



Limpompo Developers (K) Ltd v Wilfred & Ngugi Associates Advocates (Environment & Land Miscellaneous Case E013 of 2021) [2023] KEELC 17712 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND MISCELLANEOUS CASE E013 OF 2021**

LN GACHERU, J

MAY 31, 2023

BETWEEN

LIMPOMPO DEVELOPERS (K) LTD APPLICANT

AND

WILFRED & NGUGI ASSOCIATES ADVOCATES RESPONDENT

RULING

1. The 1st Application is dated 6th March 2023, brought by the Client/Applicant seeking for the following Orders
 1. Spent
 2. That the Court be pleased to stay the execution of the Ruling rendered by this Court on 2nd March 2023, and all the consequential orders arising therefrom pending the hearing and determination of the application herein.
 3. That costs of and incidental to this application be provided for.
2. The application was premised on the following grounds; that the taxing master had delivered a Ruling on the applicant's Bill of Costs on 24th January 2022. The Client/Applicant was aggrieved by the said Ruling and on 30th September 2022, filed an application for Reference seeking to set aside the taxing master's decision. In response to that, the Advocate/Respondent filed their Cross-Reference dated 7th October 2022.
3. Further that on 2nd March 2023, the Court pronounced itself on the above applications and dismissed the Client/Applicant's application for the Reference and allowed the Advocate/Respondents Cross-Reference; That the client was condemned to pay a sum of Kshs.1,699,523/56, as Advocate costs, after the Court enhanced the Advocate's/Respondent's instruction fees with Kshs.412,500/= to the taxed amount of Kshs.1,287,023/56. That the Client/Applicant is aggrieved by the above decision and thus



- this application for stay of execution, of the said Ruling. That the said assessment was based on the wrong principles and that the Court erred in its discretion on the said Ruling, and that the Client/Applicant stands to lose substantially if the orders prayed for are not granted. That it is in the interest of justice and fairness that the prayers sought in the application should be granted.
4. The application is also supported by the Affidavit of Timothy Mundia, a Director of the Client/Applicant, who reiterated the contents of the grounds in support of the application. He averred that as Client/Applicant, they intend to file a review, which review raises serious triable issues, and that he intends to file the intended review expeditiously within such time as the Court may order and that he was willing to abide by any condition set by the Court for grant of the orders sought.
 5. This application is opposed by the Replying Affidavit of Wachira J. M, an advocate of the High Court practising in the Law Firm of Wilfred & Ngugi Associates Advocates, the Advocated/Respondent herein. He averred that there is no new evidence and/or any error on the face of record that has been presented to warrant a review. He also averred that the Client/Applicant is only duplicating pleadings that are already before the Court in an attempt to buy time and delay payment of costs. Further, that since the Client/Applicant is seeking stay of execution of Kshs.1,699,523/= and the taxed off sum is Kshs.2,345,751/= then for it to be seen to be approaching the Court with clean hands, the Client/Applicant should remit the uncontested fees of Kshs.646.228/=.
 6. That the two applications are just a spirited attempt to deny the advocates their professional earned fees since the judgment was rendered on 3rd March 2019. That in the event that stay is granted, the same should be conditional that is 50% of the total taxed fees be paid to the advocate client and 50% be deposited in a joint interest earning account held between the Counsels. The Advocate/Respondent vehemently opposed the instant application.
 7. The 2nd application is dated 10th March 2023, wherein the Client/Applicant sought for the following orders.
 - a. That the Court be pleased to review the Ruling and orders of the Court delivered by this Court on 2nd March 2023, dismissing the Client/Applicant's application dated 30th September 2022, and allowing the Advocate/Respondent's cross-reference dated 7th October 2022.
 - b. That the Court be pleased to issue any other orders it may deem mete and just.
 - c. That costs of and incidental to this application be provided for.
 8. The application is premised on the grounds that on 2nd March 2023, the Court delivered a Ruling wherein it dismissed the Client/Applicant's application dated 3rd September 2022, and allowed the Advocates/Respondents Cross-reference dated 7th October 2022. It was alleged that the Ruling was premised on erroneous findings by the Court that the Client/Applicant failed to provide evidence of agreement of payment of legal fee in ELC case No. 35 of 2018 (Formerly Nyeri ELC No. 51 of 2014) Phyllis Wanjiku Mburu Vs Limpopo Developers (K) Ltd.
 9. It was averred that the Client/Applicant had duly provided copies of the Cheque drawn in favour of the Advocate/Respondent and Mpesa statement adduced by way of Replying Affidavit and Further Affidavit sworn by Timothy Mundia, evidencing full payment of legal fees to the Advocate/Respondent. Further that the Court had made a finding that there was no proof of payment of legal fees by the Client/Applicant nor agreement of legal fees despite the evidence of the same having been presented by the Client/Applicant. It was the Applicant further allegations that the finding of this Court was based on an error apparent on the face of the record and that the same ought to be reviewed.



That the said Ruling has occasioned great injustice and prejudice to the Client/Applicant, as it is an apparent case of miscarriage of Justice.

10. Further that there is sufficient reason for review of the Ruling, and orders as sought by the Client/Applicant so as to protect the interest of justice and of Client/Applicant's herein. That this application has been made diligently and expeditiously and it is in the interest of justice and fairness that the prayers sought should be allowed.
11. The application is also supported by the Affidavit of Timothy Mundia, the Director of Limpopo Developers (K) Ltd, Client/Applicant herein. He reiterated the grounds in support of the application and further averred that the advocates drew the impugned Bill of Costs out of spite and malice in a bid to make double gains which is extremely unethical and detrimental to the Client/Applicant who has evidently settled the entire legal fees payable. He urged the Court to allow the application.
12. The Advocate/Respondent relied on the same Replying Affidavit dated 23rd March 2023, sworn by Wachira J. M Advocate, to oppose the instant Notice of Motion Application dated 10th March, 2023.
13. It was his contention that there was no new evidence and/or any error apparent on the face of the record that has been presented to warrant a review. He contended that the instant application is just a spirited attempt to deny the advocate their professionally earned fees since the Judgment herein was entered on 3rd October 2019.
14. The two applications were canvased together by way of written submissions.
15. The Client/Applicant filed its submissions dated 28th March 2023, through the Law Firm of Robson Harris Advocates LLP and set out two issues for determination being:-
 - i. Whether the Client/Applicant has provided sufficient grounds that warrant a review of the Ruling delivered by the Court.
 - ii. Whether the Court erred in fact and in law on dismissing the Client/Applicant's Chamber Summons application for Reference and allowing and enhancing the Advocate/Respondent's Chamber Summons Cross-Reference Application.
16. The Client/Applicant relied on Section 80 of the Civil Procedure Act, which provides as follows;

Any person who considers himself aggrieved;-

 - a) By a decree or order in which an appeal is allowed by this Act, but from which no appeal has 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.

It further relied on Order 45 rule 4 of the Civil Procedure Rules which provided as follows;-

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 from whom 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 the judgment to the Court which passed the decree or made the order without unreasonable delay.

17. The Client/Applicant also relied on the case of Republic Vs Public Procurement Administrative Review Board & 2 Others (2018) eKRL, where it was held; -

“The Power to review a judgment or an order can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabilizing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule. Where the application is based on sufficient reason, it is for the Court to exercise its discretion”.

18. The Client/Applicant submitted that the Court erred in finding that there is no evidence of settlement of fees, despite demonstration of the same by way of the Client/Applicant’s Replying Affidavit dated 30th September 2022. That such an error calls for review to avert condemnation of the Client/Applicant. It was further submitted that this Court failed to take into account the overwhelming evidence of payment. Further, it was submitted that there was an implied existence of an agreement between parties which the Client/Applicant herein met by setting an outstanding legal fees in the matter. For this argument, the Client/Applicant relied on the case of John Maina Mburu t/a John Maina Mburu & Co. Advocates vs George Gitau Munene (sued as the Administrator of the Estate of) Samuel Gitau Munene & 3 Others (2015) eKLR, where the Court held “..... Where there is a fee agreement between an Advocate and Client, there is no jurisdiction to tax a bill of costs”.
19. It was also submitted that there was evidence of full payment of legal fees by the Client/Applicant which the Applicant craves that the same be reviewed. The Client/Applicant urged the Court to exercise its discretion in determining that the Client/Applicant’s application for review is warranted on the ground of sufficient reasons.
20. The Client/Applicant also opposed the proposal by the Advocate/Respondent payment of 50% of total taxed fees by the Client/Applicant to be deposited in a joint interest earning account on the basis that the same is an attempt to once again place financial strain upon the Client/Applicant. It was further submitted that the Applicant has established that it has provided sufficient grounds to warrant review of the orders issued by the Court on 30/6/2020 and the Ruling of 2/3/2023.
21. The Advocate/Respondent filed its submissions on 28th March 2023, through the Law Firm of Wilfred & Ngugi Associates Advocates. The Advocate/Respondent equally relied on Section 80 of the [Civil Procedure Act](#) and Order 45 of the Civil Procedure Rules already quoted.
22. It was submitted that Section 80 gives the Power of review and Order 45 sets the rules.
23. That the grounds for review are;
- (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.

24. It was the Advocate/Respondent's further submissions that wherever the Court considers it necessary to correct an error apparent or omission on the part of the Court, then review may be granted "That the error or omission must be self-evident and should not require an elaborate argument to be established". The Advocate/Respondent relied on the case of *Nyamogo & Nyamogo vs Kogo*(2001) EA 174, where the Court held;

"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 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 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

25. It was further submitted that the power of review is available only when there is an error apparent on the face of the record. Further that review proceedings are not appeal and that 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 appellate jurisdiction which is not permissible. That the Client/Applicant failed to show the alleged error on the face of the record and therefore the application lacks merit and the same should be dismissed. It was also submitted that the application for stay of execution lacks merit and it is an academic exercise.
26. The Court has considered the two applications, the Replying Affidavits, the rival Written Submissions and the relevant provisions of law and finds the issue for determination are;
1. Whether the application for stay of execution is merited?
 2. Whether the Application for review is merited?
27. As it evident herein, the Client/Applicant has filed two applications which are due for determination.
28. In its Ruling of 2nd March 2023, this Court dismissed the Client/Applicant's Reference dated 30th September 2022, and allowed the Advocate/Respondent's Cross-Reference dated 7th October 2022, which enhanced the Advocates fees due to Ksh. 1,699,523/=. The said dismissal prompted the filing of the instant two Applications.
29. The first application is for stay of execution which was premised to be brought under various provisions of law and specifically Section 80 of the *Civil Procedure Act* which Sections of Law deals with Review.
30. In the Certificate of urgency narration, the Client/Applicant narrated that the Application for stay is of execution of the Ruling is brought pending the filing of an Intended Review, which the Applicant alleged had high chances of success. The Client/Applicant had also narrated that it was dissatisfied with the said Ruling of this Court that was issued on 2nd March 2023, and intended to seek for review of the same.



31. In the main prayer of the Notice of Motion Application dated 6th March 2023, the Client/Applicant sought for stay of execution of the Ruling pending the hearing and determination of this Application.
32. The Client Applicant did not seek for stay of execution pending review or Appeal. It sought for stay pending the hearing and determination of this application. This Application is for stay of execution. Stay of execution is granted pending an intended action like “pending Appeal”.
33. In this Application, the Intended action is “Pending the hearing and determination of this Application” which application is for stay of execution.
34. The orders of stay of execution were not granted on the first instance. The Application has now been heard and determined. It was not clear why the Client/Applicant had sought for the stay of execution. It is a stay of execution pending what action? Since the Application of stay has now been heard and determined, then the prayers for stay of execution have been exhausted and there is no other reasons given why stay should be granted. The Application herein was not anchored under Order 42 Rule 6, of the Civil Procedure Rules, which would prompt this Court to find and hold that the stay of execution is pending the hearing and determination of Appeal”
35. The Application herein is brought under Section 80 and Order 45 of the Civil Procedure Act and Rules. In this Application, there is no prayer for review. Therefore, prayer No. 2, herein has been exhausted and there is nothing to grant as the application is now being determined in this Ruling.
36. Consequently, this Court finds that the Notice of Motion Application dated 6th March 2023, has been overtaken by event, and is exhausted. The same is thus found not merited and it is dismissed entirely with costs being in the cause.
37. On the 2nd Application for review, which is anchored under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, the Law is very clear on when an application for review can be filed.
38. The Client /Applicant herein has lamented that this Court made an erroneous finding that the Client/Applicant had failed to provide evidence of agreement of payment of legal fees in ELC No. 35 of 2018.
39. The Client/Applicant has faulted this Court for coming to a wrong conclusion and which conclusion, was an apparent miscarriage of justice. The Client/Applicant is aggrieved by this Court’s determination of the two findings. The Client/Applicant has sought for review of the Ruling of the Court delivered on 2nd March, 2023, allegedly based on an error apparent on the face of the record. The above lamentation by the Client/Applicant are indeed questioning the merit and determination of two applications by the Court.
40. It is evident from Section 80 of the Civil Procedure Act, that for the Court to review its earlier orders, there must be evidence of discovery of new evidence, or evidence of error apparent on the face of record or for any sufficient reasons.
41. This Court will consider the available evidence and then determine whether the Client/Applicant has satisfied the grounds for review that is;- apparent error on the fact of record or sufficient reason.
42. It is the Client/Applicant’s averments and submissions that the Courts Ruling of 2nd March 2023, was based on an erroneous finding by the Court that the Client/Applicant failed to provide evidence of agreement of payment of legal fees in ELC Case No. 35 of 2018 (Formerly Nyeri ELC No. 51 of 2014).
43. The Client/Applicant submitted that it had duly provided copies of cheque drawn in favour of the Advocate/Respondent herein and Mpesa statement which was adduced by way of Replying Affidavit



and Further Affidavit sworn by Timothy Mundia, evidencing full payment of the legal fees to the Advocate/Respondent. The Advocate/Respondent has submitted that there was no agreement of payment of legal fees.

44. The Court on Page 11 of the impugned ruling had found that there was no proof of any agreement that the sum of Ksh. 450,000/= was the agreed legal fees. The Client /Applicant in Para 14 of its submissions submitted that Annexure TM3 of the Client/Applicant’s Replying Affidavit was a fee note dated 1st October, 2019 of Ksh. 41,731/= which fee note had the words “Our interim and highly discounted Fee Note dated 18th February 2019”. Further in Para 15, the Client/Applicant submitted that the above implied existence of an agreement between parties, which the Client/Applicant met by setting the outstanding legal fees. In its Ruling, the Court gave reasons why it did not believe that the existences of an agreement on payment of legal fees.
45. The Client/Applicant has premised this Application on error apparent on the face of record. The Client/Applicant submitted that the Court erred in finding that there was no evidence of settlement of the Legal Fees, despite demonstration of the same by way of Replying Affidavit dated 30th September,2022. What is error apparent on the face of record?
46. In the case of Nyamogo & Nyamogo vs Kogo (Supra) the Court held as follows;
-where an error on the substantial point of law states on the face and there could reasonably be no opinions, a clear case of error apparent on the face of record would be made out. An error which has to be established by a long drawn process of reasoning on points where there are many conceivably two opinions can hardly be said to be an error apparent on the face of record. “.....mere error on wrong view is certainly no ground for review though it may be one for Appeal”.
47. The Client/Applicant has pointed out that the Court came to wrong conclusion and that was after long drawn process of reasoning. Certainly, the Court’s findings on no evidence of agreement for payment of legal fees is not an error apparent on the face of record. It could however be a ground for appeal. See the case of Godfrey Ajuang Okumu vs Nicholas Odere Opinya, Kisumu High Court Civil Case No. 337 of 1996, where the Court held;
- “As a general law, no review can lie where the ground put forth is that an erroneous conclusion was reached in a given case when there was an incorrect exposition of the law.....”
48. The Client /Applicant averments and submissions are that the Court reached an erroneous conclusion. Certainly, that is not an error apparent on the face of record, but as stated earlier, can be a ground of Appeal.
49. The Client/Applicant too has premised the Application for review on the ground of any other sufficient reason. In the case of “The Official Receiver and Liquidator vs Freight Forwarders Kenya Ltd, Civil Appeal NO. 235 of 1997, the Court of Appeal (then) held that;
- Any other sufficient reason need not be analogues with the other two alternatives in the order in view of Section 80 of the Civil Procedure Act which confers unfettered rights to apply for review. These words only mean that the reason must be one that is sufficient to the Court to which the Application for review is made and they cannot without at times running counter the interests of justice. “be limited to the discovery of new and important matters of evidence or occurring of a mistake or error apparent on the face of record”.



50. This Court has considered the averments by the Client/Applicant and the submissions thereon and has noted that apart from the Client/Applicant alleging that the Court misconstrued the available evidence and arrived at a wrong conclusion, there was no any other sufficient reason for seeking for review.
51. Having now carefully considered the Notice of Motion Application dated 10th March 2023, for Review, the Court finds it not merited as there is no sufficient reason to review its Ruling of 2nd March 2023.
52. For the above reasons, the two Notices of Motion Applications herein, the one dated 6th March 2023 and the other 10th March 2023, are found not merited and the said two applications are dismissed entirely with costs of 1st Application being in the cause and the costs of the 2nd Application dated 10th March 2023, granted to the Advocate/Respondent herein.

It is so ordered.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT MURANG'A THIS 31ST DAY OF MAY, 2023.

L.GACHERU

JUDGE

Delivered virtually in the presence of:

Joel Njonjo - Court Assistant

M/s Kihima for the Client/Applicant

N/A for Advocate/Respondent

L.GACHERU

JUDGE

31/5/2023

