EMW v WNK (Civil Appeal E041 of 2020)
[2023] KEHC 182 (KLR) (Family) (20 January 2023) (Ruling)

Neutral citation: [2023] KEHC 182 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E041 OF 2020

DKN MAGARE, J

JANUARY 20, 2023

BETWEEN

EMW ..... APPLICANT

AND

WNK ..... RESPONDENT

RULING

1. This matter had been closed on 18th November, 2021 through an order of Justice Maureen Odero Judge. The Appeal had been marked as withdrawn with costly to the Respondents.
2. On 28th June, 2022 the Appellant filed an application dated 28th June, 2022 where he sought the following orders: -
    1. Spent.
    2. That there be a stay of the taxation party and party bill of cost dated 25th April, 2022 pending the hearing and determination of this Application inter partes.
    3. That this Honourable Court be pleased to review, vary and/or set aside the orders of Hon. Lady Justice Maureen Odero dated 18th November, 2021 and directing that each party bears its own cost.
    4. That in the alternative and without prejudice to prayer 3 above, this Court be pleased to order that cost be capped at a reasonable amount to be fixed by the Court.
    5. That cost of this application be in the cause.
3. The grounds upon which the Application is based are on the face of the application.

4. In a nutshell, the Appellant is praying that the court sets aside an order for costs against him and substitute it with an order that each party bears its own costs.

5. The alternative prayer is that costs be capped to a reasonable amount. This prayer will summarily be rejected as that will be the work of the Deputy registrar when taxing costs. I say no more.

Pleadings

6. In so far as relevant to the Application dated 28th June, 2022 the parties filed the same application, a replying affidavit sworn on 7th December, 2022.

7. A further affidavit sworn on 19th September, 2022. The further affidavit was basically annexing 2 orders in the Lower Court and the order that is being reviewed.

8. The Appellant filed submissions dated 14th December, 2022. One curious item noted in Paragraph 21 is that the Court limits costs payable. He relies on Veronica Kangai Vs John Bundi & Another (2018)eKLR where Justice Majanja reportedly awarded a figure of Kshs. 30,000/= for an Appeal.

9. In essence, where the Appellant is say is that the High Court erred by not following the Lower Court decision, or another Court's decision of which were binding on the same.

10. On the other end the Respondent was of the position that there was no demonstrable mistake or error that is apparent on the face of the decision of 18th November, 2021.

11. The respondent contended further that it appears that the Appellant was contending that they are dissatisfied with the decision to award costs to the Respondent.

12. The Respondent relied on the decision of MNW Vs LNN 2021eKLR where at paragraph 31 Hon. Justice Kariuki held and doth; -

    31. The other ground for review is an error apparent on the face of the record. The error is not an error that has to be searched for, interpreted or even construed. It is what Thomas Jefferson posited in the declaration of the independence of the US that this truth is self-evident. They are by ordinary human and perception and reason seen as errors. If w4e have to extrapolate, construct or even base it on reason then the errors are not apparent.

Hearing of the Application

13. The application proceeded by way of written submissions as indicated above.

14. When the matter came before me yesterday for highlighting, the advocate for the Respondent was not present virtually. The Appellant highlighted their submissions briefly, and I mean briefly. I reserved the Ruling for today 20th January, 2023.

Determination

15. The application is a fairly straight forward and raises 3 questions which are essentially questions of law. The issues for determination are the following: -

    a. Whether the issue of costs are a question of right or discretion.

    b. Whether there are grounds to warrant Review.

    c. The Reliefs that commenced themselves.

Jurisdiction

16. In order to be able to handle this matter, it is important to handle the issue of jurisdiction to hear and determine this application.

17. I have to deal with this issue propriomotu as it was not raised by any party. It is however, prudent for the court before rendering a decision to be satisfied, especially where one party did not attend court, that it has jurisdiction and that the matter is properly before the court.

18. This is the position in law and in international best practices.

19. An application for Review should ordinarily be carried out by the Court that passed the decree.

20. However, this matter has been placed before me during the Rapid Results Initiative. The same is aimed at decongesting the Court. Matters that can summarily be heard and determined were placed before the visiting judges and as such this file fell on my hands.

21. I note that the order under Review was made by the Presiding Judge who assigned the visiting Judges this file. Further, this was a simple action of making a decision on withdraw of an appeal and no further proceedings were taken. I am therefore satisfied that I have jurisdiction to proceed.

Costs

22. Section 27 of the Civil Procedure Act provides on the aspect of costs. It provides: - "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

    Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

Discretion

23. Therefore, from the standpoint of law, costs are at the discretion of the Court that decides the case.

24. Not unlike any other discretion, the discretion on costs has to be judicious and not capricious, whimsical or arbitrary.

25. The High Court of Uganda had occasion to determine the issue of costs in the locus classicus case of *Multholdings Ltd Vs Uganda Commercial Bank Ltd*.(1996)UGSC 4, where, the court held as doth:

> " As the Defendant succeeded in the suit, it may only be deprived wholly or partially of the costs of the Action for a good reason...
>
> It appears to me that any costs incurred completely unnecessarily by the successful party owing to its refusal to admit facts which it obviously should have admitted and pleading facts which were patently false and were subsequently withdrawn should not be existed to burden the unsuccessful partly with costs incurred in disposing of those issues."

26. Therefore, from the foregoing there should always be a good reason for depriving a successful party costs incurred in a claim that is subsequently withdrawn. The Court ordered that the costs of the withdrawn Appeal be borne by the Appellant. There was no good cause to deprive the Respondent costs.

27. I have noted from the proceedings leading to the order, costs was a hotly contested one. If formed part of the arguments which the Court used in awarding costs. Therefore, the Court exercised discretion after hearing both sides. Exercise of discretion is a matter of law. The Judicial discretion once exercised by only be set aside by the Appellate Court.

28. The issue of exercise of discretion were settled long ago in Mbogo & Another vs Shah [1968]93, where the Court held as doth [Justice Westang VP];

> "In (circumstances) when there are matter both in favour and against the exercise of discretion by the Court below, it is very difficult for the Court to say that its discretion is wrong and although myself might have come to a different conclusion, and there is room for a divergence of views and I am not prepared to hold that the order was clearly wrong."

29. The question in this application, is whether by allowing the withdrawal of the Appeal with costs to the Respondent, resulted in an error apparent on the face of the record or it constitutes sufficient cause for review. The Court clearly did and had no reason to deprive the successive party of their costs.

30. Secondly the issue of discretion is matter, not for Review but for Appeal if there was any wrongful exercise of discretion. In any case there are no facts placed before the Court to warrant Review of the orders given.

31. The Appellant relied on the assertion that the parties were husband and wife and as such the order for costs ought not to have been given. I disagree. And this is for a good reason. At the time the court made the order, she was aware of the relationship between parties, from the record. The fact are therefore no new facts warranting setting aside or review of the impugned order.

32. Review under order 45 is proceeds on three aspects;

    a. Discovery of new and important matter or evidence, which after exercise of due diligence of the party apply.

    b. An account of some mistake or error apparent on the face of record.

    c. Any sufficient reason.

33. To be able to succeed in the above there are also certain pre-requisites to be met:

    a. The same has to have a decree for which no appeal is allowed or

    b. Where the appeal is allowed but has not been preferred and (c) It is made without unreasonable delay.

34. My understanding is that 2 of the above has to be met before review is considered.

Appealable Order

35. Section 66 of the Civil Procedure Act allows for appeal against a decree or part of the decree to the Court of Appeal. Therefore, the case falls within matter where an appeal is allowed but for which no appeal has been preferred within the meaning of Order 45 Rule 1 (a) of the Civil Procedure Rules.

Inordinate delay

36. The order for costs was made on 18th November, 2021. It is not until 28th June 2022, 225 days later, that the Appellant filed this application. It goes without saying that the application was filed after being served with the Respondent's modest party and party bill of costs of Ksh.161,199.40 as per the Certificate of Urgency filed . I have laid my eyes on the said bill of costs. I say no more.

37. The period is excessive hence there was inordinate delay in filing the application. This alone is enough to dispose this application. Nevertheless, I will address other aspects of review.

Error Apparent on the face of the record

38. The other ground for review is an error apparent on the face of the record. The error is not an error that has to be searched for, interpreted or even construed. It is what Thomas Jefferson posited in the declaration of the independence of the US that this truth is self-evident. They are by ordinary human and perception and reason seen as errors. If we have to extrapolate, construct or even base it on reasoning and philosophical thinking, then the errors are not apparent.

39. The error apparent on the face of the record is different from the error of law which stems from misconstruction or misapprehension of what the law is.

40. Once a party enters a realm of arguing that in circumstances then this ought to be the decision, then that is an error of law for which only an appeal suffices. On the other hand, where there is a finding, a holding or a recording that does not flow from the true facts of the case, and is not a conclusion reached by the Court, then that falls within the realm of an error.

41. In other words, if there is a factual disconnect from what ought to have been to what is, then that is, a realm of an error apparent. However, where a Court considers two rival arguments and in its discretion and in its wisdom or otherwise, consciously chooses one of the two correct conclusions of law, then that is not an error.

42. It is what Justice Clement de Lestang, VP in Mbogo & Another V Shah 1968(EA) 93, 95 stated that you cannot blame a Court for exercising choosing in its discretion one of the two correct ways that is where the case would go either way.

43. In short the error apparent on the face of the record should not be construed to exist where the Court exercises its discretion in one way or another. It could well be that another Judge sitting over the same circumstances could rule otherwise but that is not enough to substitute the Courts discretion in the pretext of correcting an error.

44. I therefore hold and find that the decision on discretion and the same is not amenable for review. Disturbing such a decision would amount to an appeal to the very same Court.

Other Grounds

45. The statutory grounds of review cannot be expanded. (See Zablon Mokua v Solomon on Choti & 3 Others, 2016Eklr).

46. In Chandrakhant Joshibhai Patel v R,(2004) TLR 2018 the Court held as follows:- an error apparent on the face of the record:-

> "...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."

47. In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court posited that:-

> "an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal.

48. This indeed is a pointer that , if we have to elucidate the reasons for review though serious arguments and conjecture, suppositions and drawing conclusions of law, with various permutations that are likely, then, this is not an error apparent but a question of the court misdirecting itself on law and fact.. essentially a recipe for appeal.

49. The limits of what is considered an error may not be set, but it can be seen, even by one who does want to see. The Court of Appeal succinctly stated as follows regarding an application for review in National Bank of Kenya Ltd vs Ndungu Njau(1997)eKLR,

> "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."

50. Justices Kwach , Akiwumi and Pall , JJA proceeded as doth in the foregoing case:- "The matters had been canvassed fully before the learned judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he has reached a wrong conclusion, it could be a good ground for appeal not review. Otherwise, we agree that the learned judge could be sitting in appeal on his own judgment which is not permissible in law.an issue that was hotly contested cannot be reviewed by the same court which had adjudicated upon it."

Sufficient Reason

51. The ELC Court Jutice L.W. Gitari in dealing with the aspect of sufficient course, which is synonymous with sufficient course, in the case of Nyamu Vs Mugambi (2022) KEHC 405(KLKR) given on 21st April, 2022 quoted with approval a passage from the Tanzania High Court in Archdiocese of Dar

es Sallam Vs TheChairman Bunju Village Government & Others, where discussing what constitutes sufficient cause as:-

> " it is difficult to attempt to define the meaning of the word 'sufficient cause'. It is generally accepted however that the words should receive a liberal construction in order to advances substantial justice, when no negligence or inaction of want of bona fide is imputed."

52. This was flowing from the case of *Mbogo & Another vs Shah* (1968) EA 93. In order to convince me that outside the presence of a mistake and an error apparent by the face of record, or discovery of new evidence of material character. Further the Appellant/Applicant failed to adduce a single ground to show that there was a sufficient cause/reason to warrant the review sought. See University of Nairobi Vs Muaka(2008) (2022) KEHC 103(KOLR)

53. Having found there were no important materials or new facts to warrant the exercise to discretion the first ground fails. Further, there is no error apparent on the face of the record. The Appellant has not explained the inordinate delay. Finally, the grounds given do not constitute sufficient reason.

Status of proceedings/Taxation

54. The prayer for taxation was predicated upon the prayer for Review and setting aside. The same has fallen by the way side. In Butt vs Rent Restriction tribunal (1979)eKLR, the Court held as doth

> " The power to grant or deny stay is discretionary power to be exercised in favour of a deserving power."

55. However, discretion may be exercised judiciously in Mbogo Vs Shah the Court (Lestang VP, JA) held as doth:

> " While the Court would exercise discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error, it would not assist a person, who has sought to obstruct or delay the course of justice..."

56. I agree with Justice De Lastng that discretion in granting stay must be exercised judiciously. Having lots, the application for Review, there is nothing pending. The application for stay is therefore declined.

Disposition

57. From the foregoing, it is clear that the fate of the application dated 28th Jun, 2022 is for dismissal. It lacks merit and is arising for dismissal. I hereby dismiss the same with costs.

58. To avoid hardships of again having to file further bills for taxation and cause undue delay, I exercise my discretion, taking into consideration the work done, attendances and submissions filed to defend the application, award costs related to the application dated 28th June, 2022 at Ksh.25, 000/= payable to the Respondent within 15days. In default execution do issue.

59. Further, the bill of costs be fixed for Taxation forthwith before the Deputy Registrar to avoid unnecessary delay.

60. Parties to appear before the Deputy Registrar on 30th January, 2023 for directions on taxation.

61. Before departing I wish to point out that I have noted the humongous amount of energy in parties mostly before Court and forgetting the essence of this Court. The matters relating to Children's

matters should be dealt with a lot of circumspection and restraint lest we cost irreparable dent to the future of innocent children.

62. I thank all the parties for industry in prosecuting this matter. It is my wish that the issue of quantum of costs should be settled and this matter put to bed.

63. For avoidance of doubt the application dated 28th June, 2022 stands dismissed with costs of Kshs.25,000/=to the Respondent.

64 It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 20TH DAY OF JANUARY, 2023.

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, NAIROBI

Delivered virtually in the presence of;

Macharia for the Appellant/Applicant.

Orlando for the Respondent/Respondent.

Lucy Mwangi, Court Assistant.