



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimori & another v Kwamboka (Civil Appeal E030 of 2021)  
[2023] KEHC 21095 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21095 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CIVIL APPEAL E030 OF 2021  
WA OKWANY, J  
JULY 27, 2023**

**BETWEEN**

**SAMUEL NYAKUNDI KIMORI ..... 1<sup>ST</sup> APPELLANT**

**DARSON TRADING LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ESTHER KWAMBOKA ..... RESPONDENT**

**RULING**

1. This ruling is in respect to the Application dated 12<sup>th</sup> May 2023 wherein the Applicant seeks the following orders: -
  1. Spent.
  2. Spent.
  3. Spent.
  4. That the Ruling dated 13<sup>th</sup> April 2023 be varied, enlarged and/or extended and the Applicants be ordered to provide a bank guarantee over the entire decretal amount of Kshs. 256,000/= or be ordered to deposit Kshs. 256,000/= in a joint account within thirty (30) days to enable the Applicants eventually prosecute and finalize the appeal.
  5. That this honourable Court do make any such further orders and issue other relief it may deem just to grant in the interest of justice.
  6. That the costs of this Application be in the cause.



2. The Application is supported by the Affidavit of Mr. Billy Ndolo Advocate and is premised on the following grounds: -
  - a. That in Nyamira Civil Suit No. 01 of 2020 – Esther Kwamboka vs. Samuel Nyakundi Kimori & Darson Trading Limited, judgment was entered for Kshs. 256,000/= on 25<sup>th</sup> May 2022.
  - b. That aggrieved by the said judgment, the Applicants herein filed a Memorandum of Appeal and an Application dated 24<sup>th</sup> June 2022 seeking stay of execution pending appeal in Nyamira Civil Suit No. 01 of 2020 – Esther Kwamboka vs. Samuel Nyakundi Kimori & Darson Trading Limited.
  - c. That the said Application came up for hearing on 30<sup>th</sup> November 2022 and a Ruling delivered on 13<sup>th</sup> April 2023 to the effect that the Applicants do pay half the decretal amount and the balance be secured by way of a bank guarantee.
  - d. That the Applicant is unable to comply with the Ruling as the Appeal is mainly on fraud and the Appellants are apprehensive that if the appeal succeeds and the suit is dismissed, they might not be able to recover half of the decretal amount that had already been paid to the Respondent.
  - e. That the Applicants are now praying that the Ruling dated 13<sup>th</sup> April 2023 be varied, enlarged and or extended and the Applicants be ordered to provide a Bank Guarantee over the entire decretal amount of Kshs. 256,000/= or be ordered to deposit Kshs. 256,000/= in a joint account within 30 days to enable the Applicants eventually prosecute and finalize the Appeal.
  - f. That unless the orders sought in this Application are granted the order for stay of execution granted on 13<sup>th</sup> April 2023 will be vacated and the Respondent will be at liberty to execute the judgment in Nyamira Civil Suit No. 01 of 2020 – Esther Kwamboka vs. Samuel Nyakundi Kimori & Darson Trading Limited and the appeal will be rendered nugatory.
  - g. That this Application had been made without unreasonable or inordinate delays.
  - h. That in any event, this Application has been filed timely.
  - i. That this Application ought to be granted in the interests of equity and justice.
3. The Respondent opposed the Application through her Replying Affidavit dated 26<sup>th</sup> May 2023 wherein she avers that the Application is res judicata as the issue of stay was conclusively addressed and determined by this Court in the Ruling rendered on 13<sup>th</sup> April 2023, pursuant to the Applicant's similar Application dated 24<sup>th</sup> June 2022 seeking stay of execution pending appeal.
4. The Respondent states that granting the orders sought in the present application would be tantamount to this court sitting on an appeal in its own decision and that the only avenue for the Appellants would be to the Court of Appeal. She further states that the instant application is a delaying tactic as the issues of fraud raised by the Applicants as the grounds for varying the court orders were never raised during trial and cannot be raised on appeal. She urged the Court to dismiss the Application with costs.
5. The Application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the application is merited. It is trite that this court has power to review/



vary its own orders. The framework for Review is premised on Section 80 of the [Civil Procedure Act](#) Cap 21 and Order 45 Rule 1 of the [Civil Procedure Rules](#) which stipulate as follows:

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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45 Rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

6. The Rules set the parameters for which a Court may review its own decision as follows: -

- i. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- ii. There was a mistake or error apparent on the face of the record; or
- iii. There were other sufficient reasons; and
- iv. The application must have been made without undue delay.

(See Mativo J. in [Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya](#) [2019] eKLR).

7. In [Pancras T. Swai v Kenya Breweries Limited](#) [2014] eKLR the Court of Appeal held as follows on the issue of discovery of new and important matter: -

“In [Francis Origo & another v Jacob Kumali Mungala](#) (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated:-

“Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review



rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the respondent."

We do not find it necessary to comment on the exercise of Court's discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that, the application for review was premised on alleged error of law on the part of Njagi, J.

We think Bennett J was correct in *Abasi Belinda v. Frederick Kangwamu and another* [1963] E.A. 557 when he held that:

"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal."

8. In the instant case, I note that the Applicants do not claim that they have discovered any new material or information that was not within their knowledge at the hearing of the first Application for stay. Their argument is that the appeal is based on fraud. I however find that fraud is not one of the grounds for an order of review.
9. On the second parameter of mistake apparent on the face of the record, the Court of Appeal in *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 explained what an error apparent on the face of the record entailed thus: -

"...In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said 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, and is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us." (Emphasis mine)
10. My finding is that the Applicants' claim that there was fraud does not amount to an error apparent on the face of the record because it will require an inquisitorial process to prove. It is trite that an error apparent on the face of the record must be manifest, clear or self-evident and must not require any examination or argument for it to be established. I find that the second parameter has also not been met.
11. While it is clear that this Application was filed without undue delay, I find that there are no other sufficient reasons for reviewing this Court's orders of 13<sup>th</sup> May 2023. I find that this Court is functus officio with respect to the issue of stay of execution pending appeal. In sum, I find that the instant application is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the appeal.
12. Orders accordingly.



**RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS  
27TH DAY OF JULY 2023.**

**W. A. OKWANY**

**JUDGE**

