REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

MISC APPLICATION NO. 21 OF 2020

AMONDI AND CO. ADVOCATES.....APPLICANT

-VERSUS-

COUNTY GOVERNMENT OF KISUMU....RESPONDENT

RULING

The Respondent herein filed a Notice of Motion Application under Order 45 (1) of the Civil Procedure Rules 2010, Sections 80, 1A,1B and 3A of the Civil Procedure Act seeking the following orders:

1. That this Honourable court be pleased to certify this Application urgent ***(spent).***

2. That there be an order for stay of execution pending the hearing and determination of this Application**.**

3. That court be pleased to review its order of 28th July 2021 allowing notice of motion application dated 24th May 2021 upon grant of prayer 2, this Honourable court do proceed to hear the Notice of Motion Application dated 24th May 2021 on merit by considering the response and submissions filed by the parties.

4. That the costs of this Application be provided for.

The Application was supported by the Affidavit of ROSELYNE A. BWIRE who stated that the Applicant filed an Application dated 24th May 2021 seeking orders that certificate of costs with respect to the taxation order made on 30th October 2020 for the sum of Kshs. 259,354.1942/= be adopted as judgment of court with interests at 14% per annum from the date of filing the bill for taxation plus interest and costs.

It is stated that the Application dated 24th May 2021 was scheduled for hearing on 28th July 2021. When the matter was called out for hearing virtually, the Advocate for the Applicant misrepresented to court that the Application was not opposed yet the Respondent opposed the said Application through grounds of opposition dated 21st June 2021.The Respondent filed their submissions to the application on 6th July 2021 and the Applicants filed their submissions on 21st July 2021.

It is further stated that on the date of the hearing, counsel had challenges logging in virtually and the court granted the prayers sought in the Application ex-parte on the basis that the Application was not opposed.

KENNETH AMONDI filed a Replying Affidavit in response to the Application dated 24th August 2021 where he stated that the Notice of Motion Application dated 24th May 2021 was served upon the Respondent on 11th June 2021 and the same came up for hearing on 28th July 2021 and when the same came up for hearing, the Respondent had already filed Submissions with respect to the Application.

It is stated that the matter proceeded before the Honourable Judge at noon where Counsel for the Respondent was not in court and he never misrepresented the Court that the Application was unopposed. On 5th August 2021, orders were issued and the same was served to the Respondent on 10th August 2021.

It is further alleged the Application is an afterthought meant to delay the ends of justice and the Respondent is not willing to pay for the services rendered.

I have perused the Application dated 24th May 2021 and find that it sought for orders that the certificate of costs with respect to the taxation

order made on 30th October 2020 for the sum of Kshs. 259,354.1942/= be adopted as judgment of court with interests at 14% per annum from the date of filing the bill of costs for taxation. It is the Respondent's case that when the matter came up for hearing, Counsel for the Applicant herein misled the court that the Application was not opposed and that he had challenges logging in virtually but later joined in and informed the court about the status of the matter. On the other hand, the Applicant herein in his Replying Affidavit has stated that the matter proceeded in court at noon and Counsel for the Respondent was not in court. The Applicant has also stated that he did not misrepresent the court and Counsel should proceed proceedings for the same.

Section 80 of the **Civil Procedure Act** provides as follows:

> **"Any person who considers 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 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.**

Order 45 Rule 1(1) of the **Civil Procedure Rules provides as follows:**

> **"1. (1) Any person considering himself aggrieved—**
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> **(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"**

From the above provisions of the law, it is clear that before granting an order for review, the court considers whether there is discovery of new evidence, whether there is a mistake or error apparent on the face of the record or any other sufficient reason. This court has perused the Pleadings filed by parties herein and there is no discovery of new evidence.

On the issue of apparent error on the face of the record; when the matter came up of for hearing on 28th July 2021, it crystal clear that the Respondent failed to appear in court and therefore the court proceeded to grant prayers sought in the Application dated 24th May 2021.

In the case of ***National Bank of Kenya Limited vs. Njau Njau (1995-99) 2 EA 249,*** the Court of Appeal held as follows:

> **"A review may be granted where 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."**

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."**

This court finds that there was no mistake on the face of the record as the Respondent failed to appear in court on the date scheduled for hearing. The Respondent's allegations that she had challenges logging on virtually are mere allegations since she also alleged that Counsel for the Applicant misrepresented to court that the Application was not opposed. From the court proceedings, it is clear that Counsel for the Applicant did not mislead the court and at no point did the said Counsel state that the Application was unopposed.

Bennett J was correct in Abasi Belinda v. Frederick Kangwamu and another [1963] E.A. 557 when he held that:

> **"a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous**

view of evidence or of law is not a ground for review though it may be a good ground for appeal."

On whether the Respondent herein has given any other sufficient reasons for grounds of review; In the case of **Sadar Mohamed v Charan Signh and Another (1963) EA 557**, it was held that **any other sufficient reason for the purposes of review refers to grounds analogous to the other two, that is, error apparent on the face of the record and discovery of new and important matter**. This court finds that the Respondent has not provided any other sufficient reason for review of the orders given on 28 July 2021. In conclusion I do find the Application dated 24th August 2021 lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25th DAY OF JANUARY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.