



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 3264 OF 2014

FORMERLY ELC NO. 769 OF 2014

JACOB GICHUHI WANGANGA.....PLAINTIFF

VERSUS

HANNAH WANJIRU WANGANGA.....DEFENDANT

RULING

1. The Plaintiff herein filed an application under certificate of urgency by way of a Notice of Motion dated 26th September, 2017 seeking to stay execution of the orders made by this court on 19th September, 2017 pending the hearing and determination of the present application. He also seeks to review and set aside the said orders.
2. The application is premised on the grounds that this court ordered for dismissal of this suit in favour of the Defendant citing lack of a Notice of Appointment of Advocates by the Plaintiff's Advocates as the main reason for the dismissal. That the said orders are erroneous as the Notice of Appointment albeit late was filed on 4th April, 2017.
3. The Plaintiff swore an affidavit on 26th September, 2017 in support of the application and deponed that he filed a Supplementary Affidavit dated 7th April, 2017 with the Notice of Appointment as the sole annexure but that the court failed to refer to or consider the Affidavit. The Plaintiff urged that he risks suffering irreparable harm having been denied the right to be heard on a technicality, reasons for which the ruling should be set aside and reviewed.
4. This court had by a ruling of 19th September, 2017 dismissed an application filed by the Plaintiff stating that the application was incompetent having been filed by a firm of advocates who were not properly on record for the Applicant.
5. The Defendant swore a Replying Affidavit on 22nd February, 2018 in opposition to the application.
6. Mr Thuo of M/s Shako and Company Advocates for the Plaintiff filed written submissions dated 22nd May, 2018 in support of the application. It is their submission that there is an error apparent on the face of the record since in its ruling, the court stated that there was no notice of change of Advocates present in the file yet there was a notice of change of Advocates but which mysteriously disappeared from the court file. That even if the Notice was not present, it was not sufficient to have the entire suit dismissed as it did not go to the root of the issues before the court as held by the Court of Appeal (Githinji, Nambuye & Koome JJ.A) in the case of **Abok James Odera T/A A.J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates [2013] eKIR**.
7. Counsel contended that courts have previously admitted documents filed out of time to ensure there is no subversion of justice and cited the decision of the Supreme court in **Presidential Election No. 4 of 2017, Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR** to support his contention. Counsel urged the court to set aside the technicalities used by the Defendant in line with **Article 159(2)(d)** of the **Constitution** and have the matter set down for hearing to ensure that it is heard on merit.
8. Counsel asserted that the Defendant had not demonstrated that she would suffer any prejudice if the application dated 3rd October, 2014 is reinstated and further that the court should reinstate the main suit which will bring to light the illegalities occasioned on the deceased's estate.
9. Mr. Mungai of M/s Mungai Kalande & Co. Advocates filed written submissions dated 22nd June 2018 on behalf of the Defendant. Counsel submitted that the application is fatally defective, bad in law and an abuse of the court process.

10. Counsel submitted that the parameters for an application for review are provided under **Order 45 rule 1** of the **Civil Procedure Rules 2010** and include that relied on by the Plaintiff that there is an error apparent on the face of the record. In demonstrating what constitutes an error apparent on the face of the record, Counsel cited the case of **Evan Bwire vs. Andrew Nginda Civil Appeal No. 103 of 2000, Kisumu [2000] LLR 8340** and the decision of the Court of Appeal in **Anthony Gachara Ayub vs. Francis Mahinda Thinwa [2014] eKLR**.

11. Counsel observed that the court dismissed the Plaintiff's Notice of Motion dated 7th February, 2017 for having been filed by an advocate who was not properly on record, an issue which calls for interpretation of a provision of law, legal question and is not an error on the face of the record. That as such, the Plaintiff's application for review does not meet the required parameters.

12. Counsel cited the case of **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243** where the Court of Appeal upheld the views in **Nyamogo & Nyamogo vs. Kogo [2001] EA 174**. **Nyamogo** defined an error apparent on the face of the record and stated that an error which has been 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.

13. Counsel asserted that the Notice of Change of Advocates referred to by the Plaintiff was filed on 4th April, 2017 almost two (2) months after the application in question was filed on 10th February, 2017. That this rendered the application defective and amenable to be struck out with costs. Counsel observed that the incoming Advocate should have filed an application to effect such change in accordance with **Order 9 rule 9** of the **Civil Procedure Rules 2010**.

14. Counsel cited the case of **Aggrey Ndombi & Another vs. Grace Ombara (2008) eKLR** and the case of **Simon Barasa Obiero vs. Jackson Onyango Obiero Busia High Court Civil Appeal No. 10 of 2016**. He urged that an application filed prior to obtaining leave and filing of the Notice of Change of advocates was defective and susceptible to be struck out as it was filed by an advocate with no *locus standi* to represent the Plaintiff.

15. M/s Shako & Company Advocates for the Plaintiff filed further submissions dated 20th July, 2018 and submitted that the court in exercise of its jurisdiction and discretion admitted the Defendant's submissions filed outside the stipulated period citing that each party must be heard on merit. Counsel stated that the court has in more than one occasion been lenient to the Defendant while punishing the Plaintiff heavily on a technicality, and urged the court to extend the same spirit to the Plaintiff to have the matter finally determined on merit.

16. I have analyzed the pleadings and written submissions filed by the parties herein and find that the sole issue for determination is whether the Plaintiff has satisfied the requirements to warrant the grant of the review orders sought.

17. The requirements that must be satisfied to justify the grant of an application for review are provided under **Order 45 rule 1** of the **Civil Procedure Rules (2010)** which states thus –

“(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.”

18. The Applicant submitted that there is an error apparent on the face of the record stating that the court dismissed the Plaintiff's application due to the absence of the notice of change of advocates. That the court failed to consider the Plaintiff's supplementary affidavit dated 7th April, 2017 which contained the notice that had been filed on 4th April, 2017.

19. The question that follows is what constitutes an error apparent on the face of the record. In the case of **Ryce Motors Limited vs. Jonathan Kiprono Ruto & Another [2016] eKLR**, the Court of Appeal (Karanja, Okwengu & G.B.M Kariuki JJ.A), while dealing with a similar issue cited and applied the case of **Nyamogo and Nyamogo Advocates vs. Kogo [2001] 1 E.A 173**. In **Nyamogo**, the Court of Appeal in determining an error apparent on the face of the record observed thus:

“An error apparent on the face of the record cannot be defined precisely and 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 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 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.”

20. In the instant case, it is clear that the ruling of this court of 19th September, 2017 does not disclose an error apparent on the face of the record. In its ruling, the court cited the case of **Nicholas Omondi vs. A Rocha Limited [2016] eKLR** and stated that a notice of change of advocates is necessary if a party wishes to change from an advocate already appearing in court to another. This change is effected by an application with notice to all parties as prescribed under **Order 9 rule 9** of the **Civil Procedure Rules 2010** which states thus:

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

21. The Plaintiff’s application of 7th February, 2017, which is the basis of the present application seeking review, was filed by M/s Shako & Company Advocates. At the time of looking at the Application, there was no Notice of Change of Advocates from M/s Omollo & Company Advocates who were previously on record.

22. From the present application however, it is apparent that a Notice of Change of Advocates dated 3rd April, 2017 was filed on 4th April, 2017. Be that as it may, **Order 9 rule 9** of the **Civil Procedure Rules** emphasizes that an order of the court is required upon an application with notice to all parties before such a change of advocates can be effected after judgment has been passed. This is a statutory requirement which must be complied with and not a mere technicality as alluded to by the Plaintiff.

23. From the record, it is evident that M/s Shako & Company Advocates did not obtain an order of the court to effect the change of advocate, before filing their application seeking to reinstate their originating summons, which was the basis of the ruling whose review they now seek. It is trite that an application filed by an advocate not properly on record is incompetent and defective *ab initio*. This was the basis of the court’s orders of 19th September, 2017. The reinstatement, as sought by the Plaintiff, of an application irregularly filed by an advocate not properly on record, cannot make such an application compliant.

24. I am not convinced that the Plaintiff is deserving of the orders sought and call to mind the case of **Abdullahi Mohamud vs Mohammud Kahiye [2015] eKLR**, where the Court cited and applied the case of **Pancras T Swai vs Kenya Breweries Limited [2014] eKLR** in which the Court of Appeal opined thus:

“If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which Court decisions that ought to be examined on appeal would be exposed to attacks in the Courts in which they were made under the guise of review when such Courts are functus officio and have no appellate jurisdiction.”

25. From the foregoing, I am not persuaded that the Plaintiff has proved that there is an error apparent on the face of the record in the ruling dated 19th September, 2017 to warrant the grant of the review orders as sought. Consequently, I find that the Plaintiff’s application lacks merit and is hereby dismissed with costs to the Defendant.

SIGNED DATED and DELIVERED in open court this **25th day of October 2018.**

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L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Plaintiff

In the presence ofAdvocate for the Defendant