



**Mungai v Trade Pan Reality Ltd & 2 others (Environment & Land
Case 2755 of 1996) [2022] KEELC 2652 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2652 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2755 OF 1996**

**OA ANGOTE, J
JULY 21, 2022**

BETWEEN

WAINAINA KIGATHI MUNGAI PLAINTIFF

AND

TRADE PAN REALITY LTD 1ST DEFENDANT

KAMAU JOHN KINYANJUI 2ND DEFENDANT

PAUL KINUTHIA NJENGA 3RD DEFENDANT

RULING

Background

1. Before this court for determination is the Plaintiff's/Applicant's Notice of Motion application dated February 8, 2022 brought under the provisions of Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Orders 51 Rule 1 and 42 Rule 6 of the [Civil Procedure Rules, 2010](#) and all enabling provisions of the law. The application is seeking for the following reliefs;
 - i. That this Honourable Court be pleased to review the judgment delivered herein on February 23, 2018 by Honourable Justice L. Gacheru.
 - ii. That the costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Wainaina Kigathi Mungai, the Plaintiff herein of an even date. The Plaintiff deponed that judgment in this matter was delivered on February 23, 2018 where the suit was dismissed with costs; that the 1st and 2nd Defendants filed a Counter-Claim which was also dismissed in its entirety and that there is an error apparent on the face of the record as the court vide its judgment aforesaid having dismissed the 1st and 2nd Defendants' Counter-Claim in its entirety ought to have specifically stated that it had awarded costs of the Counter-Claim to the Plaintiff.



3. According to the Plaintiff, the 1st and 2nd Defendants have since filed a Bill of Costs for Taxation by the court despite the fact that they owe him costs of the Counter-Claim; that it is only at the point of drafting submissions in response to the 1st and 2nd Defendants' Bill of Costs that the error and/or omission was noted; that the 3rd Defendant's Bill of Costs has been taxed and the 1st and 2nd Defendants' Bill is due for taxation and that unless the orders sought are granted, he is likely to suffer substantial loss.
4. There was no response to the application. The parties did not file submissions.

Analysis & determination

5. Having considered the application, the sole issue that arises for determination is
 - i. Whether the Plaintiff/Applicant has made a case warranting the grant of orders for review?
6. The Plaintiff/Applicant is seeking to review the judgment of this court (Justice L. Gacheru) delivered on 23rd February, 2018. According to the Plaintiff, the court dismissed the 1st and 2nd Defendants' Counter-Claim in its entirety without awarding costs thereof to the Plaintiff. This, he opines, constitutes an error on the face of the record.
7. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the Civil Procedure Rules, 2010. Section 80 of the 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.”
8. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:-

“ 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 judgment to the court which passed the decree or made the order without unreasonable delay.”
9. A reading of the above provisions makes it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by limiting it to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.



10. This position was restated by the Court of Appeal in *Benjob Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR where the court observed that;

“In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.
11. Briefly, the background of this matter is that the Plaintiff instituted this suit against the Defendants seeking injunctive orders to restrain the Defendants from interfering with his quiet possession of Plot No 7785/74 through activities conducted on their Plot No 7785/73 as well as damages for trespass. In response, the 1st and 2nd Defendants filed a Counter-Claim in which they claimed as against the Plaintiff damages for defamation, trespass and nuisance arising from the Plaintiff’s interference with their plot.
12. The Court made a determination on 23rd February, 2018 in which it dismissed both the Plaintiff’s case and the 1st and 2nd Defendants’ Counter-Claim stating thus;

“For the above reasons the Court dismissed the Plaintiffs Claim as sought in the Amended Plaint dated 22nd May, 2012 with costs to the Defendants herein. The Court also disallows the 1st and 2nd Defendants claim entirely.”
13. The above excerpt of the judgment is the basis of this application. In this case, the first hurdle to jump is whether the application for review was made without unreasonable delay. This is an important consideration as stated by the Court of Appeal in *Francis Origo & another vs Jacob Kumali Mungala* [2005] eKLR who held:

“...most importantly, the applicant must make the application for review without unreasonable delay.”
14. It is undisputed that the impugned judgment was delivered on 23rd February, 2018 and the application herein was filed on 8th February, 2022. The time taken to bring the application for review was in excess of three years. Is this unreasonable delay? A determination of what constitutes unreasonable delay is a matter of fact dependent on the circumstances of the case and where an Applicant comes to the Court late, it is incumbent upon him to explain the delay. This was affirmed by the Court of Appeal in the case of *Standard Ltd vs Wilson K. Kalya* C. A. 306 of 2002 – Nairobi(unreported) who stated that some explanation of the delay must be given.
15. The application is predicated on the grounds that there is an error apparent on the face of the record, which error, according to the Plaintiff, was discovered when its counsel was filing submissions in response to the 1st and 2nd Defendant’s Bill of Costs.
16. A perusal of the file indicates that counsel for the Plaintiff was present when the judgment was read in open court and certainly soon thereafter obtained a copy of the same. It is not plausible that the fact of not having been awarded costs on the dismissed Counter claim was discovered more than 3 years after the fact.
17. Nonetheless, for purposes of completion, the court will proceed to determine the application on its merits. In discussing the concept of mistake or error on the face of the record, the Court of Appeal in



Kenya Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) [2019] eKLR referred to its various decisions as follows;

“This Court in *Muyodi vs Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 described an error on the face of the record as follows:

“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.”

18. This position was also stated by the Ugandan Court of Appeal in the case of *Apollo Waswa Basude & 2 others (As administrators to the Estate of the late Sepiriya Rosiko) vs Nsabwa Ham*, Civil Appeal No 288 of 2016, where the court at para 310 stated thus;

“...an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no court of law exercising its judicial power would allow it to remain on the court record. This error may be either of fact or of law...”

19. The Plaintiff contends that that there is an error apparent on the face of the record. The basis of this argument is the court’s failure to award him costs after dismissing the 1st and 2nd Defendants’ Counter-Claim.
20. The law with respect to the award of costs in a suit is set under Section 27 of the *Civil Procedure Act* which provides;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers”

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”



21. The Supreme Court of Uganda in *Impressa Infortunato Federice vs Nabwire* [2001] 2 EA 383 stated thus:-

“The effect of section 27 of the *Civil Procedure Act* is that the Judge or court dealing with the issue of costs in any suit, action, cause or matter has absolute discretion to determine by whom and to what extent such costs are to be paid; of course like all judicial discretions, the discretion on costs must be exercised judiciously and how a court or judge exercises such discretion depends on the facts of each case. If there were mathematical formula, it would no longer be discretion... while it is true that ordinarily, costs should follow the event unless for some good reason the court orders otherwise, the principles to be applied are- (i) under section 27 (1) of the *Civil Procedure Act*, costs should follow the event unless the court orders otherwise. This provision gives the judge discretion in awarding costs but that discretion has to be exercised judicially.”

22. Whereas the Kenyan Court of Appeal in *Supermarine Handling Services Ltd vs Kenya Revenue Authority* [2010] eKLR held as follows:

“Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule.”

23. From the foregoing, is it abundantly clear that whereas it is a general rule that costs follow the event, a judge has discretion to depart from the same in awarding costs, and the failure by the court to award costs cannot be said to be an error on the face of the record. A question of whether or not this discretion was exercised judiciously is a matter for Appeal and cannot be the subject of review.

24. Accordingly, the Plaintiff's Application dated February 8, 2022 is unmerited and is hereby dismissed with no order as to costs. Other than the pending issue of taxation, the file is hereby closed.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 21ST DAY OF JULY, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Wekesa holding brief for Mungai for Plaintiff

No appearance for Defendants

Court Assistant - June

