Ngeno v Mosonik (Environment and Land Appeal E001 of 2022)
[2025] KEELC 1189 (KLR) (13 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1189 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND APPEAL E001 OF 2022

LA OMOLLO, J

MARCH 13, 2025

BETWEEN

GEOFFREY NGENO ..... APPELLANT

AND

CHARLES CHERUIYOT MOSONIK ..... RESPONDENT

RULING

1. This ruling is in respect of the Respondent/Applicant's Notice of Motion application dated 22nd May, 2024. It is expressed to be brought under Sections 1A, 1B, 3A, 80, 99 & 100 of the *Civil Procedure Act* and Order 45 & Order 51 Rule 1 of the Civil Procedure Rules.

2. The Respondent/Applicant seek the following orders;

    a. Spent

    b. Spent

    c. That in the alternative to Order 2 above, this Honourable Court be and is hereby pleased to review and/or amend the last sentence of the judgement delivered in this matter by Hon. Lady Justice M.C Oundo on 16th May, 2024, to read "The Respondent shall have costs of the instant Appeal and the suit in the subordinate."

    d. That the cost of this application be in the cause.

3. The application is based on the grounds on its face and the supporting affidavit of one Charles Cheruiyot Mosonik sworn on 22nd May, 2024.

Factual Background.

4. The Appellant/Respondent commenced the present proceedings vide the Memorandum of Appeal dated 5th February, 2022. The grounds on the face of the Memorandum of Appeal are as follows;

    a. That the Learned trial Magistrate erred in law and fact in disregarding the Appellant's evidence thus arriving at a wrong judgement.

    b. That the Learned Trial Magistrate erred in law and fact in finding that the Plaintiff is the absolute owner of parcel No. Kericho/Kaptebengwet/463 in disregard of the evidence before him.

    c. That the Learned trial Magistrate erred in law and fact in issuing a permanent injunction against the Appellant.

    d. That the Learned Trial Magistrate erred in law and fact in making an award of mesne profits and general damages.

    e. That the Learned Trial Magistrate erred in law and fact in failing to consider all the issues in controversy.

    f. That the Learned Trial Magistrate erred in law and fact in awarding costs to the Respondent.

    g. That the Learned Trial Magistrate erred in law and fact in finding in favour of the Respondent contrary to the evidence on record.

5. The Appellant/Respondent sought for the following orders;

    a. That this appeal be allowed and the judgement of the Honourable S.M Mokua Chief Magistrate dated 16th December, 2021 be varied, set aside and/or reviewed accordingly.

    b. That the costs of this appeal and in the subordinate Court be provided for.

6. The Court in its judgement delivered on 16th May, 2024 held as follows;

> " In the end, I uphold the finding by the trial Learned Magistrate in his judgement delivered on 27th January, 2022 save for the award on mesne profits which award is herein set aside. The Appellant shall have cost of the instant appeal and the suit in the subordinate"

7. The application under consideration first came up for hearing on 28th May, 2024 when the Court directed that it be served upon the Appellant/Respondent.

8. On 19th June, 2024 the Court issued directions that the application would be heard by way of written submissions.

9. The matter was mentioned severally to confirm filing of submissions before it was reserved for ruling on 22nd October, 2024.

The Respondent/Applicant's Contention.

10. The Respondent/Applicant contends that judgement in this matter was delivered on 16th May, 2024.

11. He also contends that the final orders in the judgement were to the effect that the Appellant/Respondent was to have costs of the Appeal and the suit in the subordinate Court. He adds that this order did not conform to the findings in the judgement.

12. He further contends that the Court in its judgement upheld the findings of the Learned Trial Magistrate and only set aside the award of mesne profits.

13. It is his contention that the Learned Trial Magistrate awarded him costs of the suit and they were taxed at Kshs. 307,195/=.

14. It is also his contention that it is trite law that costs follow the event. He adds that he had succeeded in his suit before the trial Court and from the judgement delivered by this Court, he successfully opposed the appeal and the judgement of the trial Court upheld. It was only the award of mesne profits that was set aside.

15. It is further his contention that having succeeded, he cannot be condemned to pay costs. He adds that the award of costs to the Appellant/Respondent is an error.

16. He contends that the said error is an accidental slip which the Court can rectify on its own motion in accordance with Sections 99 and 100 of the *Civil Procedure Act*.

17. He also contends that when his Counsel appeared before the Learned Judge on 16th May, 2024, the Court informed him (counsel) that costs had been awarded to him (Respondent/Applicant).

18. He further contends that this Court has powers to amend an error in the judgement to reflect the true intention of the judge.

19. It is his contention that the common law principle known as 'slip rule' empowers the Court to give effect to the true intention of the Court.

20. It is also his contention that the Court did not intend to award costs to the losing party against a party who had succeeded. He adds that he is not inviting the Court to sit on appeal of its judgement but merely to correct an error which is apparent on the record.

21. It is further his contention that from the judgement, the Court intended to award him costs of the appeal and the subordinate Court. It is against public policy to award a losing party costs of a suit.

22. He contends that the Court in Hiram v Muiruri & another (Environment & Land case 483 of 2017) [2023] KEELC 18485 (KLR) (29 JUNE 2023) (Ruling) allowed a similar application.

23. He ends his deposition by urging the Court to in the interest of justice allow his application.

The Appellant/Respondent's Response.

24. The Appellant/Respondent filed a Replying Affidavit sworn on 1st July, 2024.

25. He deposes that the Court in its judgement partially allowed the appeal by setting aside the award of mesne profits which lacked support from the evidence presented. Therefore, the appeal as lodged achieved partial success.

26. He also deposes the award of costs was not an inadvertent error or accidental slip. The costs were awarded as a consequence to his appeal's partial success.

27. He further deposes that the Respondent/Applicant is seeking to amend the judgement under the pretense of correcting what he terms as an accidental slip or error regarding the award of costs. The said argument is misplaced.

28. It is his deposition that the Court in its wisdom and upon being guided by the principles of justice and fairness correctly awarded him costs as he was partially successful.

29. It is also his deposition that the Respondent/Applicant's request overlooks the judicial discretion exercised by this Court which discretion was judiciously applied.

30. It is further his deposition that the Respondent/Applicant's assumptions and presumptions should not be the basis of reviewing and/or amending the judgement.

31. He ends his deposition by urging the Court to dismiss the Respondent/Applicant's application as the award of costs was just and fair. He adds that he has been advised by his advocates on record that the Respondent/Applicant's application is bad in law and an abuse of the Court process.

Issues for determination.

32. The Respondent/Applicant filed his submissions on 2nd July, 2024 while the Appellant/Respondent filed his submissions on 15th October, 2024.

33. The Respondent/Applicant submits on the following issue;

a. Whether this Court can review and/or amend the judgement delivered on 16th May, 2024 to award costs of the appeal and the subordinate Court to the Applicant herein.

34. The Respondent/Applicant submits that the Learned Trial Magistrate delivered judgement in his favour and also awarded him costs.

35. He also submits that this Court upheld the Learned Trial Magistrate's judgement except for the award of mesne profits. He adds that this meant that he was a winning party and he cannot therefore be punished by paying costs.

36. The Respondent/Applicant relies on Sections 80 and 99 of the *Civil Procedure Act*, the judicial decisions of Hiram v Muiruri & another (Environment & Land case 483 of 2017) [2023] KEELC 18485 (KLR) (29 June 2023) (Ruling), Republic v Attorney General & 15 others Ex parte Kenya Seed Company Limited & 5 Others [2010] eKLR in support of his submissions.

37. The Appellant/Respondent submits on the following issue;

a. Whether the Honourable Court can review and/or amend the judgement delivered on 16th May, 2024 to award costs of the appeal and the subordinate Court to the Appellant herein. (sic)

38. The Appellant/Respondent relies on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and submits that there is no error apparent in the judgement that would warrant its review.

39. The Appellant/Respondent also relies on the judicial decision of Republic vAttorney General & 15 others Ex parte Kenya Seed Company Limited & 5 Others [2010]eKLR and submits that the 'slip rule' is only applicable where there are clerical and/or arithmetical errors.

40. It is the Appellant/Respondent's submissions that the scope of the Respondent/Applicant's application is not envisioned under Section 99 of the *Civil Procedure Act*. He adds that the Respondent/Applicant's application is a disguised appeal of the judgement of the Court.

41. The Appellant/Respondent relies on the judicial decisions of Sanitam Services (E.A) Limited vRentokil (K) Limited & another [2019] eKLR, National Bank of Kenya Ltd vNdungu Njau [1997] eKLR and submits that errors that are corrected under the "slip rule" are those that are so obvious that their correction cannot lead to any controversy or change in the substance of the judgement.

42. The Appellant/Respondent concludes his submissions by urging the Court to dismiss the Respondent/Applicant's submissions.

Analysis and determination.

43. I have considered the application, the response thereto and the rival submissions.

44. It is my view that the only issue that arises for determination is whether this Court should review its judgement delivered on 16th May, 2024.

45. Section 80 of the *Civil Procedure Act* provides 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."

46. Order 45 Rule 1 and 2 of the Civil Procedure Rules provides as follows;

> " (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."

47. In the judicial decision of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR the Court held as follows;

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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 unreasonable delay."

48. As was held in Republic v Public Procurement Administrative Review Board & 2 others (supra) cited above, the Court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.

49. The Respondent/Applicant is seeking that this Court reviews its judgement delivered on 16th May, 2024.

50. The Respondent/Applicant contends that the Court in its judgement awarded Costs of the appeal and the suit in the subordinate Court to the Appellant/Respondent which did not conform to the findings of the judgement.

51. The Respondent/Applicant also contends that the subordinate Court had awarded him costs which were assessed at kshs. 307,195/=.

52. He further contends that he successfully opposed the appeal as the judgement of the Trial Court was upheld save for the award of mesne profits that was set aside.

53. It is the Respondent/Applicant's contention that the award of costs to the Appellant/Respondent was an accidental slip which the Court can rectify on its own.

54. It is also the Respondent/Applicant's contention that it was the Court's intention to award him costs and that it was against public policy to award costs to a losing party.

55. In response, the Appellant/Respondent contends that his appeal as lodged achieved partial success and the Court exercised its judicial discretion in awarding him costs.

56. The Appellant/Respondent also contends that the Respondent/Applicant is seeking to amend the judgement under the pretense of seeking review.

57. It is important to note that the Respondent/Applicant is seeking that this Court reviews its judgement under the slip rule as there is an error apparent on the face of the Court record.

58. The Supreme Court in the judicial decision of Outa v Okello & 3 others [2017] KESC 25 (KLR) observed as follows;

> " By its nature, the Slip Rule permits a Court of law to correct errors that are apparent on the face of the Judgment, Ruling, or Order of the Court. Such errors must be so obvious that their correction cannot generate any controversy, regarding the Judgment or decision of the Court. By the same token, such errors must be of such nature that their correction would not change the substance of the Judgment or alter the clear intention of the Court. In other words, the Slip Rule does not confer upon a Court, any jurisdiction or powers to sit on appeal over its own Judgment, or, to extensively review such Judgment as to substantially alter it."

59. As was held by the Supreme Court in the above cited judicial decision, under the Slip Rule, the Court can only correct obvious errors that are apparent on the face of the record which errors will not alter the substance of the judgement or the intention of the Court.

60. In addition to the Respondent/Applicant relying on the slip rule, he also contends that there is an error apparent on the face of the record.

61. The Court of Appeal in Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243 stated thus;

> " In Nyamogo and 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 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 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 apparent on the face of the record even though another view was also possible. Mere 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." (Emphasis mine)

62. In the judicial decision of Omo*te & another v Ogutu (Civil Appeal E005 of 2021*) [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling) the Court held as follows;

> " From the submissions made by the applicant, he believes he was the successful party and ought to have been awarded costs of the appeal. This is akin to asking the Court to sit on appeal of its decision and reverse it. The fact that a party believes that the Court should have reached a different conclusion or that
>
> the decision was erroneous are matters fit for appeal rather than review which is limited in scope. Notably also, courts have held that; ''the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.'' And that; ''an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.'(Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019]
>
> (21) Similarly, the request herein entails a re-appraisal of the evidence and re-analyzing its decision to establish whether or not the applicant is entitled to costs- something which is beyond the scope of review jurisdiction.
>
> (22) Accordingly, the supposedly 'mistake or error apparent on the face of the record' is not a misstate or error in the sense of the law for which review may be granted."

63. In the judicial decision of Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party); Kingángá (Ex parte) (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated)) [2021] KEHC 298 (KLR) (Judicial Review) (16 November 2021) (Ruling) the Court held as follows;

> " In summary, in a civil proceeding, an application for review is entertained only on a ground mentioned in Order 45 Rule 1. A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. An error apparent on the face of the record exists if of two or

more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the Court in the original judgment is a possible view having regard to what the

record states, it is difficult to hold that there is an error apparent on the face of the record. Review of the earlier order cannot be done unless the Court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review." [Emphasis Mine]

64. An error apparent on the face of the record must be a self-evident error which does not need elaborate arguments to support it.

65. As afore stated, the Respondent/Applicant contends that there is an error apparent on the face of the record as the Court in its judgement delivered on 16th May, 2024 awarded costs to the Appellant/Respondent and yet he was the one entitled to the costs.

66. He also contends that since he was the successful party, he ought to have been awarded the costs of both the appeal and the matter before the subordinate Court.

67. The Respondent/Applicant further contends that when his Counsel appeared before Court on 16th May, 2024 he was informed by the Court that costs had been awarded to him.

68. The Court record for 16th May, 2024 is as follows;

> " Mr. Kefa Advocate for the Appellant.
>
> N/A for the Respondent
>
> Mr. Kefa Advocate;
>
> The matter is coming up for judgement. We are ready to take the same.
>
> Judgement delivered online. The trial Magistrate's judgement dated the 27th January, 2022 is upheld save for the award of mesne profits for Kshs. 1,104,000/= which award is set aside. Costs of the appeal and the suit in the subordinate Court be provided for."

69. It is my view that the assertions by the Respondent/Applicant

that his counsel was informed by the Court on 16th May, 2024 that he was awarded costs are not supported by the Court record as his counsel is recorded as absent during the delivery of the judgement.

70. As was held in the above cited judicial decisions, an error apparent on the face of the record must be self-evident. In the event that a party argues that the decision of the Court was erroneous, the proper recourse would be to file an appeal.

71. In the present matter, it is my view that the Respondent/Applicant is essentially contending that the judgement delivered by the Court was erroneous as it should have awarded him costs instead of the Appellant/Respondent. My view is that this can only be a ground of appeal and not review.

Disposition.

72. Taking the foregoing into consideration, It is evident that the Respondent/Applicant's issue is that the judgment was erroneous. This is not the same thing as there being an error apparent on the face of the record. The latter warrants review.

73. Consequently, I find that the Respondent/Applicant's Notice of Motion application dated 22nd May, 2024 lacks merit and it is hereby dismissed with costs.

74. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 13TH DAY OF MARCH, 2025.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Langat for the Applicant.

Mr. Okok for the Respondent.

Court Assistant; Mr. Joseph Makori.