



REPUBLIC OF KENYA



**Amudavi v Invest and Grow Sacco Ltd (Civil Appeal E408 of 2021)
[2023] KEHC 1292 (KLR) (Civ) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E408 OF 2021**

**JK SERGON, J
FEBRUARY 24, 2023**

BETWEEN

WYCLIFFE SHIVACHI AMUDAVI APPELLANT

AND

INVEST AND GROW SACCO LTD RESPONDENT

RULING

1. The respondent herein has brought the Notice of Motion dated 2nd September, 2022 supported by the grounds laid out on its face and the facts stated in the affidavit of Peter Vuhya, the Chief Executive Officer of the respondent. The respondent sought for the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. That the decretal sum be deposited in a joint interest earning account in the names of the Advocates for the applicant and the respondent.
 - v. That the judgment of this Honourable Court delivered on 17th June, 2022 and the decree dated 8th July, 2022 be reviewed.
 - vi. That costs of the application be provided for.
2. The appellant swore a replying affidavit on 3rd October, 2022 to resist the Motion.
3. At the interparties hearing of the instant Motion, this court gave directions for the parties to file and exchange written submissions.



4. I have considered the grounds set out on the face of the Motion together with the facts deponed in the affidavits supporting and opposing the Motion and the rival submissions plus the authorities cited in reliance thereto.
5. A brief background of the matter is that the appellant instituted the present appeal to challenge the dismissal order made by the Cooperative Tribunal (“the Tribunal”) on 9th April, 2020 against the statement of claim dated 8th August, 2018 wherein the appellant sought for reliefs in the nature of a refund of the sums of Kshs.320,000/= and Kshs.160,000/= respectively, and general damages, together costs of the suit and interest thereon.
6. Upon hearing the parties on the appeal, this court vide the judgment delivered on 17th June, 2022 allowed the appeal thereby setting aside the aforementioned decision by the Tribunal and substituting it with an order entering judgment in favor of the appellant and against the respondent, as prayed in the statement of claim.
7. The respondent is now seeking the substantive order for a review of the above judgment through the instant Motion, as well as an order for deposit of the decretal sum.
8. To support the order for review sought, the respondent states and submits that there is a mistake/error apparent on the face of the record since the loan shares which constituted the subject matter of the claim before the Tribunal had been termed as settled and hence the respondent cannot be directed to refund the appellant the sum of Kshs.320,000/= which was sought in the claim.
9. In response, the appellant states and submits that the facts being deponed in the supporting affidavit are untrue and constitute a misrepresentation of the actual facts.
10. According to the appellant, there is no error apparent on the face of the record to warrant a review of the judgment on appeal, citing the case of *Republic v Advocates Disciplinary Tribunal Exparte Apollo Mboya* [2019] eKLR where the court held that:

“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. In the instant case therefore, I am not convinced that there is an error apparent on the face of the record. What the applicant is raising requires examination and argument.”
11. Consequently, the appellant urges this court to dismiss the Motion with costs.
12. The germane principles to guide this court in deciding whether to review its earlier ruling are found under Order 45 of the *Civil Procedure Rules*, 2010 and reaffirmed under Section 80 of the *Civil Procedure Act* Cap. 21 Laws of Kenya, cited in the submissions by the respondent, and set out in the manner below:

“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.”

13. The following are the instances in which a court can review a decision already in place:
 - a. the discovery of new and important matter or evidence, or
 - b. some mistake or error apparent on the face of the record, or
 - c. any other sufficient reason.
14. From my study of the instant Motion, it is clear that the respondent has come under the principle of “error apparent on the face of the record.”
15. The Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR cited in the respondent’s submissions had the following to say regarding an error on the face of the record:

“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.”
16. From my consideration of the explanations given by the respondent to support its argument that there is an error apparent on the face of the record, I am of the view that the purported error in the present instance cannot be termed as being so self-evident as to not require further arguments or elaborations.
17. In my view, it is apparent that the respondent is essentially asking this court to sit on appeal against its own decision, under the guise of an apparent error. It is noteworthy that an order for review is distinguishable from an appeal and the circumstances under which a review can be sought and granted are clear-cut, and have been set out hereinabove.
18. In my reasoning above, I am supported by the above-cited decision by the Court of Appeal in the case of *National Bank of Kenya Limited* (supra) as well as the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR appearing in the submissions by the appellant, where the court aptly rendered itself thus:

“Review is impermissible without a glaring omission, evident mistake or similar ominous error. 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.”
19. In view of all the foregoing circumstances, I am not satisfied that there is any error apparent on the face of the judgment delivered on 17th June, 2022 which would warrant a review of the same. Upon



arriving at this decision, I see no reason to consider the second order sought concerning the deposit of the decretal sum in a joint interest earning account.

20. The upshot therefore is that the Notice of Motion dated 2nd September, 2022 is found to be without merit. It is dismissed with costs to the appellant.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
24TH DAY OF FEBRUARY, 2023.**

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

