



**Munguti & another v Simiyu & another (Suing as Administrators  
of the Estate of the Late Frank Mwasi Mwabaga) (Civil Appeal  
45 of 2019) [2022] KEHC 16377 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 45 OF 2019  
RN NYAKUNDI, J  
DECEMBER 16, 2022**

**BETWEEN**

**FRANCIS NZIVO MUNGUTI ..... 1<sup>ST</sup> APPELLANT**

**SOUTH SIOUX FARM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LINDA MUTIEMBU SIMIYU ..... 1<sup>ST</sup> RESPONDENT**

**JANET NDATA SIMIYU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE FRANK  
MWASI MWABAGA**

**RULING**

1. The applicant approached this court vide a notice of motion dated October 13, 2022 seeking the following orders;
  1. That this honourable court be pleased to review and/or set aside its judgment delivered on 12th October 2022.
  2. That costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit to said application.
3. The applicant contends that there is an error apparent on paragraph 5 of the judgment delivered on October 12, 2022 which indicates that the respondents did not file their submissions. The respondents filed their submissions to the appeal on August 15, 2022 after payment of requisite filing fees and despite not being served with the appellants' submissions contrary to the directions of this court issued



on July 5, 2022. This material error on the face of the record constitutes a sufficient ground for this honourable court to review its judgment.

4. The respondents opposed the application vide a replying affidavit dated October 31, 2022. The respondents stated that the application now before court is an abuse of the court process and should be dismissed with costs to the appellants/respondents given that the respondent/applicant has already filed an appeal challenging this court's judgment. It thus follows that this court's jurisdiction to entertain any further proceedings and in particular an application for review of the judgment has been ousted following the appeal lodged to the Court of Appeal. The move by the respondent/applicant to institute parallel proceedings challenging the judgment both in this court and in the Court of Appeal is a clear demonstration of forum shopping that should not be entertained by this court.
5. The reasons advanced for seeking a review are therefore not plausible and devoid of factual backing as to when the submissions were presented to court, the identity of the person who presented them and the identity of the person who the respondent/applicant dealt with at the court at the time of filing submissions.
6. The respondents prayed that the application be dismissed with costs.

### **Analysis & Determination**

7. I have considered the pleadings by both counsels and the annexures thereto. I have also taken note of the fact that the applicants herein have instituted an appeal against the decision they seek to review.
8. Review is provided for under order 45 rule 1 of the *Civil Procedure Rules*:-

“ 45 (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 an 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.”

8. The foregoing provisions are based on section 80 of the *Civil Procedure Act* which provides that:

“ any person who considers himself aggrieved: -

- a. By a decree or order from which no 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.”

9. An applicant seeking an order for review needs to satisfy the court with the following:-



- a. There is a 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 or order was made.
  - b. There is some mistake or error apparent on the face of the record.
  - c. Or for any other sufficient reason.
10. The question which this court must answer is whether that impugned statement alone meets the critical threshold under section 80 of the Civil Procedure Act and order 45(1) of the Civil Procedure Rules. The standing point is to appreciate the guiding principles which oxygenate the prescribed provisions of the Civil Produce Act and Rules. From the comparative perspective the courts in Ajit Kumar Rath v State of Orisa & others, 9 Supreme Court Cases 596 at Page 608. had this to say:-

“the power 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 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 stabling it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule”

11. In *Tokesi Mambili and others v Simion Litsanga* the court held as follows: -
- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
  - ii. Where the application is based on sufficient reason it is for the court to exercise its discretion.
12. In developing this rich jurisprudence our courts have delved into this issues as evidenced by the principles in *In Muyodi v 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 v 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. The concept of an error of law is an important one both for errors on the face of the record and jurisdictional errors. The former determines the availability of review and in the later the courts are far more disposed to intervene if the error can be characterised as one of law rather than fact. At the end of the spectrum there is always misinterpretation of the above statutory provisions by the decision maker when exercising the review jurisdiction. The difficulties sometime experienced have to do with drawing inferences on factual scenarios which present themselves before the session judge. It is trite that if an error is classified as an *intra vires* of law. That error must appear on the face of the record, ruling or judgment for the review court to intervene pursuant to section 80 of the [Civil Procedure Act](#) and order 45(1) of the Rules. Essentially errors of law will frequently be detected for the reasons given for the impugned decision. This aspect of judicial review is unique as it is not based on the concept of *ultra vires* action. It is rather a jurisdiction exercisable when it comes to orders, rulings and judgments resting on the doctrine of the courts inherent discretion to correct patent errors readily detectable from the conceived record or decision.
15. The court acknowledges that there is an error apparent on the face of the record with regards to whether the applicant had filed their submissions but in determining the appeal the court was guided by the principles in the *Commissioner of Lands v Sheikh Mohamed Bashir*, civil appeal no 76 of 1957 (Sir Kenneth O’connor, P, Gould AVP and Crawshaw, JA on 8 November 1960) (EACA) [1960] EA 818 “An appeal to appeals court is by way of rehearing, and in dealing with questions before it, the court has full discretionary powers to receive further evidence even as to matters which have occurred after the decision appealed from, it, upon special grounds, it thinks such evidence material to be considered.”
16. The court also in *Peters v Sunday Post Ltd* [1958] EA 429; *Shah –v- Aguto* (1970) EA 265 observed that “The court on first appeal has jurisdiction to review the evidence in order to determine whether the conclusion originally reached on that evidence should stand. It is a strong thing for the appellate court to differ from the finding on a question of fact of the judge who tried the case and who has had the advantage of seeing, hearing witnesses. But the jurisdiction to review the evidence should be exercised with caution. It is not enough that the appellate court might itself come to a different conclusion.”
17. Centrally, the allegation against the court tends to imply that the failure to acknowledge submissions by the applicant seeking judicial review is a kind of recognisable error remediable by varying or setting aside the impugned judgment. The question then arises as to whether the submissions rightly classified and evaluated will provide some alternative findings than those arrived at on the 12<sup>th</sup> day of October, 2022. In the context of the jurisdiction exercised by an appeals court no party suffers prejudice or an injustice for the basic reasons that his or her perspective of the case did not find its way to the final decision of the court. Why do I say so? I believe a judge should decide particular cases in accord with explicit legal rules, such as statutes, and consistently with principles as evaluated under the soundest theory of law. It is the distinct feature of the institutionalised first appeals court role to evaluate, scrutinise and conduct a rehearing of the trial court evidence with judgment from which it draws its own conclusions. The nature of this judicial process is confined within the limits of discretion and applicable precedents and therefore approaching the concept of law from analytical perspective to arrive at a decision. Like in basketball rule book which states that no foul should be called if the conditions stated in the rule book are not met, I also agree with the respondents that the errors complained of are not too serious to impact on the overall judgment of the court. The exercise of discretion is at the heart of the judicial decision making and social function known as judgment. There are two forms of legal product issued by the court among others verdict and determination. Whereas submissions have been ingrained in our procedural systems as a litigation protocol, the conceptual framework of it does not take away the discretionary power of the judges to determine the dispute based on the evidence and the law. A judge is the last pillar in which law is depicted working in the functioning of a judicial system. He or she is



therefore considered a person who is obliged to have a living and functioning conscience to apply the law without fear, bias, ill will to all parties who have a stake in that forum. I am therefore persuaded to rule against the applicant for failure to satisfy the criteria set out in section 80 of the CPA and order 45 rule 1 of the CPR.

18. In obiter however, given that the applicant had also instituted an appeal against the said decision, the *locus standi* to file simultaneously a motion for review jurisdiction seems to have been ousted by that single act. By considering this exposure, the freedom or power of a party to choose a forum of convenience required a notice of withdrawal from the appeals court. Nevertheless, I embrace a paradigm that significantly influences the reality of our administration of justice by deciding the application on review as filed on the merits.

18. As a result of the foregoing I hereby dismiss the application with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 16<sup>TH</sup> DAY OF DECEMBER, 2022.**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Kemboi for the respondent

