



**Hillspark Investment Company Limited v Murimi (Civil Appeal
E006 of 2021) [2023] KEHC 558 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E006 OF 2021
F GIKONYO, J
JANUARY 19, 2023**

BETWEEN

HILLSPARK INVESTMENT COMPANY LIMITED APPELLANT

AND

CHACHA SABASTIAN MURIMI RESPONDENT

*(Being an appeal from the Judgement of Hon. G.N. Wakabiu (C.
M) Delivered on 28th April 2021 in Narok CMCC No. 206 of 2018)*

RULING

1. Before me are two applications. One is dated June 21, 2022. It is made by the respondent and is seeking the following orders;
 - i. That the honourable judge be pleased to and/or revise his own orders on costs on the judgment delivered on May 24, 2022.
 - ii. That the honourable court be pleased to direct and order the appellant to pay costs both of the appeal and lower court and interest thereof to the respondent.
 - iii. That the costs of this application be borne by the appellant.
2. The other application is by the appellant. It is dated June 23, 2022 and is seeking the following orders;
 - i. Spent
 - ii. That from the sum of Kshs 1,869,674.00 deposited in court, the sum of Kshs 1,631,504.00 should be released to the applicant.
 - iii. That this honourable court be pleased to grant directions on whether interest is owing to the respondent from the lower court judgment of Hon G.N.



Wakahiu delivered by Hon W. Juma on 13/2/2019 and which judgment interest to the respondent.

- iv. That this honourable court do make any such order(s) and issue any other relief it may deem just to grant in the interest of justice.
 - v. That the costs of this application be borne by the respondent.
3. Both applications are capable of being, and shall be determined in a single ruling. For that purpose, the parties shall be referred to as appellant and respondent as they appear in the appeal.

Directions of the Court.

4. On June 28, 2022, this court directed and ordered that a sum of Kshs 238,170 be deposited by K.O.Obae & co. Advocates into a joint interest-earning account in the name of K.O. Obae & co. advocates and Kimondo Gachoka & co. Advocates within 30 days. K.O. Obae & co. advocates to open the account.
5. Further that the respondent was to file replies to the application dated June 23, 2022. The respondent did not file any replies thereof.
6. The respondent in the application dated June 21, 2022 filed their replying affidavit.
7. The two applications were canvassed by way of written submissions. Both parties have filed their respective written submissions.

Respondent/Applicant Submissions.

8. The respondent submitted that their application is unopposed since the appellant did not file any replies. The record shows that the appellant filed a replying affidavit on September 16, 2022. In fact, it is the respondent who did not file any replies to the appellant's application dated June 23, 2022.
9. The respondent submitted that the order as to costs was an error or mistake on the face of the record as this court did not give any good reason for ordering the parties to bear their own costs of the appeal despite having dismissed the appeal for lack of merit. They relied on section 80 *CPA*, order 45 of the *CPR*, Misc. Application No 455 of 2016, *Paul Mwaniki v National Health Insurance Fund Board Of Management* [2020] eKLR, *Ajit Kumar Rath v State of Orisa & Others*, *Nyamogo & Nyamogo v Kogu* [2001] EA 170, *Attorney General & O's Boniface Byanyima* (Hvma No 1789 Of 200) cited of *Levi v Uganda Transport Company*, *Aribam Tuleshwar Sharma v Aribam Pishak Sharmal* (1979) 4 SCC 389, Section 27 CPA, Nairobi Civil Appeal No 59 of 2007 *Michael Murimi Kimanzi v Jameson Industries Limited & Another*[2016] eKLR.
10. The respondent submitted that the appellant should bear costs for both the appeal and lower court and interests thereof since the said appeal was dismissed for lack of merit.
11. They argued the trite law that costs follow the event. They relied on section 27 *CPA*, Nyahuru Civil Case No E002 of 2021, *DGM v EWG* (2021) eKLR, *Republic v Rosemary Wairimu Munene (Ex Parte Applicant) v Ibururu Dairy Farmers Co-Operative Society Ltd* Judicial Review Application No 6 Of 2004, *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR, *Judicial Hints On Civil Procedure*, 2nd Ed (Nairobi: Law Africa) Page 94, *Halsbury's Law Of England*, 4th Edition (Re-Issue) [2010] Vol 10 Paragraph 16, Section 26 *CPA*, Nairobi Civil Appeal No 8 of 2018, *Center For Mathematics Science And Technology Edition In Africa (CEMESTE) v Apex Security Services Limited* [2021] eKLR, *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited (No 2)*[1970] E.A 469 At 475.



12. They urged this court to award the costs of this application.

The Appellant's Submissions

13. The appellant submitted that the applicant has not satisfied the other two grounds; the discovery of new and important matter or evidence and mistake or error apparent on the face of the record. The appellant/respondent argued that an error established by any long reasoning on points of opinion other than points of law is not grounds for review but for appeal. They relied on the case of Nyamogo & Nyamogo v Kogo cited in Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR and section 80 CPA.
14. The appellant /respondent submitted that the award of interest and costs is discretionary and should be exercised in accordance with the law. And, the High court ordered that each party bears its own costs of the appeal.
15. They also argued that the applicant was awarded costs in the lower court with no order as to interest. According to them, the applicant did not file an application in the lower court asking the court to review the judgment on why interest was not awarded, which means they were satisfied with the award. They were of the view that applicant has not provided any concrete reason why they should be awarded interest in the appeal.
16. The appellant/respondent urged this court to dismiss the application for review dated June 21, 2022 with costs to the respondent as the applicant has not met the required threshold to warrant a review of this court's judgment.

Analysis and Determination

17. The two applications, affidavits as well as submissions filed by the parties give forth three issues for determination, namely;
- i. Whether there is a mistake or error on the face of the record or any sufficient reason to justify a review of the judgment herein
 - ii. Whether the deposit in the joint names of legal counsel of the respective parties should be paid over to the appellant
 - iii. Who bears the costs of one of or both the applications herein?

Of Mistake or Error Apparent on the Face of the Record.

18. Under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, the court may review its decision, *inter alia*: - on account of
- a) Discovery of a new and important matter or evidence
 - b) A Mistake or error apparent on the face of the record and
 - c) Any other sufficient reason.
19. An error or mistake apparent on the face of the record in the sense of section 80 and order 45 rule 1 of the Civil Procedure Act, and Civil Procedure Rules, respectively, is one that is self-evident and does not require elaborate arguments to be established. See Paul Mwaniki v NHIF Board of Management [2020] eKLR.
20. Is there any such mistake or error on the face of the record?



21. In essence, the purported error is the order that: ‘Each party shall bear own costs of the appeal;’ in the judgment delivered on May 24, 2022.
22. From the submissions made by the applicant, they believe they were the successful party and ought to have been awarded the costs of the appeal. This is akin to asking the court to sit on an appeal of its decision and reverse it.
23. In addition, an order for costs is ordinarily specific to the case, but of course, being guided by the applicable law; and, it is never an order in rem. In any event, costs follow the event, and the event is determined by the sum total of the circumstances of each case.
24. Therefore, the request to declare the respondent the successful party in a review application entails a re-appraisal of the evidence and re-analyzing of the facts of the case and decision to establish whether or not the applicant is entitled to costs- something which is beyond the scope of review jurisdiction.
25. I should state also that, the fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous is a matter fit for appeal, and not review.
26. In light of the purported error, it should be notable that, courts have held that; 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.’ And that; ‘an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.’ (*Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya* [2019])
27. Accordingly, there is no ‘mistake or error apparent on the face of the record’ in the sense of the law for which review may be granted.
28. The only error in the judgment is the correction by the court of purported mathematical error in the judgment of the trial court on the sub-total and total of the general and special damages. I have revisited the trial courts judgment and there was no error in the additions. By this judgment I hereby correct the inadvertent error by deleting that part on the purported error.
29. In relation to the request for award of interest, I do note that there was no cross appeal on interest. In the absence of cross-appeal thereto, I should think it is wise counsel which the respondent has given; that the appellant ought to have applied before the trial court to cure the omission. In the circumstances, making a request for interest which was not granted by the trial court exhibits great incongruity; it is totally incapable of being made in an application for review at this stage.
30. The foregoing analysis points to only one thing; that the application herein does not meet the legal threshold for review under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.
31. I find the application that out of the sum of Kshs 1,869,674.00 deposited in court, the sum of Kshs 1,631,504.00 should be released to the applicant, to be merited. However, the court ordered the difference to be deposited in the joint names of legal counsel for the respective parties. I should think the proper order is for the latter deposit of Kshs 238,170 to be paid to the appellant.

Conclusions and Orders.

32. For the reasons stated above, the court makes the following findings and determinations;
 - i. The Notice of Motion dated June 21, 2022 does not meet the threshold for Review; and it is hereby dismissed. Except, the purported correction of a purported error in the trial court’s judgment in respect of the totals of the sum awarded is deleted



- ii. In reference to the notice of motion dated June 23, 2022, I direct the deposit of Kshs 238,170 to be paid to the appellant.
- iii. I should now be clear that the result of these applications and the circumstances leading to the decision I have taken does not warrant any party getting costs of the applications. Accordingly, each party shall bear own costs of their applications. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
19TH DAY OF JANUARY, 2023**

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F. GIKONYO M.

JUDGE

