



Republic v Public Procurement Administrative Review Board & 3 others; Astonea Construction Limited (Exparte Applicant) (Miscellaneous Civil Application E143 of 2023) [2024] KEHC 14754 (KLR) (Judicial Review) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 14754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS CIVIL APPLICATION E143 OF 2023
JM CHIGITI, J
OCTOBER 31, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD 1ST RESPONDENT

THE ACCOUNTING OFFICER, COUNTY GOVERNMENT OF BOMET 2ND RESPONDENT

COUNTY GOVERNEMENT OF BOMET 3RD RESPONDENT

BIOMAX AFRICA LIMITED 4TH RESPONDENT

AND

ASTONEA CONSTRUCTION LIMITED EXPARTE APPLICANT

RULING

1. The Application before me for determination is the one dated 18th April, 2024 wherein the applicant is seeking the following:
 - a. That the Honourable court be pleased to grant a temporary stay of proceedings in regards to taxation of the Bill of Cost dated 12th April, 2024 pending the hearing and determination of this application.



- b. That the Honourable court be pleased to grant an order for review and set aside order (c) of the judgment of Hon. Justice J. Chigiti (SC) delivered on 14th February, 2024 on award of costs to the Applicants/Respondents.
 - c. That the Honourable Court be pleased to order that the judgment delivered by Hon. Justice J. Chigiti (SC) delivered on 14th February, 2024 was with no orders as to costs or was with party bearing its own costs.
2. In opposition, the ex-parte Applicants/Respondent filed their grounds of opposition dated 4th June, 2024.
 3. The Applicants/Respondents filed an Application vide a Notice of Motion dated 5th January, 2024
 4. The suit was heard and judgment delivered on 14th February, 2024 wherein awarding costs to the Applicant/Respondent herein contrary to Section 175(7) of the [Public Procurement and Asset Disposal Act 2015](#).
 5. The Ex parte Applicants/Respondents thereafter proceeded to file a Bill of Costs dated 12th April, 2024 necessitating the application before this court.
 6. If is The Applicants case that there is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'.
 7. A review is by no means an appeal in disguise where an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say there is a substantial point of law which stares one in the face.
 8. 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 either of the facts or the legal position.
 9. 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 the purpose of Order 45 Rule 1 of the [Civil Procedure Rules](#) and Section 80 of the Act. Section 80 of the [Civil Procedure Act](#) provides for Review 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.”
 10. Additionally, Order 45 Rule 1 Application for review of decree or order.
 - “ 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 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”

11. Reliance is placed in the Supreme Court of India case of *Ajit Kumar Rath vs State of Orisa & Others*, where the court had this to say: -

“The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ... means a reason sufficiently analogous to those specified in the rule”

12. In *Nyamogo & Nyamogo v Kogo* {2001} EA 170 discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”



13. In Kisii Miscellaneous Application No.57 of 2016- *Zablon Mokuu v Solomon M. Choti* the court rendered itself as follows: -

“Having found that the applicant has satisfied this court that there was an error apparent on the face of the record and having found that adverse orders were made against the applicant in his absence without notice to him, the order that commends itself to me is the order to allow the applicant’s application dated 10th June 2016 in the following terms: The orders made in Kisii CMCC 3 of 2015 are hereby reviewed and set aside together with all other consequential orders. Each party shall bear its own costs of the application in view of the fact that the error that gave rise to the instant application was a mistake/error made by the court itself in omitting to open a High court file upon calling for the subordinate court file.”

14. It is the Applicants case that Section 175(7) of the *Public Procurement and Asset Disposal Act* No. 33 of 2015 provides that where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.
15. Reliance is also placed in Nairobi HCCJR No. E063 of 2021- *Republic v Public Procurement Administrative Review Board Ex parte Sports, Arts and Social Development Fund* where the court reviewed and set aside an earlier Judgment delivered on 21st June, 2021 awarding costs to the Ex parte Applicants where a decision of the Review Board had been quashed.
16. The use of the word shall in the Section 175(5) of the *Public Procurement and Asset Disposal Act* No. 33 of 2015 denotes a mandatory obligation and obedience of an absolute enactment which must be fulfilled.
17. Justice Mativo in *Republic v Kenyatta University Ex parte Ochieng Ora Domnick and 7 others* [2018] eKLR held as follows;

“The word “shall” when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation. The Longman Dictionary of the English Language states that “shall” is used to express a command or exhortation or what is legally mandatory. Ordinarily the words “shall” and “must” are mandatory and the word “may” is directory...”

Ex Parte Applicant/Respondent’s case;

18. The Ex parte Applicant/Respondent's filed grounds of opposition dated 4th June 2024 challenging the Application dated 18th April 2023. The Respondent/Applicant posits that there is a 'mistake or error apparent' on the face of the court record, to justify the exercise of this Court's power of review under Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the *Civil Procedure Rules*. The 1st Respondent/Applicant states at page 5 of its written submissions that “The Judgment delivered on 14th February 2024 is clearly on account of some mistake apparent (sic) on the face of the record as the same is in violation of Section 175 (7) of the *Public Procurement and Asset Disposal Act* No. 33 of 2015.”



19. Reliance is placed in *Paul Mwaniki vs National Hospital Insurance Fund Board of Management* (2020) eKLR which relied on the holding of the Court of Appeal in *Nyamonge & Nyamongo vs Kogo* 2001 EA 170 thus;

“an error which has to be established by a long 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review, though It may be one of appeal. “The learned judge went on to elaborate that”...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 provision of law cannot be a ground for review”

20. In *Omote & Another vs Ogutu* (2022) KEHC 16441 (KLR) the Court was categorical that “the fact that a party believes 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 process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.”
21. The Applicant contends that this award is an error for being contrary to the provisions of section 175 (7) of the *Public Procurement and Asset Disposal Act* 2015 which provides that where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party. However, does this constitute a mistake or error apparent on the face of the record? We think not.
22. The Ex Parte Applicant's Application dated 5th January 2024 which is the primary subject of the impugned judgment of 14th February 2024, sought a total of seven (7) orders (a-g) not just an order for quashing the Review Board's decision. In fact, prayer (g) of that Application specifically sought an order for the award of costs, which order the 1st Respondent/Applicant despite filing a Replying Affidavit sworn by James Kilaka on 15th January 2024 did not oppose.
23. It is its case that the application is an afterthought at a point where the Court is functus officio. The Applicant's case does not identify any mistake or error apparent on the face of the record to justify the exercise of this Honourable Court's power of review under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, the 1st Respondent/Applicant instead, questions the reasoning of this Honourable Court and argues that the judge ought to have arrived at a different decision.
24. It is its case that the Applicant should have challenged the Judgement at the Court of Appeal.
25. It invites the court to take an error apparent on the face of the record, from the case law that it ought to be an error that is manifest on the face of the decision without argument and/or analysis.
26. The contention raised by the 1st Respondent/Applicant invites argument and raises issues that were not pleaded through their response to the Judicial Review Application that gave rise to the impugned judgement.



Analysis and determination:

27. Order 45 Rule 1 of The [Civil Procedure Rules](#) provides that;
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 made the order without unreasonable delay.
28. Section 175 (7) of the [Public Procurement and Asset Disposal Act](#) No. 33 of 2015 provides that where a decision of the Review Board has been quashed, the High Court shall not impose costs on either party.
29. In the case of Nairobi HCCJR No. E063 of 2021 - [Republic v Public Procurement Administrative Review Board Ex parte Sports, Arts and Social Development Fund](#) wherein the court reviewed and set aside an earlier Judgment delivered on 21st June, 2021 awarding costs to the Ex parte Applicants where a decision of the Review Board had been quashed.
30. The argument that the Ex Parte Applicant's Application dated 5th January 2024 which is the primary subject of the impugned judgment of 14th February 2024, sought a total of seven (7) orders (a-g) not just an order for quashing the Review Board's decision is neither here nor there and has no relevance to the application before this court.
31. In the same token, the fact that there was a prayer (g) of that Application specifically seeking an order for the award of costs, which order the 1st Respondent/Applicant despite filing a Replying Affidavit sworn by James Kilaka on 15th January 2024 did not oppose is also none consequential.
32. This is so because either way, Section 175(7) of the [Public Procurement and Asset Disposal Act](#) is coined in mandatory terms to the effect that The High Court shall not impose costs on either party.
33. It matters not whether costs were sought or not or whether the Applicant opposed the application for cost or not. The outcome remains what the legislator intended in Section 175(7) of the [Public Procurement and Asset Disposal Act](#) is coined in mandatory terms to the effect that the High Court shall not impose costs on either party.

Disposition;

34. There is a mistake or error apparent on the face of the court record, to justify the exercise of this Court's residual jurisdiction of review under Section 80 of the [Civil Procedure Act](#) as read with Order 45 Rule 1 of the [Civil Procedure Rules](#) and I so hold.

Order:

1. An order for review and setting aside order (c) of the judgment of 14th February, 2024 on award of costs to the Applicants/Respondents is hereby issued.
2. The judgment delivered on 14th February, 2024 is hereby reviewed to read, “with no orders as to costs”.



It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF OCTOBER, 2024

.....

J. M. CHIGITI (SC)

JUDGE

