



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kamau v National Bank of Kenya Limited (Civil Suit 95 of 2003)
[2022] KEHC 16805 (KLR) (23 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 95 OF 2003
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

ALLAN GEORGE NJOGU KAMAU PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED DEFENDANT

RULING

1. The applicant approached this court by way of notice of motion dated July 28, 2022 seeking the following orders;
 - a. That this honourable court be pleased to review its judgment of the September 27, 2021 which was held in favour of the plaintiff for failing to make an order for costs in his favour which had been prayed for in the amended plaint thus being in breach of its duty to enforce the principle which states that costs follow the event.
 - b. That this honourable court be pleased to issue an order for costs in favour of the plaintiff as against the defendant/ respondent (respondent).
 - c. That the defendant/respondent be condemned with the costs of this application.
2. The application is based on the grounds set out therein and the contents of the supporting affidavit dated July 28, 2022.
3. The brief facts underlying the application are that the applicant instituted this suit by way of plaint dated November 5, 2003. The applicant amended his plaint vide an amended plaint dated December 17, 2011 and after the matter being heard the court delivered its judgment on September 27, 2021 in favour of the plaintiff/applicant. The applicant then filed the present application seeking review of the judgment.



Applicant's case

4. The applicant's case is that the court failed to award costs in its judgment delivered on September 27, 2021. On the June 15, 2021, the matter came up for defence hearing and upon the successful hearing of the defendant's case the court ordered parties to file their written submissions with the mention to confirm filing of the same being fixed for the July 27, 2021. On the said date the parties confirmed that they had filed submissions and the court set a judgment date for September 27, 2021. The said judgment was delivered on the aforesaid date in favour of the applicant herein but the honourable judge failed to award the costs as prayed for in the amended plaint.
5. It is clear from the judgment and from the record that it was indeed an error by the judge on the face of the record not to grant costs to the applicant as in his entire judgment he has not addressed the issue of costs at all and since it was one of the prayers by the applicant it was incumbent upon him to address the said issue of costs.
6. The material before court is sufficient to warrant review of this honourable court's orders thus granting the applicant costs of the suit and the current application.

Respondent's case

7. The respondent opposed the application by filing grounds of opposition dated October 12, 2022. The respondent contended that the application is misconceived, incompetent, bad in law, lacks merit and is an abuse of the court process. Further, that the applicant has not met the threshold for review under order 45 rule 1 of the Civil Procedure Rules. The respondent contended that the applicant has not demonstrated any error apparent on the face of record as purported to invite this court to review the judgment.
8. An award of costs is matter of discretion and the court and the court cannot be faulted for declining to award the applicant costs. No basis has been laid to demonstrate that the said discretion was not judiciously exercised and in any case, if the discretion is exercised wrongly, the same is not an error apparent on the face of record and it is an issue to be taken up on appeal as only an appellate court can reverse errors in exercise of discretion.

Issues for determination

Whether the judgment delivered by the court on September 27, 2021 should be reviewed

9. Review of judgment is covered by the provisions of section 80, 63 (e) and 3A of the Civil Procedure Act and order 45 rule 1 of the Civil Procedure Rules which provide that:

Section 80. Review

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.'

Section 63 (e)



In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

order 45, rule 1. Application for review of decree or order.

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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review'

10. Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.

11. The basis of the present application is that there was a mistake or error apparent on the face of the record as the court did not address the issue of costs despite the same having been pleaded and addressed by the parties in their pleadings and submissions.

12. Whether there was a mistake or error apparent on the face of the record

13. In *Muyodi vs Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*, the Court of Appeal described an error apparent on the face of the record as follows:

' 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.'

14. As a matter of general principle, costs follow the event and a successful party will always have costs of his success unless the court has good reason to order otherwise. The same is the spirit of the statute under section 27 of the *Civil Procedure Act* which reads as follows:-

(1) 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 whom 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.

15. I have observed that the judgment was silent on the issue of costs despite the same having been pleaded in the amended plaint. The question that arises therefrom is whether the silence was an accidental slip or bona fide mistake.

16. In my view I think the same was a mistake on the part of the court. Had it been the intention of this court to deprive the successful respondent of costs, then the court would have given reasons for doing so as is required under section 27 of the *Civil Procedure Act*. As there were no reasons provided to the court as to why the applicant should be awarded costs, then it becomes apparent that the intention of the court was to allow the claim with costs to the applicant. I am therefore inclined to rectify the error by granting the costs as stated.

17. In the upshot, the notice of motion application dated July 28, 2022 succeeds to the extent that the judgment made on September 27, 2021 is hereby amended to include costs to the plaintiff.

18. However, parties shall bear their own costs for this application since the same was necessitated by an error on part of the court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET VIA EMAIL THIS 23RD DAY OF DECEMBER, 2022.

R NYAKUNDI

JUDGE

