Gakara v Chepchieng & another (Civil Appeal 696 of 2017)
[2023] KEHC 22961 (KLR) (Civ) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22961 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 696 OF 2017

JN MULWA, J

SEPTEMBER 29, 2023

BETWEEN

DAVID NJOROGE GAKARA ..... APPELLANT

AND

JEREMIAH CHEPCHIENG ..... 1ST RESPONDENT

MID-HILL NURSING HOME ..... 2ND RESPONDENT

RULING

1. Before the court is the appellant's Notice of Motion dated February 23, 2023 brought pursuant to section 3A and 99 of the *Civil Procedure Act* and order 45 rules 1, 2 & 3 and order 51 of the *Civil Procedure Rules,* 2010. The Appellant seeks an order of review of the judgment of this court delivered on November 15, 2022 as well as costs of the application.

2. The application is predicated on the grounds set out on its face and supported by the appellant's supporting affidavit in which he averred that there is an apparent error on the face of the judgment. He stated that the court's analysis at paragraph 10 of the judgment is contradictory with its findings in paragraphs 13 and 14 thereof and thus the error should be rectified to reflect the intentions of the court.

3. The application was opposed through a replying affidavit sworn by Wanjira Kinuthia a director of the 2nd Respondent. She refuted the appellant's claim of there being an apparent error on the face of the said judgment and contended that this court will be sitting on its own appeal if it proceeds to review the judgment as sought by the Appellant.

4. The only issue for determination is whether the appellant has made out a case for an order of review to correct an apparent error on the court's judgment dated 15/11/2022.

5. Section 80 of the *Civil Procedure Act* donates to courts the power to review their own decisions. It stipulates as follows:

> " 80. Any person who considers himself aggrieved-
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> a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> 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."

6. Order 45 rule 1 of the *Civil Procedure Rules* 2010 provides for the grounds upon which review may be granted as follows;

> " (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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."

7. From the foregoing provisions, it is clear that a review may be granted by the court if there is a discovery of new and important matter or evidence; or the if there is a mistake or error apparent face of the record; or for any other sufficient reason, provided that the application is made without unreasonable delay.

8. In the circumstances of this case, it is not in doubt that the application was filed without unreasonable delay. The impugned judgment was delivered on 15/11/2022 and the application was made 2 months and 8 days later on 23/2/2023.

9. As to the grounds for review, the Appellant contends that there is an apparent error on the face of the judgment. What constitutes an error on the face of the record was aptly spelt out by the Court of Appeal in *Nyamogo & Nyamogo v Kogo* [2001] EA 174, as follows: -

> " 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." [emphasis mine]

10. In *Kanyabwera v Tumwebaze* [2005] 2 EA 86, the court stated that:

> " In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear, that no court would permit such an error to remain on the record....." [emphasis mine]

11. The court has re-examined the impugned judgment. At paragraph 10 thereof, this court held the considered view that the Appellant had until 5th February 2017, at the latest, to file his medical negligence claim. The Record shows that the Appellant filed his Plaint dated 25th January 2017 in the lower court on 27th January 2017. Indeed, this was before the lapse of the 3 years period within which the claim would have been time barred. In the premises, it is manifestly clear that there was an apparent error in the court's conclusion at paragraph 13 of the judgment; that the learned magistrate did not err by striking out the Appellant's suit against the 2nd Respondent for being time barred. The said conclusion was obviously not in line with the court's earlier reasoning and this court cannot allow the error to remain on the record.

12. For the foregoing:

    a. The Appellant's Notice of Motion dated 23rd February 2023 is merited and is hereby allowed.

    b. Paragraphs 13 and 14 of this court's judgment of 15/11/2022 are hereby reviewed and amended to read as follows:

        13. Consequently, the court finds that the learned magistrate erred by striking out the Appellant's suit against the 2nd Respondent for being time barred.

        14. Accordingly, the appeal is merited and is hereby allowed."

    c. Each party shall bear own costs of this application.

    Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

JANET MULWA

JUDGE