



**Jomo Kenyatta University of Agriculture and Technology v Kwanza Estate Limited
(Environment & Land Case E19 of 2020) [2022] KEELC 12807 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 12807 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E19 OF 2020
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND
TECHNOLOGY PLAINTIFF**

AND

KWANZA ESTATE LIMITED DEFENDANT

RULING

1. This is a ruling with respect to the defendant's amended Notice of Motion application dated June 16, 2022. It has been brought under Sections 1A, 1B, 3A, 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules 2010](#) which seeks the following orders;
 - a. Spent
 - b. That this honorable court be pleased to review its judgement delivered on April 27, 2022 on account of some mistake or error apparent on the face of the record and give effect to clause 3.3(b) of the lease which provides that 'the rent stipulated hereinabove are subject to and exclusive of Value Added Tax and the Lessee shall at all times pay Value Added Tax and other Taxes' and order that the sum of Kshs 71,965,138.70/= being rent for the period February 1, 2021 to April 30, 2022 is subject to and exclusive of Value Added Tax of Kshs 11,514,422.20 being Value Added Tax at the current rate of 16%.
 - c. That this honorable court be pleased to review its judgement delivered on April 27, 2022 on account of some other sufficient reason and order that the plaintiff is liable for payment of mesne profits at the rate of Kshs 5,328,188.10 per month exclusive of VAT from May 1, 2022 until the premises are handed over to the defendant.
 - d. That the costs of the application be provided for.



2. The application is supported by the grounds on the face of the application and the affidavit sworn by Geoffrey Makana Asanyo. He deposed that he is the managing director of the defendant company and had the authority of the board of directors of the company to swear the affidavit on behalf of the defendant; that on May 1, 2010, the plaintiff and the defendant entered into a lease agreement in which the defendant agreed to lease to the plaintiff the parcel of land known as Nakuru Municipality Block 9/90 and the building thereon for a period of over six years expiring on April 30, 2016; that upon expiry of the said lease agreement, the plaintiff and the defendant entered into another lease agreement for the suit property for a period of six years on May 1, 2016 to April 30, 2022; that the lease provided for the payment of rent with clause 3.3(b) of the lease providing that the rent stipulated hereinabove is subject to and exclusive of Value Added Tax and the Lessee shall at all times pay Value Added Tax and other taxes; that the court delivered its judgement on April 27, 2022 and failed to consider the said clause; that the plaintiff as the lessee has always paid value added tax on all rents paid; that it is only fair that the court reviews the judgement on account of some mistake or error on the face of the record to give effect to clause 3.3(b) of the lease; that the defendant stands to suffer loss of Kshs 11,514,422.20 if the judgement is not reviewed; that the plaintiff has not exited the premises as it has left some of its items in it; that since the premises have not been handed over, the defendant has not been able to restore the premises to its original state for purposes of renting them out; that hence the plaintiff is liable for mesne profits at the rate of Kshs 5,328,188.10 per month exclusive of VAT from May 1, 2022 until the premises are handed over to the defendant and that he stands to suffer loss in the tune of Kshs 11,514,422.20 being VAT if the orders sought are not granted.
3. In response to the application, the plaintiff filed a replying affidavit sworn by Richard Wokabi Kariuki its legal officer who deposed that upon the delivery of the court's judgement on April 27, 2022, the plaintiff filed its Notice of Appeal with the intention of appealing the court's judgement; that the Lease agreement formed part of the proceedings together with the provisions of Clause No 3.3 (b) and the court addressed all the issues raised by the defendant during the hearing of the main suit; that the court having addressed all the issues raised pertaining to the lease agreement, there is no error apparent on the face of the record as alleged and the court relied on the pleadings in making the judgement; that he is advised by the advocates on record that parties are bound by their pleadings and cannot expect the court to grant that which has not been pleaded; that the application is res judicata as provided for Section 7 of the *Civil Procedure Act*; that the issue of Value Added Tax ought to have been raised and addressed by the defendant and cannot therefore be raised in an application for review of the said judgement; that the issues raised by the defendant ought to be raised at the Court of Appeal; that he has been advised by the plaintiff's advocates on record that the defendant's application for review does not meet the threshold for granting the prayers sought as there is no error apparent on the face of the judgement as alleged and further that the application for review and the request for mesne profits through an application is an apparent abuse of the court process and the said application ought to be dismissed.
4. In response to the plaintiff's replying affidavit, the defendant filed a supplementary affidavit sworn by Geoffrey Makana Asanyo its managing director where he deposed that the defendant always invoiced the plaintiff as per the terms of the lease and included 16% VAT; that the sum of Kshs 97,817, 231/= sought in the counterclaim as rent included VAT; that when the court awarded Kshs 71,965,138.70, it did not factor the issue of VAT which had been claimed in the amount sought in the counterclaim; that if the court does not review its judgement and order that the amount of Kshs 71,965,138.70 is exclusive of VAT then the defendant will lose a sum of Kshs 11,514,422.20 /= which is a substantial amount of money; that the amount claimed in the counterclaim included VAT and the court made an error in not factoring the VAT on the amount that it awarded as rent which error it seeks the court to address by way of review; that even though the plaintiff insisted that the plaintiff exited the premises



- on January 31, 2021, the correct position is that the plaintiff exited the premises on July 6, 2022 and therefore the claim of mesne profits is justified given the unique circumstances of this case; that the court is neither functus officio nor the issues raised res judicata as alleged by the plaintiff and that the defendant has made a proper case for grant of the orders sought.
5. The defendant filed its submissions dated August 22, 2022 on the same date while the plaintiff filed its submissions dated July 19, 2022 on September 1, 2022.
 6. The defendant in its submissions gave a summary of the application, the response thereto and its supplementary affidavit and identified the following issues for determination; whether judgement delivered on April 27, 2022 should be reviewed on account of some mistake or error apparent on the face of the record and order that the sum of Kshs 71,965,138.70 being rent for the period February 1, 2021 to April 30, 2022 is subject to and exclusive of Value Added Tax of Kshs 11,514,422.20 being Value Added Tax at the current rate of 16%, whether this honorable court should review its judgement delivered on April 27, 2022 on account of some other sufficient reason and order that the plaintiff is liable for payment of mesne profits at the rate of Kshs 5,328,188.10 per month exclusive of VAT from May 1, 2022 until the July 6, 2022 when the plaintiff vacated the suit premises and on who should bear the cost of this application.
 7. It first submitted on whether the court is functus officio and relied on the case of *Leisure Lodges Limited v Japhet S Asige & another [2018]*. It was submitted that a court does not become functus officio at the point judgement is delivered but when it has discharged all its duties. On whether the issues raised by the defendant are res judicata, the defendant submitted that its application is for review and is seeking rectification of an error apparent on the face of the record and a matter which is related to the interpretation of the lease between the parties and the doctrine of res judicata is not applicable in the circumstances of this application. The defendant relied on the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)* in support of its arguments.
 8. On the first issue, the defendant relied on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and submitted that the main complaint is that the court awarded it rent for Kshs 71,965,138.70 but failed to apply 16% VAT; that the plaintiff argued that the issue of VAT was not pleaded and therefore could not be awarded but it has on the other hand demonstrated that the amounts claimed in its counterclaim included VAT. The defendant relied on the case of *Nyamogo and Nyamogo v Kogo [2001] 1 EA 173* and submitted that the failure to include VAT in the sums awarded is an error apparent on the face of the record.
 9. On the second issue, the defendant submitted that the plaintiff vacated the suit property on July 6, 2022 and relied on clause 5.27 of the lease and the case of *Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR*. The defendant further submitted as a result it is entitled to mesne profits for the two months the plaintiff was in occupation. The defendant then sought that the court allows its application with costs.
 10. The plaintiff in its submissions identified the following issues for determination; whether the applicant has proved a mistake and/or error apparent on the face of the record as a ground for review as provided for in law, whether the matter is res judicata, whether parties are bound by their pleadings, whether the court can grant prayer 3 of the amended application in an application for review under Order 45 of the Civil Procedure Rules, whether the defendant/respondent stands to suffer loss and whether the application is merited.
 11. On whether the applicant has proved a mistake and/or error apparent on the face of the record as a ground for review as provided for in law, the plaintiff relied on Order 45 Rule 1 and 2 of the Civil



Procedure Rules and submitted that it has already filed its Notice of Appeal and its record of appeal and therefore the defendant has an opportunity to cross-appeal the matter if it wishes and the issues raised be canvassed in the appeal.

12. The plaintiff further relied on Order 45 Rule 3(2) of the Civil Procedure Rules and the case of *Republic v Medical Practitioners & Dentists Board & another* (citation not given) and submitted that the matters being pleaded by the defendant are of new evidence rather than one of an error made by the court.
13. On whether the matter is res judicata, the plaintiff relied on Section 7 of the *Civil Procedure Act* and submitted that the defendant alleges that the court failed to consider a certain clause in the lease agreement and sought for review of the judgement on the ground of an error apparent on the face of the record but that this argument was not brought up by the defendant in its pleadings and that the court is considered as functus officio once it has delivered its decision, it cannot hear an issue raised after delivery of its judgement. The plaintiff relied on the case of *Njangu vs Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported) among other cases.
14. On whether parties are bound by their pleadings, the plaintiff relied on the case of *Patrick Muiru Kamunguna v Kaylift Services Ltd & another [2021] eKLR* among other cases and submitted that the defendant pleaded specific issues and as such the court should not at this juncture interrogate issues falling out side its pleadings.
15. On whether the court can grant prayer 3 of the amended application in an application for review under Order 45, the plaintiff submitted that the defendant is raising the issue of mesne profits which issue was not raised during the hearing of the suit. The plaintiff relied on the cases of *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR*, *Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR* and *John Gilbert Ouma vs Kenya Ferry Services Limited [2021] eKLR*. The plaintiff concluded its submissions by praying that the application be dismissed with costs.

Analysis and Determination

16. After considering the application, the affidavits and submissions, the only issue that arise for determination is whether the court should review its judgement and order that the sum of Kshs 71,965,138.70 being rent for the period February 1, 2021 to April 30, 2022 is subject to Value Added Tax at the current rate of 16% and also order that the plaintiff is liable for payment of mesne profits at the rate of Kshs 5,328,188.10 per month exclusive of VAT from May 1, 2022 until the premises are handed over the defendant.
17. Section 80 of the *Civil Procedure 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.'
18. Order 45 Rule 1 of the Civil Procedure Rules 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.
- (2) A party who is not appealing from a decree or order may apply for 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.'
19. The Court in the case of [*Republic v Public Procurement Administrative Review Board & 2 others \[2018\] eKLR*](#) held as follows:
- ' Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.'
20. The court in the case of *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* considered various authorities and set out the following principles:
- 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.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
21. The defendant in this matter is seeking that the judgment delivered on April 27, 2022 be reviewed on account of some mistake or error apparent on the face of the record and give effect to clause 3.3 (b) of the lease and order that the sum of Kshs 71, 965,138.70 being rent for the period February 1, 2021 to April 30, 2022 is subject to Value Added Tax of Kshs 11,514,422.20 being Value Added Tax at the current rate of 16%. The defendant is also seeking that the court reviews its judgement and orders that the plaintiff is liable to pay mesne profits at the rate of Kshs 5, 328,188.10 per month exclusive of VAT from May 1, 2022 until the premises is handed over to the defendant.
22. The plaintiff on the other hand states that the court dealt with all the issues raised by the defendant during the hearing of the main suit and was guided by the defendant's counterclaim which did not raise the issue of VAT on rent. The plaintiff further stated that the defendant is raising new issues which were not part of its pleadings and further that there is no error apparent on the face of the judgement as alleged and the application for review is therefore an abuse of the court process.
23. As was held in the case of Republic v Public Procurement Administrative Review Board & 2 others (supra), the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the decree was issued, on account of mistake or error apparent on the face of the record and any other sufficient reason.
24. Order 45 Rule 1 of the Civil Procedure Rules also provides for the circumstances under which a judgement can be reviewed. I am in agreement with the plaintiff's counsel that the reasons given by the defendant in support of their application does not fall within any of the circumstances provided for under Order 45 Rule 1.
25. A perusal of the defendant's statement of defence and counterclaim indicates that the issue of Value Added Tax was not pleaded and neither was the issue of mesne profits raised. As pointed out before, the said issues do not fall within the circumstances provided for under Order 45 Rule 1 of the Civil Procedure Rules.
26. In conclusion therefore, the defendant's amended application dated June 16, 2022 lacks merit and it is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

