



**Legal Advice Centre & 2 others v County Government of Mombasa & 2 others  
(Constitutional Petition 39 of 2016) [2022] KEHC 12338 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 12338 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION 39 OF 2016**

**JM MATIVO, J**

**JULY 28, 2022**

**BETWEEN**

**LEGAL ADVICE CENTRE ..... 1<sup>ST</sup> PETITIONER**

**HAKI YETU ST. PATRICKS ..... 2<sup>ND</sup> PETITIONER**

**TRANSPARENCY INTERNATIONAL KENYA ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF MOMBASA .... 2<sup>ND</sup>  
RESPONDENT**

**COUNTY EXECUTIVE COMMITTEE MEMBER LAND PLANNING AND  
HOUSING DEPARTMENT ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. In order to put the Respondent’s application dated 9<sup>th</sup> November 2021, the subject of this ruling into a proper perspective, it is necessary to highlight, albeit briefly, this court’s ruling dated 30<sup>th</sup> day of September 2021 which the Respondent’s/applicants seek to review. Vide an application dated 21<sup>st</sup> December 2020, the Petitioners sought an order that Ali Hassan Joho, Dennis Lewa, and Tawfiq Balala, the 1<sup>st</sup> Respondent’s Governor, its County Secretary and it’s County Executive Committee Member in charge of Land, Housing and Physical Planning respectively or any other person acting in those respective capacities, jointly and severally, be summoned by this court to show cause why they should not be committed to civil jail for 6 months for disobeying this court’s Judgment delivered on 23<sup>rd</sup> December 2016 and the ensuing decree. The Petitioners also prayed for costs of the application to be paid by the Respondents jointly and severally.



2. In the ruling sought to be reviewed, the court (Ogola J) held that the Respondents were guilty of contempt and issued the following orders, namely:- (a) The Respondents shall within 30 days of service of this order comply with the judgment of this Court delivered 23/12/2016 and the resultant order by furnishing the Petitioners with copies of the contracts/Joint venture Agreements between the 1<sup>st</sup> Respondent and Buxton Point Apartments limited and all document relating to the project; (b) This matter is fixed for a Mention on 16/11/2021 with a view to ascertain compliance and/or for further orders of the Court. (c) Costs for the application are given to the Applicants.
3. The Respondents/applicants seek to review/set aside the above ruling together with all the consequential orders. They also pray for the costs of this application. The applicant's core grounds are:- (i) the court made an apparent error of law and or mistake of omission whilst delivering the impugned ruling; (ii) that the court misconstrued the prayers sought in the Petitioner's Notice of Motion dated 21<sup>st</sup> December 2020 which sought an order that the alleged contemnors be summoned to show cause why they should not be committed to civil jail for 6 months for disobeying this courts orders dated 23<sup>rd</sup> December 2016; (iii) that contrary to the prayers sought and without summoning the alleged contemnors, the court proceeded to arrive at a finding that the Respondents were in contempt of the said judgment; (iv). that the alleged contemnors have never been personally served with the Notice to Show Cause, order and decree in respect of the said judgment; (v) that the order alleged to have been disobeyed was ambiguous, lacking in specificity and incapable of being obeyed; (vi) that the copies of contracts and joint venture agreements ordered to be supplied to the Petitioners in the impugned ruling were as a result of a 2019-2020 tender re-advertisement and are not covered under the ambit of the judgment dated 23<sup>rd</sup> December 2016; (vii) that the position advanced by the court suggests that the said judgment gave the Petitioners an open cheque to request any document whatsoever noting that the judgment was silent on the documents to be availed to the Petitioners; (viii) that the application has been brought without delay and it is in the interests of justice and fairness that it be allowed.
4. In their grounds of opposition dated 11<sup>th</sup> December 2020, the Petitioner/Respondents stated:- (i) that the application does not meet the threshold for review; (ii) that the grounds raised in support of the application are issues to be raised on appeal, not review; (iii) that the argument that the court made an error or mistake and misconstrued the prayers sought are grounds for appeal not review; (iv) there is no requirement in law that the Respondent be served with Notice to Show Cause, order and decree before they can be found to have disobeyed a judgment delivered in the presence of their advocate; (v) that the Respondents never denied being aware of the judgment;(vi) that the argument that the court judgment did not state the documents to be availed ought to have been raised in response to the application dated 21<sup>st</sup> December 2021; (vii) that the allegation that the order was ambiguous, lacking in specificity and incapable of being obeyed ought to have been raised in response to the application; (viii) that the argument on the contract and joint venture agreements is not a matter for review; (ix) that the application was filed after an unexplained delay of 70 days; and that the application is an afterthought and an abuse of court process.
5. The application was canvassed by way of written submissions. I note that Respondents'/applicants' written submissions dated 8<sup>th</sup> March 2022 are entitled "written submissions to the Notice of Motion dated 9<sup>th</sup> December 2021" yet the application before me is dated 9<sup>th</sup> November 2021. This must be a mistake.
6. The applicants replicated the provisions of Order 45 Rule (1) of the *Civil Procedure Rules*, 2010 and cited *National Bank of Kenya Ltd v Ndungu Njau*<sup>1</sup> which held 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.

<sup>1</sup> [1997] e KLR.



They also cited *Nyamogo & Nyamogo v Kogo*<sup>2</sup> which held that an error apparent on the face of the record must be determined on the facts of each case. The applicants submitted that the court made an apparent error of law and or mistake of omission whilst delivering its ruling because contrary to the prayers sought and without summoning the alleged contemnors, the court proceeded to find that the Respondents were in contempt of the judgment delivered on 23<sup>rd</sup> December 2016.

7. They argued that they have never been personally served with the Notice to Show Cause, order and decree arising from the judgment dated 23<sup>rd</sup> December 2016. They also argued that no decree or court order was attached to the contempt application dated 21<sup>st</sup> December 2020. They cited *Alken Connections Limited v Safaricom Limited & 2 others*<sup>3</sup> which held that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order, he is liable to the process of execution.
8. They also argued that the judgment did not specify the documents to be availed by the Respondents to the Petitioners and that the order alleged to have been disobeyed is ambiguous, lacking in specificity and incapable of being obeyed. To buttress their argument, they cited *Miriam Nyambura Mwenja & another v Susan Murigi Wachira*<sup>4</sup> which held that before a person can be punished for contempt, the court must be satisfied that the court order alleged to have been disobeyed was clear and unequivocal in its terms.
9. Additionally, the applicants argued that the documents ordered to be supplied are not covered under the ambit of the judgment dated 23<sup>rd</sup> December 2016. They also argued that their Replying affidavit in opposition to the application dated 21<sup>st</sup> December 2020 inadvertently failed to expound on the tendering process which led to confusion and adverse orders being issued against them. They argued that they filed the instant application on 10<sup>th</sup> December 2021, hence, they are not guilty of delay.
10. The Petitioners submitted that if the trial judge made an error of law as alleged or misconstrued the prayers, then their recourse lies on appeal not review and cited *Nyamogo & Nyamogo v Kogo* (*supra*) in support of the holding that there is a real distinction between erroneous decision and an error apparent on the face of the record and added that the argument that the decision is erroneous is a ground of appeal. On merits, the Petitioners argued that the learned judge granted the applicants 30 days to comply but they failed.
11. They submitted that the judgment was delivered in the applicant's presence, so it was not necessary to serve them with the judgment, decree or order. Further, they argued that the said argument ought to have been raised at the time of the hearing of the application and that the applicants are not candid. Lastly, they submitted that the allegations that the judgment did not specify the documents to be supplied and that the order was ambiguous, lacking in specificity and incapable of being obeyed or the documents ordered to be supplied are not grounds of review but such arguments ought to have been raised in response to the application dated 21<sup>st</sup> December 2021.
12. A suitable starting point is to underscore that this court has a power of review. However, such power must be exercised within the framework of section 80 of the *Civil Procedure Act*<sup>5</sup> as read with Order

<sup>2</sup> [2001] EA 170.

<sup>3</sup> [2013] e KLR.

<sup>4</sup> [2021] e KLR.

<sup>5</sup> Cap 21, Laws of Kenya.



45 Rule 1 of the Civil Procedure Rules, 2010. Section 80 provides: 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.

13. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 provides: -

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.”

14. A reading of the above provisions shows that section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review by laying down the jurisdiction and scope of review by limiting review 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 un reasonable delay.

15. To fully understand the scope of a review, section 80 has to be read carefully. However, this section does not outline the ambit of interference expected of the court since it merely states that it "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." The parameters for review are prescribed in Order 45 Rule 1 which permits an applicant to press for a review "on account of some mistake or error apparent on the face of the records or for any other sufficient reason."

16. Paragraph (a) part of the above rule deals with a situation attributable to the applicant, while paragraph (b) deals to an action attributed to the court which is manifestly incorrect or on which two conclusions are not possible. However, neither of the above provisions suggests a retrying of the dispute. The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case is not a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy. The court must exercise the power to review its order with the greatest circumspection.



17. Undisputedly, there is a clear distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent.' 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.
18. A review can only 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.<sup>6</sup>
19. The expression "mistake or error apparent" by its actual meaning suggests 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. An order or 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. While exercising the power of review, the court/tribunal cannot sit on appeal over its judgment/decision. This position was articulated in *Nyamogo & Nyamogo v Kogo*:<sup>7</sup>
- “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.”
20. Guidance can be borrowed from the Indian Supreme Court<sup>8</sup> which held that 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. The rationale behind this reasoning is that there is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent.' 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

<sup>6</sup> See *National Bank of Kenya Ltd vs Ndungu Njau*, {1996} KLR 469 (CAK) at Page 381.

<sup>7</sup> {2001} EA 170.

<sup>8</sup> In the case of *Aribam Tuleswar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389; AIR 1979 SC 1047.



reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.<sup>9</sup>

21. The applicants' arguments as earlier on reproduced are that: - (i) the court made an apparent error of law and or mistake of omission whilst delivering the impugned ruling; (ii) that the court misconstrued the prayers sought in the Petitioner's Notice of Motion dated 21<sup>st</sup> December 2020 which sought an order that the alleged contemnors be summoned to show cause why they should not be committed to civil jail for 6 months for disobeying this courts orders dated 23<sup>rd</sup> December 2016; (iii) that contrary to the prayers sought and without summoning the alleged contemnors, the court proceeded to arrive at a finding that the Respondents were in contempt of the said judgment; (iv). that the alleged contemnors have never been personally served with the Notice to Show Cause, order and decree in respect of the said judgment; (v) that the order alleged to have been disobeyed was ambiguous, lacking in specificity and incapable of being obeyed; (vi) that the copies of contracts and joint venture agreements ordered to be supplied to the Petitioners in the impugned ruling were as a result of a 2019-2020 tender re-advertisement and are not covered under the ambit of the judgment dated 23<sup>rd</sup> December 2016; (vii) that the position advanced by the court suggests that the said judgment gave the Petitioners an open cheque to request any document whatsoever noting that the judgment was silent on the documents to be availed to the Petitioners; (viii) that the application has been brought without delay and it is in the interests of justice and fairness that it be allowed.
22. A reading of the above grounds shows that without exception, all the above grounds are a direct attack on the merit of the ruling. They are simply grounds of appeal as opposed to review. The law as I understand is that Review proceedings are not an appeal. The 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 amounts to exercise of appellate jurisdiction, which is not permissible.<sup>10</sup>
23. The grounds essentially fault the leaned judges' findings. 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 an elaborate argument or more than one opinion. First, the arguments propounded by the applicants do not fit this description. An error contemplated under Order 45 Rule 1(b) must be such which is apparent on the face of the record and not an error which has to be fished out and searched. In other words, it must be an error of inadvertence. The applicants are inviting this court to sit on an appeal against its own ruling which will amount to rehearing the matter, which is outside the scope of review.
24. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment/ruling is correct or not. The applicants are inviting this court to overturn the decision as if this court is hearing an appeal. A review of a judgment is a serious step and it can only be resorted where a glaring omission or patent mistake or like grave error has crept in the judgment or order by judicial fallibility but not where the judge has misapplied, misinterpreted or misconstrued the law or facts. The power of review can be exercised for correction of a mistake but not to substitute a view. The grounds cited by the applicant cannot and do not qualify to be grounds for review. The instant application is a clear invitation to this court to exercise appellate jurisdiction on its own judgment/ruling. I decline the invitation to do so. On the above grounds, the applicants' application collapses. Accordingly, I dismiss the application dated 9<sup>th</sup> November 2021 with no orders as to costs.

Right of appeal

**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF JULY 2022.**

<sup>9</sup> see *Thungabhadra Industries Ltd. v. Govt. of A.P.*<sup>1</sup>

<sup>10</sup> See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170.



**JOHN M. MATIVO**

**JUDGE**

**SIGNED, DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022.**

**OLGA SEWE**

**JUDGE**

