



Arch-Diocese of Kisumu Catholic Church v Makodiembo (Environment and Land Appeal E008 of 2022) [2023] KEELC 18421 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18421 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E008 OF 2022
SO OKONG'O, J
JUNE 29, 2023**

**BETWEEN
THE ARCH-DIOCESE OF KISUMU CATHOLIC CHURCH APPELLANT
AND
EUSEBIUS RAMOGY MAKODIEMBO RESPONDENT**

(Applications that were opposed were heard together by Ombwayo J.)

RULING

Background

1. The Respondent filed a suit against the Appellant at the Chief Magistrate's Court at Kisumu namely; Kisumu CMCELC No 426 of 2018 (hereinafter referred to only as 'the lower court suit') seeking specific performance of an agreement for the sale of land that the parties had entered into. The lower court after hearing the suit entered judgment for the Respondent against the Appellant on July 21, 2021. The appellant was aggrieved by the said judgment and filed this appeal on February 21, 2022. The appeal was filed several months out of the prescribed time for filing appeals from subordinate courts.
2. On February 22, 2022, the Appellant filed an application of the same date seeking among others; leave to file an appeal out of time against the said judgment of the lower court and for its memorandum of appeal filed on February 21, 2022 aforesaid to be deemed as duly filed with leave. On March 17, 2022, the Respondent also filed an application dated March 14, 2022 seeking an order that the Appellant's appeal filed on February 21, 2022 be struck out for having been filed out of time without leave of the court and for the costs of the application to be provided for. The two applications that were opposed were heard together by Ombwayo J. In a ruling delivered on January 27, 2023, Ombwayo J found that the Appellant's application was filed after an inordinate delay and dismissed the same. He also agreed with the Respondent that the Appellant's appeal had been filed out of time without leave of the court and allowed the Respondent's application dated March 14, 2022 that sought the striking out of the



appeal. The court did not make any order in relation to the costs of the two applications. The Appellant was aggrieved by the decision of Ombwayo J and filed a notice on March 2, 2023 of its intention to appeal against the same to the Court of Appeal.

The application before the court

3. What is now before the court is the Respondent's application dated February 21, 2023 brought under sections 99, 1A and 3A of the *Civil Procedure Act* and Order 45 Rules 1 and 2, and Order 51 Rule 1 of the *Civil Procedure Rules*. In the application, the Respondent sought the following orders;
 1. That this court be pleased to review its ruling dated January 27, 2023 by specifically granting an order as to costs to the Respondents for the application dated March 14, 2022 and for the memorandum of appeal that was struck out.
 2. That the costs of the application be provided for.
4. The Application was brought on the grounds set out on the face thereof and on the affidavit of the Respondent's advocate, Jude Ragot sworn on February 21, 2023. The Respondent averred that in its ruling delivered on January 27, 2023, the court allowed his application dated March 14, 2022 and struck out the Appellant's appeal on the ground that the same was filed out of time without leave of the court. The Respondent averred that as the successful party in the said application, he was entitled to the costs of the application and of the appeal that was struck out. The Respondent averred that under section 27 of the *Civil Procedure Act*, costs follow the event unless the court orders otherwise for good reason. The Respondent averred that the court did not pronounce itself on the issue of costs. The Respondent averred that the court failed to make a specific order on costs in its ruling dated January 27, 2023 and did not give any reasons for its failure to award costs to the successful party.
5. The Respondent averred that failure by the court to make an order on the issue of costs in the said ruling appeared to have arisen from an accidental slip or omission on the part of the court. The Respondent averred that the court had jurisdiction under section 99 of the *Civil Procedure Act* to correct the said error by making an order that the costs be paid to the Respondent. The application was served upon the Appellant but it did not respond to the same. When the application came up for hearing on June 7, 2023, the Appellant's advocates did not appear. The Respondent's/Applicant's advocate relied entirely on the grounds on the face of the application and the supporting affidavit and urged the court to allow the application as prayed.

Analysis and Determination

6. The Respondent's application was brought principally under section 99 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya which provides as follows:
 99. 'Amendment of judgments, decrees or orders Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.'
7. As I mentioned earlier in this ruling there were two applications before Ombwayo J, the application dated February 22, 2022 by the Appellant seeking an extension of time within which to file the appeal and the application dated March 14, 2022 by the Respondent seeking the striking out of the Appellant's appeal that had been filed out of time. In his ruling dated January 27, 2023, Ombwayo J dismissed the Appellant's application and allowed the application by the Respondent with the effect that this appeal was struck out. The court however did not make any order as to the costs of the two



applications. The Respondent has now moved this court to review and amend the said ruling to award the costs of the Respondent's application dated March 14, 2022 and the appeal that was struck out to the Respondent.

8. What I need to determine is whether the failure of the court to make an order on costs can be taken as an error in the ruling arising from an accidental slip or omission that can be corrected under section 99 of the *Civil Procedure Act*. In *Amritlal Bhamji Davda v Abdi Ahmed & 2 others [1987] eKLR* the court faced with an application like the one before me stated as follows:

'There was no provision for costs in the learned judge's judgment which can be perfected by correction and it cannot therefore be said that there was an error or omission in expressing the manifest intention of the court. If the court exercised its discretion to award costs, we do not know what order for costs could have been made. The High Court of Tanzania in *Quick Service Stores v Thakra [1958] EA 357*, a case where the trial magistrate omitted to make orders as to costs in his judgment and who had not given consideration to the question of costs, held that the omission to make an order as to costs was not an error arising in the judgment from accidental slip or omission. In this case, there was no error or omission which can be corrected under S 98 of the *Civil Procedure Act*. There was only lack of exercise of discretion in which case the applicants should have filed an application for revision or appealed.'

9. In *Dominic Alois George Omenye t/a Omenye & Associates v Prime Bank Limited [2017] eKLR*, the court stated as follows:

'We start by asking ourselves the question, what is the true purpose of Section 99 of the *Civil Procedure Act* on which the application before Amin, J was founded? In *Raniga v Jivraj [1965] EA 700*, the predecessor of this Court was considering an application to vary its judgment. The Court stated that under section 3(2) of the *Appellate Jurisdiction Act*, it had the same jurisdiction to amend judgments and orders that the High Court has under section 99 of the *Civil Procedure Act*. Regarding that jurisdiction, the Court was emphatic that the power to correct errors will only be made where the court is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given, or in the case where a matter was overlooked, where it is satisfied beyond doubt as to the order which it would have made had the matter been brought to its attention.'

10. In the same case, the court cited with approval the case of *Lakhamshi Brothers Ltd v R Raja & Sons [1966] EA 313*, where the court stated that:

'Indeed there has been a multitude of decisions by this Court, on what is known generally as the slip rule, in which the inherent jurisdiction of the court to recall a judgment in order to give effect to its manifest intention has been held to exist. The circumstances however, of the exercise of any such jurisdiction are very clearly circumscribed. Broadly these circumstances are where the court is asked in the application subsequent to judgment to give effect to the intention of the court when it gave its judgment or to give effect to what clearly would have been the intention of the court had the matter not inadvertently been omitted.'

11. From the foregoing authorities, I cannot see any error in the ruling by Ombwayo J which would require correction through amendment. As acknowledged by the Respondent, the judge did not apply his



mind to the issue of costs. He neither awarded nor disallowed costs to any of the parties. Section 27(1) of the Civil Procedure Rules provides as follows:

'Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by who and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.'

12. The costs of the two applications that were before the judge was at the discretion of the court. There is no doubt from the ruling of the court that the court did not apply its mind to the issue and as such did not exercise its discretion. As stated in the authority that I cited earlier, failure by the court to exercise discretion is not an error that can be corrected under section 99 of the *Civil Procedure Act*. The correction envisaged under that section is one that will make the judgment or ruling to express the intention of the court. In the present case, it is not clear how Ombwayo J would have dealt with the issue of the costs of the two applications. This court cannot assume as suggested by the Respondent that since it was the Respondent who was successful in the two applications, the court would have awarded him the costs.
13. As mentioned earlier, the Respondent's application was also brought under Order 45 of the Civil Procedure Rules. I am of the view that a judge's failure to exercise discretion cannot be a ground for review. The court's power to review its orders and decrees is provided for in section 80 of the *Civil Procedure Act* 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.'

Order 45 of the Civil Procedure Rules lists specific grounds upon which an application for review can be made as follows:

- a. Where there is discovery of new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order made.
 - b. Where there is a mistake or error apparent on the face of the record.
 - c. For any other sufficient reason.
14. The Court of Appeal set out the requirements to be satisfied by an applicant seeking review in *Francis Origo & another v Jacob Kumali Mungala, Eldoret CA No 149 of 2001[2005]eKLR* as follows:

'it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be



produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.'

15. Similarly, in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints, Nairobi CA 132 of 2014[2016]eKLR*, the requirements were set out as follows:

'To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.'

16. The scope of the court's jurisdiction to review its own orders was defined in *John Kamau Rubangi v Kenya Reinsurance Corporation, Civil Appeal No 208 of 2006[2012]eKLR* as follows:

'It is important to bear in mind that Order 44 Rule 1 of the Civil Procedure Rules sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal.'

17. The Respondent's application was brought on the ground of an error apparent on the face of the record. I have already held that there was no such error. What is apparent is the court's failure to exercise discretion. In my view, that should be made the subject of an appeal and not a review.

Conclusion:

18. In conclusion, I find no merit in the Notice of Motion application dated February 21, 2023. The application is dismissed with no order as to costs.

DELIVERED AND DATED AT KISUMU THIS 29TH DAY OF JUNE 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Abir for the Appellant

Mr. Ragot for the Respondent

Ms. J. Omondi-Court Assistant

