



**Eastmore School Limited & another v Faulu Microfinance Bank Limited & another
(Environment & Land Case 86 of 2019) [2023] KEELC 20665 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20665 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 86 OF 2019
A OMBWAYO, J
OCTOBER 5, 2023**

BETWEEN

EASTMORE SCHOOL LIMITED 1ST PLAINTIFF

JOSHUA MUSEMBI NDOLO 2ND PLAINTIFF

AND

FAULU MICROFINANCE BANK LIMITED 1ST DEFENDANT

**JOSHUA GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS 2ND
DEFENDANT**

RULING

Introduction

1. Faulu Microfinance Bank Limited (hereinafter referred to as the 1st Defendant) filed the instant application dated 18th May, 2023 seeking orders that this Honourable court be pleased to review and or vary the court order issued on 17th April, 2023 as regards costs of the suit. That the costs of this application be provided for.
2. The Application was based on grounds set out and supported by the Affidavit of Ashley Kimathi sworn on 18th May, 2023. She stated that the matter was last in court on 28th January, 2021 and the Plaintiff never made any attempt to progress the matter. That upon the lapse of one year, the 1st Defendant filed an application seeking to dismiss the suit for want of prosecution. That on 17th April, 2023 the application was set for virtual hearing and she logged in and waited but the court session did not commence. She then made a follow up with the registry and was told that the court link on the cause list was erroneous as the court had already dealt with the matter.
3. That she was astonished to discover that the court had dismissed the Plaintiff's case with no orders as to costs. She added that the court ought to review the said orders as the same occasions great prejudice



to the 1st Defendant as it has incurred substantial costs through its active participation in defending its case since 2019. She stated that the non-attendance by the 1st Defendant was not intentional and urged the court to provide justice to both parties by reviewing the said orders.

Response

4. The Plaintiffs herein filed their Replying Affidavit dated 20th June, 2023 through their advocate in opposition to the 1st Defendant's application.
5. He deposed that the matter had initially been fixed for hearing on 17th April, 2023. That the instructions from his clients were that there had been negotiations with the Defendant bank with a view to amicably resolve the dispute. That the Plaintiffs wished to withdraw the matter so that parties can engage on an out of court settlement.
6. He stated that they filed a Notice of Withdrawal of suit dated 11th April, 2023 and served the same upon the Defence counsel via email. He further stated that on the hearing date he attended court virtually and that the 1st Defendant's advocate Maina Onsare Advocates were listed as present. He stated that when the matter was called out the Defence counsel though logged in did not respond. That as a result the Plaintiff's application was allowed as prayed. He deposed that the said link has always been there and that any member of public or advocate could easily call the court assistance for any inquiry. He stated that the 1st Defendant's application for review is unmerited and ought to be dismissed with costs.
7. The 1st Defendant in response filed a supplementary affidavit dated 26th June, 2023. She deposed that the decision to withdraw the suit by the Plaintiff was as a result of the 1st Defendant's application which sought to dismiss the suit for want of prosecution. She added that the Plaintiff's assertion that the withdrawal was due to ongoing negotiations is false and unsubstantiated.
8. She deposed that they used the wrong link provided by the court thus when the matter was called out they were not present in court. She added that the 1st Defendant having been engaged in litigation for four years has the right to costs. She further stated that there was no evidence of actual negotiations and urged the court to apply the principle of equity in this matter by allowing the application.

Submissions

9. The 1st Defendant filed its submissions on 27th June, 2023 while the Plaintiffs filed their submissions on 13th July, 2023.
10. The Plaintiffs relied on Section 27 of the *Civil Procedure Act* and the case of *National Bank of Kenya Ltd Ndungu Njau* [1997] eKLR and submitted that the grant of costs is discretionary and cannot be challenged by way of an application for review but may form a ground for appeal. They submitted that the grounds relied upon in the application are not lawful grounds for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.
11. They submitted that the consequences of non attendance is governed under Order 12 rule 7 which specifically provides for an application for setting aside orders or judgment made ex parte as a result of non attendance. The Plaintiffs further submitted that in line with Order 45 Rule 1, the instant application does not meet the foregoing threshold for granting of review orders. They submitted that there has been delay of more than one month from the date of the impugned order and urged the court to find that the 1st Defendant came to court with unclean hands thereby not deserving of the court's indulgence. They also added that the said application is an afterthought.



12. The Plaintiffs submitted that the instant application for review is an appeal in disguise as the 1st Defendant is challenging the factual merits of withdrawal of the suit and order on costs. They relied on Order 25 rule 3 of the *Civil Procedure Rules* and submitted that the 1st Defendants had the right to apply I writing to the Registrar for judgment on costs upon such withdrawal of suit but no such request has been made.
13. In conclusion, the Plaintiffs submitted that the instant application is incompetent with no merit and should be dismissed with costs.
14. This court noted that the 1st Defendant's submission as filed was rather incomplete.

Analysis and Determination

15. This court has looked into the application, replying and supplementary affidavit and submissions and is of the view that the main issue for determination is whether the 1st Defendant is entitled to the orders being sought.
16. Section 80 of the *Civil Procedure Act* Cap 21 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.”
17. Further, Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows: -
 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
18. The 1st Defendant contends that it would be in the interest of justice that this court reviews its orders of 17th April, 2023. The 1st Defendant argues that its non attendance arose from an apparent error on



the virtual court link provided on the day's cause list. It argues that it logged in during the said hearing date and waited but the session did not commence until when it inquired with the registry only to find that the matter had already been concluded.

19. The Plaintiffs on the other hand argue that the Defence counsel was present when matter was called out, he argues that though he was logged in, he did not respond. He added that the court link has always been there and that any party had the liberty to seek assistance if need be.
20. It is not in dispute that on 17th April, 2023 when the matter came up for hearing of the 1st Defendant's application for dismissal of the suit for want of prosecution, court record shows that the same was indeed heard virtually and only the Plaintiff was present. The court gave orders as prayed for by the Plaintiffs and clearly the 1st Defendant did not have an opportunity to address itself on the issue of costs.
21. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -
 - i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record."



22. In *Muyodi v Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal described an error apparent on the face of the record in the following terms:

...in *Nyamogo & 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 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...”

22. I am of the view that an error apparent on the face of record must be one that is obvious to the eye, and when looked at does not yield two results. It should easily show itself to an ordinary reader and not one looking for something hidden. This court finds that indeed the mistake is very clear that the 1st Defendant was not present in court when its application was being heard virtually. The court recorded that the 1st Defendant was not available while the Plaintiff was present through their advocate. The 1st Defendant has explained the mistake was due to the fact that he logged into the wrong court link thus it could not address the court and only realized later that the same had already been heard. It is this court’s view that the allegation by the Plaintiff that the 1st Defendant was present and had logged in but did not address the court is rather misplaced since the court record for 17th April, 2023 out rightly indicates that the 1st Defendant was not present.
23. I therefore find that this was a mistake that warrants review of the orders made by this court on 17th April, 2023.
24. It is not in dispute that the Plaintiff filed a Notice of Withdrawal of the suit. It is also not in dispute that the 1st Defendant had filed an application to have the suit dismissed for want of prosecution and the same was heard virtually without the presence of the 1st Defendant.
25. Order 25 of the *Civil Procedure Rules*, 2010 provides the consequences of withdrawal of a suit. Rule 3 thereof provides:
- Upon request in writing by any defendant the registrar shall sign judgment for the costs of a suit which has been wholly discontinued, and any defendant may apply at the hearing for the costs of any part of the claim against him which has been withdrawn.”
26. In view of the foregoing, I find that the 1st Defendant has established that it was not aware of the correct court link and neither did it participate in the said hearing. In the upshot, having found that the 1st Defendant has satisfied this court that the same was an error apparent on the face of the record and having found that adverse orders were made against it in its absence, I proceed to allow the 1st Defendant’s application dated 18th May, 2023 and do award costs of the withdrawn suit to the 1st defendant. Costs of this application to the 1st defendant.

RULING DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF OCTOBER 2023

A.O. OMBWAYO



JUDGE

