



**Kenya Medical Association Housing Co-operative Society Limited v Coast Neurology Center Limited (Civil Appeal 91 of 2019) [2022] KEHC 11752 (KLR) (19 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 11752 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 91 OF 2019  
OA SEWE, J  
APRIL 19, 2022**

**BETWEEN**

**KENYA MEDICAL ASSOCIATION HOUSING CO-OPERATIVE SOCIETY LIMITED ..... APPELLANT**

**AND**

**COAST NEUROLOGY CENTER LIMITED ..... RESPONDENT**

**RULING**

- [1] This Ruling is in respect of the notice of motion dated October 29, 2021. it was filed by respondent pursuant to sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act* and order 45 rule 1 & 2 and order 51 rule 1 of the *Civil Procedure Rules*, 2010, and all enabling provisions of the law, for the following orders: -
- [a] That the court be pleased to review, vary and/or set aside the orders of the court made herein on September 21, 2021 directing the applicant to file a formal application
  - [b] That the said order be substituted with an order directing the Deputy Registrar to issue notices to the parties and list the appeal before a judge in chambers for dismissal;
  - [c] That the costs of this application be costs in the cause.
- [2] The application was opposed by the appellant vide a replying affidavit sworn by Mr. Aboge, Advocate on February 1, 2022. His basic assertion was that the progress of this matter was slowed down in the years 2020 and 2021 due to the Covid-19 pandemic and the subsequent containment measures put in place by the Government geared at combating the novel virus. He was therefore quick to add that they eventually filed and served the Record of Appeal on November 17, 2021. It was, accordingly, the assertion of Mr. Aboge that there is no error apparent on the face of the record with regard to the proceedings of September 21, 2021.



- [3] The brief background to the application is that, vide the Memorandum of Appeal filed herein on May 2, 2019, the appellant appealed the decision of the Chief Magistrate delivered on April 5, 2019, by which the appellant's defence was struck out. In the course of time, the respondent wrote to counsel for the appellant complaining of indolence in the prosecution of the appeal. Counsel for the respondent also wrote to the Deputy Registrar a letter dated June 23, 2021 seeking that the file be placed before a judge for dismissal under order 42 rule 35(2) of the *Civil Procedure Rules*.
- [4] When the matter came up for mention on September 21, 2021 before Hon. Chepkwony, J. the remarks of the Deputy Registrar on the face of the letter dated June 23, 2021 were endorsed as a formal order of the Court. The effect was that the respondent was thereby required to put in a formal application for dismissal of the appeal for want of prosecution.
- [5] The application was argued on February 14, 2022. On behalf of the respondent, Mr. Muinde submitted that they wrote to the Deputy Registrar a letter seeking dismissal under order 42 rule 35(2) of the *Civil Procedure Rules*, and that since there is no provision for a formal application, the order dated September 21, 2021 was made in error and therefore ought to be corrected under order 45 rule 1 of the *Civil Procedure Rules*.
- [6] Mr. Aboge on his part took the view that the application for review is not properly founded in law; in so far as there is no formal order or decree to be reviewed. He relied on *Orchid Pharmacy Ltd v Southern Credit Banking Corporation Ltd & 2 others* [2005] eKLR. He also submitted that the application is vague as to which particular ground the respondent is relying on; and that the application was brought after inordinate delay. He was of the view that if it is the contention of the respondent that the Court made an erroneous view then an appeal ought to have been filed instead. He relied on *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR and *Otieno Ragot & Company Advocates v National Bank of Kenya* [2020] eKLR to support his arguments.
- [7] Mr. Muinde, in his rejoinder pointed out that, so long as the order is on the file, no objection should be sustained on the basis of the fact that the order was not extracted and annexed to the application. He also urged the Court to find that delay of one month is not at all inordinate; and therefore that the application was brought in good time.
- [8] Order 45 rule 1 under which the application was filed provides that:
- 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.
- [9] In this instance, although Mr. Aboge argued that the respondent did not clearly state his ground for review, the application is explicit, at paragraphs 5 and 6 of the grounds thereof, that the respondent's contention is that there is an error on the face of the record with particular regard to the order that a formal application for dismissal be filed, yet the application for dismissal has been made under rule 35(2) of order 42, *Civil Procedure Rules*. I likewise find no merit in the argument that the application is



incompetent simply because the order complained of was not extracted and annexed to the application; there being no such requirement either in Section 80 of the Civil Procedure Act or Order or Order 45 Rule 1 of the Civil Procedure Rules.

[10] On the merits of the application, I have perused the record and noted the following:

[a] That the appeal is yet to be admitted for purposes of section 79B of the Civil Procedure Act. The section provides:

Before an appeal from a sub-ordinate Court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79c, reject the appeal summarily.

[b] In the letter dated June 23, 2021, Mr. Muinde did not specifically state that his request was pursuant to order 42 rule 35(2) of the Civil Procedure Rules. Order 42 rule 35 (1) and (2) provides:

(1) Unless within three months after the giving of directions under rule 13, the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.

(2) If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.

[11] It is manifest therefore that the respondent's argument that there is no provision for a formal application for the dismissal of an appeal for want of prosecution is misplaced. In the same vein, it cannot be argued that the Order of September 21, 2021 was made in error in so far as the request for dismissal was not an initiative of the Court, but was prompted by the respondent. Either way, since no directions have been given in the appeal for purposes of section 79B and order 42 rule 13 of the Civil Procedure Rules, it goes without saying that it was well within the discretion of the court to give directions as deemed appropriate.

[12] More importantly, it is now trite that when it is the soundness of the decision of the Court that is questioned the proper thing would be for a party to pursue an appeal as opposed to review. In *Muyodi vs. Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal held that:

“...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 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...”



[13] And, in *National Bank of Kenya Limited v Ndungu Njau* (supra), the Court of Appeal explained 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 ground for review.”

[14] In the instant matter, order 42 rule 35 of the Civil Procedure Rules clearly provides an option for dismissal at the instance of a party by way of a formal application. I am therefore not convinced that the order of September 21, 2021 is in any way erroneous from the standpoint of order 45 rule 1, *Civil Procedure Rules*. That being my view, I find no merit in the application dated October 29, 2021. The same is hereby dismissed with costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19<sup>TH</sup> DAY OF APRIL 2022.**

.....

**OLGA SEWE**

**JUDGE**

