



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELCA 1 OF 2020

PETER MAINA MUNINA.....APPELLANT /RESPONDENT

VS

ANNE WANJIRU WACHIRA (suing as Attorney of

SAMUEL NDUATI NJUGUNA).....RESPONDENT /APPLICANT

RULING

1. On the 10/12/2020 the Court pronounced judgment as follows;

a. The Appellant shall refund the sum of Kshs 1.330,000/=together with 20% p.a interest to the Respondent from the time of filing suit until payment in full.

b. The costs of the Appeal shall be payable to the Respondent.

2. The Respondent /Applicant filed the Notice of Motion dated 18/12/20 seeking orders interalia that:

a. That the judgement of this Court delivered on 10/12/20 be reviewed.

b. That the sum awarded as refund be amended/substituted to read Ksh1,350,000/= in place of 1,330,000/=.

3. The application was under the provisions of Section 1A, 1B & 3A, Section 80 of the Civil Procedure Act and brought on the grounds that this Court entered judgement against the Appellant. It is supported by the affidavit of Counsel for the Applicant.

4. The Respondent did not file any response to the application despite service.

5. The key issue for consideration in the uncontested application is; -

a. Whether the Court has jurisdiction after the judgement

b. Whether there is evidence of error or mistake in the judgement.

Whether the Court has jurisdiction after the judgement

6. The general rule is that upon delivery of judgement, the Court becomes functus officio. The exceptions that are relevant to the case before this Court were settled in the case of ***Republic –Vs- Attorney General & 15 Others, Ex-Parte Kenya Seed Company Limited & 5 others [2010] eKLR***, where the Court held that:-

“27. It is a codification of the common law doctrine dubbed ‘the Slip Rule’, the history and application of which has a wealth of authorities both locally and from common law jurisdictions. It is a rule that applies as part of the inherent jurisdiction of the Court, which would otherwise become functus officio upon issuing a judgment or order, to grant the power to reopen the case but only for the limited purposes stated in the section.

28. Some of the applications of the rule are fairly obvious and common place and are easily discernible like clerical errors, arithmetical mistakes, and calculations of interest, wrong figures or dates. Each case will, of course, depend on its own facts, but the rule will also apply where the correction of the slip is to give effect to the actual intention of the Judge and/or ensure that the judgment/order does not have a consequence which the Judge intended to avoid adjudicating on.”

7. The application is brought under the Section 80 of the Act together with the enactment on the Court's overriding objectives vide Section 3A, 1 A & Section 80 which 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 judgement to the Court, which passed the decree or made the order, and the Court may make such order thereon as it thinks fit”

8. The procedure is set out in the procedural legislation under Order 45 of the Civil Procedure Rules 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

(c.) on account of some mistake or error apparent on the face of the record, or

(d) 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.”

9. The finding of the Court is that the Court has power to review the application.

Whether there is evidence of error or mistake in the judgement.

10. An error within the meaning of Section 80 and Order 45 of the Civil Procedure law was defined in the case of **National Bank of Kenya Ltd -Vs- Ndungu Njau [1997] Eklr**, the Court of Appeal as thus:-

“A review may be granted wherever 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”.

11. In the case of **Republic -Vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** Justice Mativo held that;

“...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.”

12. The Court may also review its decision where there is evidence of sufficient cause as seen in the case of **Nuh Nassir Abdi -vs- Ali Wario & 2 Others (2013) E KLR EP NO. 6 of 2013**, G.V Odunga J. stated that :-

“A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the Court could only exercise such discretion if so to do would serve useful purpose....”

13. This sufficient cause is considered further to the overriding objectives of the Court to do justice in the circumstances of the case or to avoid abuse of Court process. The discretion cannot be fettered. In the case of **Sarden Mohamed -Vs- Charan Singh Nard Singh and Another (1959) EA 793**, the High Court held that **Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in that section was deliberate.**

14. In its decision, the Court made the following finding in para 40;

“With respect to the sum of Kshs 1,350,000/= the Appellant argues that the sum paid and received by the Appellant was Kshs 1.0 million only. That the Court erred in granting the Appellant the sum of 1,350,000/= a sum in excess of what was received. In evidence the Appellant admitted receipt of Kshs 1,350,000/=. The Appellant is estopped from turning the corner and denying the receipt of the cash.

15. It is on record that the Court concluded its decision in para 44a as follows;

a. “The Appellant shall refund the sum of Kshs 1,330,000/= together with 20% p.a interest to the Respondent from the time of filing

suit until payment in full”.

16. In applying these principles, the judgement of the Court in para 40 confirms that the Appellate Court had entered an award for Ksh 1,350,000/=. The sum of Kshs 1,330,000/- therefore contained in para 44 a can only be an error on the face of the record. This error does not require elaborate argument and falls within the expected definition of error apparent on record.

17. It is noteworthy that the Court further has power to act on its own motion to regularize formal clerical or arithmetical slips under Section 99 of the Civil Procedure Act. The section provides;

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

18. It is the finding of the Court that this is an application that falls within the precincts of Section 99 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules and fosters the overriding objectives of the Court. It is allowed as prayed.

19. For avoidance of doubt the final orders in the Appeal are reviewed to read;

“44 The judgement of the lower Court is substituted with the orders of this Court as follows;

a. The Appellant shall refund the sum of Kshs 1,350,000/= together with 20% p.a interest to the Respondent from the time of filing suit until payment in full.

b. The costs of the Appeal shall be payable to the Respondent.”

20. I exercise my discretion and make no orders as to costs.

21. **It is so ordered.**

DATED, SIGNED & DELIVERED ONLINE THIS 28TH DAY OF JANUARY 2021.

J. G. KEMEI

JUDGE

Delivered online in the presence of:

Waiganjo Gichuki for the Appellant/Respondent

Omulama for the Respondent/Applicant

Court Assistant: Kuiyaki