REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 317 OF 2018

IN THE MATTER OF AN APPLICATION BY APPOLO MBOYA

FOR ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1, 2, 3, 10,

22, 23, 25, 27, 47, 50, 159 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ADVOCATES ACT, CAP 16, LAWS OF KENYA

AND

IN THE MATTER SECTIONS 4(1) (2) (3) AND (5) OF

THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTIONS 5 OF THE LAW SOCIETY OF KENYA ACT, 2014

AND

IN THE MATTER OF PRIVATE PROSECUTION

DISCIPLINARY CAUSES NUMBER 17 AND 26 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

APOLLO MBOYA.....EX PARTE APPLICANT

RULING

1. The applicant seeks an order to review and set aside the judgment delivered on 17th January 2019. He also prays that this court grants such other or further relief as it may deem fit and necessary in the circumstances and an order providing for costs of the application.

2. The grounds in support of the application are that there is an apparent error in paragraph 134 of the judgment, which indicates that the applicant had been supplied with a copy of the judgment in Advocates Disciplinary Tribunal Private Prosecution Cause Number 17 of 2016. He states that a copy of the said judgment was delivered to him on 11th March 2019 despite the directive of the Tribunal of 18th May 2018.

3. He also states that the presiding members of the Advocates Disciplinary Tribunal are indicated as Wanjama Ezekiel N, Kinyanjui Gladys W, Wabwile Michael N who are different from E.N.K. Wanjama, A.N. Mwaure and O. Kebira who delivered the said judgment.

4. The applicant states that he has discovered 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 suit was filed and the judgment delivered. He also states that the error apparent on the face of the record at paragraph 134 of the judgment if corrected taking into account the newly discovered evidence should lead the court to a different decision in consonance to the prayers his application dated 2nd August 2018.

5. In opposition to the application, Mercy Wambua, the Respondent's Secretary swore the Replying Affidavit dated 14th June 2019. She averred that no evidence has arisen that would necessitate this honourable court to review its judgment. She deposed that the applicant did not make efforts to pick the judgment from the Tribunal's offices as expected of any litigant and added that the judgment was annexed to her Replying Affidavit dated 18th September 2019. In addition, she deposed that the applicant was present when the judgment was delivered; hence, he was aware of its contents, and, that, he was supplied with a copy of the judgment on 11th March 2019. She denied that the judgment was delivered to the applicant's chambers as he claims.

6. M/s Wambua also deposed that the proceedings show that the panel that sat on 18th June 2018 when the judgment was delivered composed of Wanjala Ezekiel N., Kinyanjui Gladys W and Wabwile Michael N. She maintained that as attested by the proceedings, the panel that heard the case and wrote the judgment was composed of Wanjama Ezekiel N., A.N. Mwaure and O. Kebira.

7. She averred that judgment was delivered on 18th June 2018 in the presence of the applicant, even though it was previously scheduled to be delivered in 2017, hence, the reason the year was altered, and that, there is no new evidence nor is there an error on the record.

Determination

8. I find it useful to examine the provisions of Section **80** of the Civil Procedure Act[1] and Order **45** Rule **1** of the Civil Procedure Rules, 2010. It is common ground that the High Court has a power of review, but such power must be exercised within the framework of Section **80** Civil Procedure Act[2] and Order **45** Rule **1**.[3] Section **80** of the Civil Procedure Act[4] provides as follows:-

> ***80.*** *Any person who considers himself aggrieved-*
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> > ***(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.*

9. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

> ***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."*

10. A clear 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. They lay down the jurisdiction and scope of review. They limit 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.*

11. Mr. Mboya, appearing for himself essentially highlighted the contents of his affidavits and argued that there is an error on record in that paragraph 134 of the judgment shows that he was supplied with the judgment of the Tribunal, yet it was only supplied to him on 11th March 2019, long after its delivery. He further argued that a panel, which did not hear the case, signed the judgement. In addition, he argued that a judgment must comply with the requirements of Order 21 of the Civil Procedure Rules, which requires a judgment to be dated, signed and delivered. It was his submission that the impugned judgment is a nullity for want of compliance with the said provision. He also took issue with corrections on the year the judgment was delivered. He urged that such discrepancies amount to discovery of new and important matter.

12. The Respondent's counsel Mr Olembo relied on the Replying Affidavit of M/s Mercy Wambua. He pointed out that the judgment was annexed to the Relying Affidavit of Mercy Wambua, and, that there was no discrepancy in the panel that heard the case, and the panel, that wrote the judgment. He also argued that the applicant was supplied with a copy of the judgement within 10 days as evidenced by the record. Lastly, he pointed out that a different panel, on behalf of the panel, which heard the case, delivered the judgment. He added that the judgment was initially to be delivered in 2017 but was adjourned to 2018, hence, the reason the year was changed.

13. The starting point is 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 a ground for review.[5]

14. In *Nyamogo & Nyamogo v Kogo**[6]*** discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

> *"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."*

15. The Indian Supreme Court[7] made a pertinent observation that is 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.

16. In *Attorney General & O'rs v Boniface Byanyima*,[8] the court citing *Levi Outa v Uganda Transport Company*,[9] held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."

17. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised 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.[10]

18. The term "mistake or error apparent" by its very connotation signifies 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 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, 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. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

19. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.[11] In the instant case therefore, I am not convinced that there is an error apparent on the face of the record. What the applicant is raising requires examination and argument. He argues that he was not supplied with a copy of the judgment. The Respondent's position is different. Its position is that the applicant was personally present in court when the judgment was delivered. It also states that the applicant was supplied with a copy of the judgement. The Respondent denies that the judgement was delivered to the applicant's office as he alleges. It is common ground that the judgment was annexed to the Respondent's Replying Affidavit. The applicant also states that the judgment was signed by a different panel other than the panel that heard the case. The Respondent's explanation to this allegation (which is supported by the record) is that the panel, which heard the case, prepared the judgment. However, a different panel on its behalf delivered it.

20. Review is impermissible without a glaring omission, evident mistake or similar ominous error. 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

21. The power of **review** is available only when there is an **error appare**nt on the **face** of the **record.** I emphasize 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 would amount to exercise of Appellate Jurisdiction, which is not permissible.[12]

22. The applicant argues that the judgment did not conform to the provisions of Order 21 of the Civil Procedure Rules, which requires a judgment to be dated, signed and delivered. The contestation as I understand it is twofold. *First*, the applicant argued that the typed date in the judgment was 2017, but in the copy given to him, it was altered in ink to read 2018. The Respondent's explanation, which is supported by the record, is that initially the judgment was to be delivered in 2017, but it was adjourned to 2018 and ultimately delivered on the date shown in the presence of the applicant. This issue was sufficiently explained by the Respondent and it is evident from the record.

23. *Second*, it is argued that the panel that heard the case is not the panel that delivered it. Differently put, the judgment was signed by a different panel. Again, the Respondent explained this. It is evident from the record that the panel which heard the case is not in dispute. The explanation is that the judgment was delivered on their behalf by a different panel. That cannot be an error of the face of the record nor is it new matter or evidence.

24. In any event, whether the judgment offended the provisions of Order 21 of the Civil Procedure Rules is in my view a ground of appeal as opposed to a ground for review. It is important to distinguish grounds of appeal and grounds for review.[13] **Bennet J** was in my humble

view correct in *Abasi Belinda vs Fredrick Kangwamu and another*[14] when he held that:- *"a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal."*

25. Discussing the scope of review, the Supreme Court of India in the case of[15] 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 for 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"*

26. The argument that the applicant was not supplied with a copy of the judgment and proceedings, or that the judgment was not signed or that the case was not heard by the panel which delivered the judgment, cannot be new evidence. For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court. As stated above, the judgment in question was annexed to the Replying affidavit. The proceedings were part of the documents presented to the court. Differently stated, the material in question does not qualify to be new in that it was not available to the applicant or the court.

27. A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Signh and Another*[16] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. **Mulla** in the *Code of Civil Procedure*[17] (writing on Order **47** Rule **1** of the Civil Procedure Code of India), (the equivalent of our Order **45** Rule **1**), states that the *expression 'any other sufficient reason'...*means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[18]

28. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga*[19] where they 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.(Emphasis added)*
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> ii. *Where the application is based on sufficient reason it is for the Court to exercise its discretion.*

29. I am not persuaded that the reasons offered by the applicant amounts to *'sufficient reason'* within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.** My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda*[20]where the court held that *'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.*

30. The principles which can be culled out from the above noted authorities are:-

> *i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*
>
> *ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.*
>
> *iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.*
>
> *iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
>
> *v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
>
> *vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*
>
> *vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*
>
> *viii. 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 any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.*

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

31. Guided by the jurisprudence discussed above, it is my finding that the reasons cited by the applicant do not quality to be any of the grounds prescribed in Order 45 Rule 1 of the Civil Procedure Rules.

32. In view of my above conclusions, I find that the grounds cited do not qualify to be grounds for review to bring the applicant's application within the ambit of the grounds specified in Order 45 Rule 1. It is my finding that this is not a proper case for the court to grant the review sought or even to exercise its discretion in favour of the applicant. Accordingly, the applicant's application dated 27th March 2019 is dismissed with no orders as costs.

Orders accordingly

Signed, Delivered and Dated at Nairobi this **25th** day of **June** 2019

John M. Mativo

Judge

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[1] Cap 21, Laws of Kenya.

[2] Ibid

[3] See Sinha J in *Union of India vs B. Valluvan*, AIR 2007 SC 210; (2006) 8 SCC 686

[4] Supra.

[5] See *National Bank of Kenya Ltd vs Ndungu Njau,* {1996} KLR 469 (CAK) at Page 381.

[6] {2001} EA 170.

[7]In the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047.

[8] HCMA No. 1789 of 2000.

[9] {1995} HCB 340.

[10] see This Court in *Thungabhadra Industries Ltd. v. Govt. of A.P*.1

[11] *Batuk K. Vyas Vs Surat Municipality* AIR (1953) Bom 133.

[12] See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170.

[13] See *National Bank of Kenya Ltd vs Ndungu Njau* {1996} KLR 469 (CAK) at Page 381.

[14] {1963}E.A 557, also see Chittaley & Rao in the Code of Civil Procedure, 4th Edition, Vol 3, Page 3227.

[15] *Ajit Kumar Rath vs State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608.

[16] {1963}EA 557.

[17] Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (CAK)

[18] Ibid.

[19]{2004} eKLR.

[20] Civil Appeal No. 103 of 2000, Kisumu; {2000} LLR 8340.