstruing a statute or other provisions of law cannot be a ground for review.

34. The court went on to say:-

> The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.

35. Evidently, from the above, it is clear that the error ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. It is thus my considered view that the 1st & 2nd applicants ought to have filed an appeal instead of the instant application. The 1st & 2nd applicants seek to have the court award damages under the head loss of dependency yet the court failed to award the same on the premise that the 1st applicant did not prove dependency.

36. The 3rd applicant has premised its application for review on an error on the face of the record, the error being that there was a failure to make an award of costs. An award of costs is in the discretion of the judge as brought out in Section 27 of the *Civil Procedure Act* and therefore it cannot be termed as an error apparent on the face of the record when the court fails to award a party the costs of a suit. If the 3rd applicant is aggrieved by the court failing to make an award of costs in its favour, the avenue to pursue

is to file an appeal and not seek review. If the court reverses the order on costs as sought herein, this would amount court sitting on its own finding appeal.

37. It is my considered view that the 3rd applicant has not met the threshold of grant of orders of review. Accordingly, the applications dated 8th February 2024 and 11th March 2024 lack merit and are hereby dismissed.

38. Each party to meet its own costs of this application.

39. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED THIS 23RD DAY OF AUGUST 2024.

F. MUCHEMI

JUDGE