



REPUBLIC OF KENYA



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Mashashi & another v The Archdiocese of Kisumu & 3 others (Commercial Case 13 of 2018) [2023] KEHC 24832 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24832 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 13 OF 2018
RE ABURILI, J
OCTOBER 31, 2023**

BETWEEN

MARGARET ATIENO MASHASHI 1ST PLAINTIFF

GEORGE MASHASHI 2ND PLAINTIFF

AND

THE ARCHDIOCESE OF KISUMU 1ST DEFENDANT

THE RIGHT REV. BISHOP ZACCHEAUS OKOTH 2ND DEFENDANT

TUMSIFU AGENCY 3RD DEFENDANT

ERASTUS IAN KHANDIRA 4TH DEFENDANT

RULING

Introduction

1. This court has been moved to determine an application dated 9th June 2023 and filed on the 14th June 2023 in which the applicants who are defendants and judgment debtors seek the following orders;
 - a. That the consent order recorded between the parties hereon on 19th December, 2022 be reviewed, varied and set aside.
 - b. That the Notice to Show Cause issued by the court on 28th April, 2023 directed against FR. Felix Attindah be set aside or expunged from the record.
 - c. That an order be made directing the plaintiff/decree – holder to refund or retribute to the 1st defendant/judgement – debtor the sum of Kshs. 349, 502 on account of overpayment made to the plaintiff/decree – holder.
 - d. That costs of this application be provided for.



2. The application was anchored on the grounds therein as well as the supporting affidavit of Kenneth Ochomo.
3. The applicants' case is that the consent order recorded between the parties herein on the 19th December 2022 was recorded by an advocate who was not properly on record for the applicants and thus the consent was irregular, null and void.
4. The applicants averred that the advocate who purported to record the impugned consent did not seek or obtain instructions from the applicants on the correct position regarding payment of the decretal sum.
5. Further to the above, the applicants averred that the impugned consent order was thus recorded in error or by mistake of fact and without the knowledge or consent of the applicants.
6. The applicants further averred that the decretal sum, interest thereon and costs were fully paid to the respondents/decreed – holder as at 27th July 2020 itemised as a decretal sum of Kshs. 3,600,000, interest of Kshs. 5,510,000 and costs of Kshs. 540,498 totalling up to Kshs. 10,000,000.
7. It was the applicants case that the Notice to Show Cause issued against Fr. Felix Attindah was irregular and/or in error as the Fr. Attindah was not a judgement debtor in the case.
8. Opposing the application by the defendants/judgment debtors, the plaintiffs/decreed holders / respondents filed a replying affidavit sworn by the 1st plaintiff on 27th June 2023 in which she deposed that in the instant case, judgement was entered in favour of the respondents with costs and interests set at 19% per annum.
9. The respondents further deposed that they had so far received Kshs. 8,600,000 which monies were received by their advocates from the applicants' advocates. Further to this, the respondents deposed that the applicants had not presented any evidence that the cheques adduced by the applicants were received by their advocate and that some of the documents presented were not eligible and one could not know who they were intended for.
10. It was deposed by the respondents that on the 19th December 2022, the applicants' advocate and accountant as well as the respondents' advocate and accountant confirmed that the monies remaining owing to the respondents was Kshs. 3,245,748.
11. The respondents further deposed that it was strange for the applicants to deny giving instructions to the firms of Peter Warindu and Ken Omollo as the two firms acted for the applicants in various instances and therefore, the applicants act of disowning the two advocates reeked of malice and bad faith.
12. The respondents further deposed that Mr. Peter Warindu Advocate had ostensible authority to negotiate with their advocate and enter into consent with them and that the relationship between the applicants and their advocate was none of their business and did not involve the respondents.
13. It was the respondents' contention that the argument that the firm of Ken Omollo did not have authority to enter into a consent was a frivolous and spurious argument as it meant that the said firm also did not have authority to pay and thus no monies had been paid to the respondents.
14. It was the respondents case that the applicants had a history of changing advocates whenever confronted with notices to show cause which in essence was a display of a cunningness panache for lack of transparency.
15. The respondents deposed that the interest owed to them as calculated by the applicants was wrong as the Law on calculation of interest is that the amount owed continues to accrue interest so long as it's



- due and payable and that as per their own calculations, the applicants still owed them Kshs. 1,050,498. The respondents further deposed that in their calculation of monies owed to them by the applicants they failed to include the 14% interest that was supposed to be levied on the awarded costs of the suit which would bring the cumulative amount owed to them at Kshs. 17,284,047.20 thus bringing the balance outstanding and payable to an amount of Kshs. 8,184,047.20.
16. Further to the above, the respondents deposed that they would be insisting on the amount of Kshs. 8,184,047.20 and not the amount entered in the consent.
 17. The respondents further deposed that the judgement entered against the applicants had not been appealed against or reviewed and therefore it stood valid. It was further deposed that 6 months had elapsed since the consent between the parties herein was entered into and that the agreed sum continued to accrue interest which interest they would pray to be applied.
 18. It was their case that the party to party costs were taxed 10 years ago which entitled them to a further Bill of Costs which they would pray for with interest from the date when the last bill was taxed.
 19. The respondents deposed that the instant application had been brought in bad faith and was unacceptable and further that the notice to show cause was properly before the court as there was a substantial amount outstanding that was yet to be paid.
 20. The respondents further deposed that the applicants' advocates were not properly before court as there was no order of court obtained prior to them filing the instant application.
 21. The respondents deposed and prayed that the court ought to give the following directions;
 - a. That the notice to show cause be varied to read Kshs. 8,184,047.20
 - b. That the Deputy Registrar tax the Decree Holders Party and Party further Bill of Cost.
 - c. That the Party and Party Bill of Cost to attract interest from 23rd June 2015 to date at a rate of 14% per annum.
 - d. That decree holder be granted the cost of this application
 22. The parties filed submissions to canvass the application.

The Applicants' Submissions

23. The applicants submitted that they wished to amend prayer No. 3 in their application to substitute the sum of Kshs. 349,502 with that of Kshs. 1,449,502 which they stated was the correct amount they overpaid to the respondents.
24. It was submitted that the decretal sum having been overpaid, the notice to show cause dated 28th April 2023 requiring Fr. Felix Attindah to show cause for alleged default to pay Kshs. 7,138,090.48 was therefore issued in error and ought to be set aside.
25. The applicants also submitted that the consent recorded on the 19th December 2022 stating that the defendants still owed Kshs. 3,245,748 was recorded in error, was irregular and null and void as the court had already made a ruling dated 2nd June 2023 confirming that the firm of Ken Omollo & Company Advocates was not properly on record as it did not comply with the requirements of Order 9 Rule 9 of the Civil Procedure Rules.
26. Further to the above, the applicants further impugned the aforementioned consent on the ground that it was recorded without instruction from the applicants. The applicants relied on the case of Wachira



- Karani v Bildad Wachira [2016] eKLR where it was held inter alia that a litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant to give the advocate due instructions.
27. Reliance was also placed on the cases of *In re Estate of the Late Okwany Ongoye (Deceased)* [2021] eKLR and that of *Republic v District Land Registrar Nandi & Another, Ex Parte Kiprono Tegerei & Another* [2005] eKLR where the courts set aside a consent on the grounds that the advocate who entered into it did not have instructions to take that step.
 28. The applicants submitted that in the instant case, the impugned consent was recorded at a time when the entire decretal sum had been paid and the respondents even received an overpayment.
 29. It was submitted that the applicants had overpaid the decretal sum by the sum of Kshs. 1,449,502 which they were entitled to be refunded as was held in the case of *Charles Wahome Mwai v Evelyn Ndoti Wahome* [2016] eKLR.

The Respondents' Submissions

30. The respondent submitted that the instant application ought to be struck out with costs for lack of precision and specificity as the orders cited therein were not specific under which rule they were brought in. Reliance was placed in the cases of *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* [2013] eKLR where the Court of Appeal stated inter alia that the courts must not provide succor and cover to parties who exhibit scant respect for rules and timelines, the case of *Raila Odinga & 5 Others v IEBC & 3 Others* [2013] eKLR where the court held that Article 159 (2) (d) was not a panacea for all procedural shortfalls but was applicable on a case to case basis and the case of *Karuturu Networks Ltd & Another v Dally Figgis Advocates, Nairobi Court of Appeal CA No. 293/2009* where the court held inter alia that the application of the overriding objective principle did not operate to uproot the established principles and procedures and thus the court was under duty to ensure that the application or interpretation given to any rule facilitates the just, expeditious, proportionate and affordable resolution of appeals.
31. It was submitted that the applicants had not met the grounds for review and setting aside set out under Order 45 rule 1 of the Civil Procedure Rules and further restated by the Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR.
32. The respondents submitted that the applicant had not submitted that they had discovered a new and important matter or evidence which was not within their knowledge at the time the decree was passed or the consent order made neither had they laid any material before the court to suggest that there was some mistake or error apparent on the face of the record or that there was sufficient reason to tamper with the consent order.
33. It was the respondents' submission that Order 45 rule 1 cannot be used to help a litigant like the applicant who had shown complete lack of diligence as held in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR where the Court of Appeal stated inter alia that the discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence.
34. The respondents submitted that the application was filed on the 14th June 2023 after an unreasonable delay period of 7 months after the order sought to be set aside was entered without an explanation being given for the delay. Reliance was placed on the case of *Thomas K'bahati t/a K/Bahati & Co Advocates v Janendra Raichand Shah* [2021] eKLR where the court dismissed an application for review brought more than 7 months later with no explanation given for the delay. Further reliance was also placed on the case of *Mohsen Ali & Another v Priscillah Boit & Another* [2014] eKLR where the application



for review was denied as it was brought after an unreasonable delay. The court further stated that an unreasonable delay is dependent on the surrounding circumstances of each case.

35. The respondents submitted that in the instant matter Ken Omolo and Peter Warindu Advocates participated in these proceedings for the last 10 years during which time the applicants had every opportunity to come to Court to challenge the appointment but did not do so but rather allowed those Advocates to participate in the proceedings and did not raise any issue regarding the irregularity of the Notice of Change of Advocate that placed KEN OMOLO advocate on record.
36. It was submitted that the representation of Ken Omolo on behalf of the Applicants were so notorious that the court takes Judicial notice of their relation as principal and agent under section 60 of the *Evidence Act*.
37. It was submitted that the firm of Ken Omolo Advocate filed an application to come on record for the applicants after judgement but the said application was not prosecuted a situation that cannot be blamed on the respondents and that the said firm continued to act as agents of the applicants. The respondents further submitted that Ken Omolo Advocate and Peter Warindu Advocate had handled the instant matter for the past 10 years with full knowledge, connivance and acquiescence of the applicants and what they did cannot be undone as it would create chaos in the legal system.
38. The respondents relied on the case of Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR where the court dealing with a similar matter where the advocates came on record for the respondent after judgement without leave of court and the court held that the appellant had every opportunity to challenge the appointment but did not do so but instead participated in the resultant proceedings and thus there was no injustice occasioned on the appellant to warrant the court to interfere with the same.
39. It was submitted by the respondents that they had demonstrated that despite the Court finding that the representation by Ken Omolo Advocate and Peter Warindu Advocate were not clearly on record this did not negate their actions and representations on behalf of the Applicant and the Applicant was estopped from saying that they had no authority to act for them for 10 years.
40. Further to the above, the respondents submitted that based on the Applicants conduct of business in this matter and their instructions to the said Advocates over 10 years it must be safely concluded that they were Applicants agents and had ostensible Authority to act for the Applicants as their appointed and trusted agents and that Peter Warindu Advocate represented by Mr. Clifford Odhiambo had ostensible authority to enter into the consent entered on the 19th December 2022.
41. The respondent submitted that the fact that that there was no Court order allowing their previous advocate to be on record was being taken advantage of to demonstrate that their Advocates were not given authority and that this must not be allowed by the Court as it amounted to introducing new documents which were not available at the time of filing the consent.
42. The respondents relied on the case of Cheall v Association of Professional Executive Clerical and Computer Staff [1983] 1 All ER where it was held inter alia that a contracting party cannot rely upon an event brought about by his own breach of contract..... as “A man cannot be permitted to take advantage of his own wrong”.
43. Reliance was also placed on the cases of Abu Chiaba Mohammed v Mohammed Bwana Bakari & 2 Others [2005] eKLR where it was held that no man can be allowed to rely on his own wrong to defeat the otherwise valid claim of another man, he cannot be allowed to take advantage of his wrong, the law will not and cannot permit such a party to rely on his own wrong to defeat an otherwise valid petition, and that of Macharia Mwangi Maina & 87 others v David son Mwangi Kagiri [2014] eKLR in which



the Court of Appeal held inter alia that it was a court of equity and equity shall suffer no wrong without remedy thus no man shall benefit from his own wrong doing, and equity detests unjust enrichments. This court was thus bound to deliver substantive rather than technical and procedural justice.

44. The respondents submitted that there were no impressions given to the Respondents and their Advocates that the Judgment Debtors Advocates had no such instructions and further that it was instructive to note that the Applicant had not secured an affidavit from either Peter Warindu Advocate or Ken Omolo advocate.
45. The respondents relied on the case of *Kuwinda Rurinja Company Ltd v Andikuwinda Holdings Ltd & 13 Others* (2019) eKLR, where the Court of Appeal quoting the decision of the Supreme Court of South Africa in *Stand 242 Hendrik Potgieter Road Ruimsig Pty v Gobel* (No 246/10) (2011) ZASCA 105 (June 2011) observed that the rule, in essence, was that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities and further that when there are persons conducting the affairs of a company in a manner which appears to be perfectly consonant with the articles of association, then those dealing with them externally are not to be affected by any irregularities which may take place in the internal management of the company.
46. The respondents also relied on the Court of Appeal decision in *National Bank of Kenya Ltd v Otieno Ragot & Company Advocates* (2020) eKLR where it was held inter alia that a Consent Judgment has contractual effect and can only be set aside on such grounds as would obtain in a contract and thus by lodging the appeal, the appellant was basically asking this Court to set aside orders which it consented to and were adopted as orders of the Court and a decree issued.
47. It was submitted that in their dealings with Applicants they (The Respondents) had no legal obligation or otherwise to know how the Applicants were dealing with their books, agents and Representatives and that it had not been demonstrated by the Applicants that the compromise was obtained by fraud collusion or an agreement contrary to public policy as held by the Supreme Court in the case of *Fredrick Otieno Outa v Jared Oduyo Okello & 3 others* [2017] eKLR.
48. The respondents submitted that Setting aside of the impugned consent would go against the twin public policies that litigation must come to an end and that mediation, consensus and agreements are constitutional ways of concluding cases by parties.
49. It was submitted that the applicants' submissions that that they be allowed to amend their application to demonstrate that they paid more came late in the day and could not be allowed as it amounted to a trial by ambush where a party responding to a replying affidavit introduced new evidence not exhibited when the consent was filed and when they filed their application.
50. The respondents relied on the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR where Justice Kiage held that the discretion of the law to grant review could not be used to help a party who had shown lack of diligence.

Analysis & Determination

51. I have considered the pleadings herein. The following issues fall for determination;
 - i. Whether the application dated 9th June 2023 has any merit or should be dismissed?
 - ii. Whether the consent order recorded on the 19th December 2022 merits review and if so, on what grounds
 - iii. Whether the Notice to show cause should be set aside



- iv. Whether the applicants overpaid the decretal sum and whether they are entitled to a refund of any money and if so, how much
- v. What orders should this court make

Whether The Application Dated 9th June 2023 Has Any Merit Or Should Be Dismissed

52. The respondent submitted that the court ought to dismiss the instant application for lack of specificity. It was the respondents case that the orders cited therein were not specific under which rule they were brought under.
53. The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR stated that:
 - “(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial --decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”
54. I have considered the applicant as filed by the applicants herein on 14th June 2023. Indeed, the application was brought under sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules and Article 159 of *the Constitution*.
55. The applicants in their application are clear on the orders sought, their claim is well articulated in the supporting affidavit deposed by Kenneth Ochomo. The applicants herein are seeking review and setting aside of a consent order made on the 19th December 2022 and a Notice to Show Cause issued on the 8th May 2023. Therefore, the question as to the validity of the applicant’s claim is a matter that shall be determined herein on its merit.
56. The essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties.
57. In the instant case, the respondents have failed to adduce evidence as to how the instant application lacks precision and specificity. I thus find that the instant application is properly before court and ought to be considered on merit.

Whether The Consent Order Recorded On The 19th December 2022 Merits Review

58. It was the applicants’ case that the impugned consent was obtained by error or mistake as the advocates on record for the applicants on at the time were not properly on record and further as the said advocates did not have their instructions to record the impugned consent.
59. In response, the respondents stated that the applicants’ advocates had been acting for them for over 10 years and had acted for the applicants in the same matter during this time and thus had formed an



agency relationship. The respondents further averred that the applicants had not met the grounds to merit award of review.

60. The applicants claim is for review of a consent order and setting aside of the Notice to Show Cause issued to one Fr. Attindah as a result of the applicants' failure to comply with the terms in the impugned consent order.

61. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

“ 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.”

62. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

“ 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

63. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held that:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”



64. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR John M. Mativo Judge (as he then was) culled out the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1."
65. 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. See *National Bank of Kenya Ltd vs Ndungu Njau*, {1996} KLR 469



66. In *Nyamogo & Nyamogo v Kogo* 2001 EA 170, 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.”
67. The Indian Supreme Court in the case of *Aribam Tuleswar Sharma v Aribam Pishak Sharmal* AIR 1979 SC 1047, made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.[emphasis added]
68. In *Attorney General & O’rs v Boniface Byanyima*, HCMA No. 1789 of 2000 the court citing *Levi Outa v Uganda Transport Company* (1995) HCB 340 held that the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.”
69. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'.
70. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.
71. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act.
72. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.
73. 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.



74. The applicants herein asserted that the consent entered into by the firm of Ken Omolo on their behalf on the 19th December 2022 ought to be set aside as the same was entered into on account of a mistake as the said firm were not properly on record and further as the said firm did not have their instructions to enter into the said consent.
75. The question this court is faced with is whether the mistake alleged by the applicants' amount to discovery of new evidence that was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier, a mistake or error on the face of the record sufficient to merit grant of orders of review.
76. The principles guiding the applications for setting aside of a consent orders are well established in a line of cases including Brooke Bond Liebig v Mallya (1975) EA 266 where Mustafa Ag. VP stated thus:
- “The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed.”
77. And in the case of Flora N. Wasike v Destimo Wamboko [1988] eKLR Hancox JA cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that;
- “Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement.”
78. Essentially, the above cited authorities are clear that a consent Order will only be set aside if it can be demonstrated that it was procured through fraud, non-disclosure of material facts or mistake or for a reason which would enable a court set it aside. So, was this a case of fraud or misrepresentation or mistake by the said Ken Omolo advocate that would lead to setting aside of the consent order of 19th December 2022.
79. To begin with Black's Law Dictionary defines “fraud” as;
- “1. Knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases (esp. when the conduct is willful) it may be a crime.”
80. The same dictionary defines misrepresentation as;
- “1. The Act or an instance of making a false or misleading assertion about something, usually. with the intent to deceive. The word denotes not just written or spoken words but also any other conduct that amounts to a false assertion.



2. The assertion so made; an incorrect, unfair, or false statement; an assertion that does not accord with the facts.”

81. And “mistake” as;

- “1. An error, misconception, or misunderstanding; an erroneous belief. 2. Contracts. The situation in which either (1) the parties to a contract did not mean the same thing, or (2) at least one party had a belief that did not correspond to the facts of law. As a result, the contract may be voidable.”

82. The applicants’ further case is that the impugned consent was obtained by error or mistake as the advocates on record for the applicants on at the time were not properly on record and further as the said advocates did not have their instructions to record the impugned consent. Does this constitute an error or mistake sufficient to void the consent?

83. Indeed, this court had ruled that the firm of Ken Omolo were irregularly on record in their dealings with the respondents herein. However, this court notes that the said firm acted on behalf of the applicants with the applicants’ acquiescence. It is also noteworthy that the applicants were okay with paying the sums as agreed in the impugned consent that they went on to present the respondents with a cheque of Kshs. 200,000.

84. The applicants herein alleged that the firm of Ken Omolo did not have instructions to enter into the impugned consent of 19th December 2022. It is trite that he who alleges must prove. No evidence has been placed before this to demonstrate that in this instance, the 19th December 2022, as opposed to the other times when the aforementioned firm acted on their behalf, they did not have instructions. This court cannot act in the absence of evidence.

85. In my view, the applicants herein have not demonstrated that the impugned consent was entered into by fraud, misrepresentation or that the firm of Ken Omollo had no authority to act for them. I will however revert back to this issue later on the question of whether there is sufficient cause to review or set aside the consent.

86. Turning to the order seeking to set aside the Notice to Show Cause against Fr. Attindah, which orders were issued following failure by the applicants to comply with the consent order dated 19th December 2022, it is my finding that the applicants having failed to comply with the consent order, the Notice to show cause was the ultimate order to compel compliance. I will again revert back to this issue in a short while, after considering whether there is sufficient cause to set aside or review the consent order and if so, the effect of the review order on the notice to show cause.

87. Turning to the last limb, of whether there is “sufficient cause,” to review or set aside the consent order and therefore the notice to show cause as impugned, the question is whether the applicants’ averments that prior to the impugned consent the applicants had paid to the respondents a total of Kshs. 10,000,000 between December 2015 and 27th July 2020 set against the judgement debt owed to the respondents of a decretal sum of Kshs. 3,600,000, interest of Kshs. 5,510,000 and costs of Kshs. 540,499 totalling to Kshs. 9,650,499 and therefore whether the applicants are entitled to a refund of the excess sums paid.



88. In Republic v Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abullahi Said Salad [2019] eKLR, the court observed, with respect to any other sufficient reason:

“A court can review a judgment for any other sufficient reason. In the case of Sadar Mohamed vs Charan Singh and Another [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

89. In Tokeshi Imbuka Mambili & 2 others v Joseph Onzeke Sambwa & another [2004] eKLR the court stated that where the application is based on sufficient reason it is for the court to exercise its discretion.

90. The Court of Appeal in Shanzu Investments Limited v Commissioner for Lands (Civil Appeal No 100 of 1993) held that;

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *civil procedure act*: and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”

91. I have carefully perused the court record and pleadings filed in the instant application, more specifically the receipts for payment received by the respondents’ advocate and note that the cumulative sum paid to the respondents as evidenced from the receipts attached in support of their application amounts to Kshs. 10,000,000. It is also not lost on this court that the cumulative amount owed to the respondents was Kshs. 9,650,499 inclusive of costs and interest at commercial rates as ordered by the court which heard the case.

92. What that means is that at the time when the parties herein agreed to the impugned consent, the applicants had overpaid the decretal sum by Kshs. 349,501. Although the applicants in their advocates’ submissions tended to amend this figure, I find no basis as the respondents were not given the opportunity to respond to the belated amendment hence I decline to use the figure that was not pleaded as parties are bound by their pleadings and evidence and submissions should not be an avenue for adduction of new evidence which the adverse party had no opportunity to controvert as that would infringe on the party’s right to be heard and therefore prejudice that party.

93. In addition, I find no basis for the respondents’ claim that they are entitled to further costs as their costs were assessed and no application was ever filed and or an order made allowing them to file a further bill of costs for consideration by this court or additional interest. I further find no basis upon which I would review the amount in the notice to show cause to be over 8 million suggested by the decree holder’s counsel as that would amount to an injustice being visited on the respondents.

94. On the whole, I find and hold that the consent entered into by the parties herein on the 19th December 2022 was entered into on an error and is thus voidable. Further it means that the fact that the applicants had overpaid the judgement debt prior to recording of the impugned consent constitutes sufficient reason to warrant this court exercising its discretion and granting the applicants the review orders sought.



95. For the above reasons, I order that the consent recorded between the parties herein on the 19th December 2022 is hereby reviewed and set aside. Consequently, the resultant Notice to Show Cause issued against the applicants/ judgment debtors herein on the 28th April 2023 and specifically directed at Fr. Felix Attindah is hereby recalled and set aside.
96. The upshot of the above is that I find the application dated 9th June 2023 is meritorious. It is hereby allowed with an order that the respondents/decree holders are ordered to refund to the applicants/ judgment debtors a sum of KShs. 349,501 being the sum overpaid to them by the applicants. The Notice to show cause issued against Fr Felix Attindah is hereby recalled and set aside.
97. Each party to bear their own costs of the application so as to bring to an end this over ten-year-old dispute that has seen the judgment debtors three times the amount claimed in the plaint and as awarded by the court, which has seen the judgment debtor which is a church struggle so much to settle decree as the outstanding sums continued to accrue interest such that they lost count of how much they had paid as reconciliation of the figures became a nightmare to them.
98. I so order.
99. Mention on 23/11/2023 to confirm settlement.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2023

R.E. ABURILI

JUDGE

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