



**Bryan Muturi & Associates v Simmons & another (Miscellaneous Application  
369 of 2015) [2023] KEHC 18635 (KLR) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 18635 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION 369 OF 2015**

**DKN MAGARE, J**

**APRIL 28, 2023**

**IN THE MATER OF: TAXATION BETWEEN ADVOCATE &  
CLIENT**

**BETWEEN**

**BRYAN MUTURI & ASSOCIATES ..... APPLICANT**

**AND**

**ANNAH WAMBUI SCHUMACHER ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES HENRY SIMMONS ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. This is an application dated 6/7/2022 seeks review of the orders given by the Honourable Justice Njoki Mwangi on 13/5/2022. They raised main grounds. They raise issue with an order of the Court dismissing the Notice of Motion dated 8/9/2022.
2. The main question is whether there is an error apparent on the face of the record. The Court dismissed both Applications on strength of lack of leave to come on record.

**Analysis**

3. The application for review is provided under section 80 of the [Civil Procedure Act](#). The section provides as doth: -

“ 80. Review 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.”

4. This is further buttressed by order 45 Rule 1 which provides as follows: -
  - (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.”
5. An application for review must be on matters of fact not law. If the court makes an error of law, it is an appealable one and not review one. In the case of *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR, the court of Appeal stated as doth: -

“The High Court is presumed to know the law. That is why the Constitution has conferred on the High Court in Article 165(3)(a) unlimited original jurisdiction in Civil and Criminal matters and in Article 20 (3)(a) jurisdiction to develop the law and in Article 20 (3) (b) the mandate to interpret the Bill of Rights. It was expected that counsel, in getting up on the brief would come up with the law and authorities including the Treaty and the case-law. But he failed to do so. It was the duty of the Court to have before it the relevant law and to apply it correctly. Njagi, J. was not well served. He seems to have made an error of law. The appellant’s right to seek review, though unfettered, could not be successfully maintained on the basis that the decision of the Court was wrong either on account of wrong application of the law or due to failure to apply the law at all.

In *National Bank of Kenya Limited v Ndungu Njau* (Civil Appeal No 211 of 1996 (unreported)) this Court, with respect, correctly 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. I will not be a sufficient ground for review that another Judge could have taken a different view of the matter. More 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 ground for review.”

“... the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same Court which had adjudicated upon it.”



6. Turning to the fact, the tragedy is that there were actually three applications filed. The first one sought leave to be heard during the vacation. Annexed to it was another application dated 8/9/2020. It is therefore clear that there are errors apparent on the face of the record. The application to come on record had been made.
7. The error should not be through an analysis but it is clear on the face. It is what the bible calls, even the blind can see. In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, the court stated as follows:-
  - “ 13. The starting point is 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.
  14. In *Nyamogo & Nyamogo v Kogo* [6] 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.”
8. In this case the application to come on record was filed and was not dealt with. It could have been due to the avalanche of applications the Applicant filed.
9. It is therefore clear that the issue of service was live but not dealt with. I therefore set aside the order dismissing both Applications on basis of lack of Leave to come on record, due to the error apparent on the face of record.
10. To begin with I allow the firm of Wameyo Onyango & Associates be granted leave to come on record for the Applicant in place of M/s Mogaka, Omwenga & Mabeya Advocates.
11. The question regarding warrants is a question of execution. It is covered under Section 34 of the *civil procedure Act*.
  - “ 34. Questions to be determined by court executing decree (1) All questions arising between the parties to the suit in which the decree was passed, or their



representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.” 34. Questions to be determined by court executing decree (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

12. In the case of *James Wainaina Imunyo & 6 others v Karanja Mbugua & Co Advocates & Another* [2012] eKLR, the court, Hon H A Omondi, as then she was held as doth: -

“I am in total agreement with both Mr Githui and Mr Nderitu, that if the plaintiff wishes to contest the execution process in that suit, then the only avenue open is to challenge that process in the same suit, and not by filing a fresh suit. I need not belabour the point, section 34 speaks for itself. Whereas it is correct that the misjoinder of party in this suit by naming a non-judicial entity can be cured by way of amendment – such amendment will not cure the violation of section 34 of the Civil Procedure Act. This limb of the preliminary objection has merit and is sustained.”

13. The court should not be worried about execution it is not carrying out. The matter shall be addressed in the manner of speaking, before the court issuing the warrant.
14. Consequently, I do not find any error regarding the legality of the warrants issued and the decree dated 18/7/2018. Therefore, dismiss the balance of the Application dated 8/7/2023. The costs be borne by the Applicant.
15. The effect of these order is that the orders of stay of any be and are hereby vacated.

#### **Determination**

- a. The Application dated 6/7/2022 is allowed to the extent that there is an error apparent on the face of the record.
- b. The firm of Wameyo Onyango & Associates are allowed to come on records for the Applicants.
- c. Upon considering the application dated 8/9/2020, the balance other than prayer (b) are dismissed with costs of Kshs 15,000/= to the Respondent.
- d. Each party to bear their own costs for the application dated July 6, 2022.
- e. The orders of stay of any be and are hereby vacated.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28<sup>TH</sup> DAY OF APRIL, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Wameyo for the Applicant

No appearance for the Respondent

Court Assistant - Brian

