Wachira v Sapit, Archbishop of the Anglican Church of Kenya & 2 others; Kagunda (Interested Party) (Civil Suit E017 of 2024) [2025] KEHC 2212 (KLR) (13 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2212 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E017 OF 2024

DKN MAGARE, J

FEBRUARY 13, 2025

BETWEEN

EVANSON MUGWIMI WACHIRA .... PLAINTIFF

AND

THE MOST REV DR JACKSON OLE SAPIT, ARCHBISHOP OF THE ANGLICAN CHURCH OF KENYA .... 1ST DEFENDANT

THE CHANCELLOR, ANGLICAN CHURCH OF KENYA DIOCESE OF MT. KENYA WEST .... 2ND DEFENDANT

THE ADMINISTRATIVE SECRETARY, THE STANDING COMMITTEE OF SYNOD, ANGLICAN CHURCH OF KENYA DIOCESE OF MT KENYA WEST .... 3RD DEFENDANT

AND

RT REVEREND JOSEPH MWANGI KAGUNDA .... INTERESTED PARTY

RULING

1. This is a ruling on an application dated 23.12.2023 and filed by the Plaintiff seeking reliefs as follows:
    a. Spent
    b. This Honourable Court be pleased to review its decision made on 20.12.2024 striking out this suit and the same be reinstated for hearing on merit.
    c. That the Plaintiff's Notice of Motion dated 9.12.2024 be determined on urgent basis and interim orders injuncting the ongoing elections be maintained.
2. The application is brought under the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* and is materially based on the grounds thus:

i. The striking out of the suit was in error as the suit in Nyeri HCCC No. E001 of 2024 was instituted by one Pharis Muriithi Mwangi and not the Plaintiff and so the causes of action were different.

ii. The issue of the validity of the synod was not addressed in Nyeri HCCC No. E001 of 2024.

iii. There was an error on the face of the record when the Court found that the Plaintiff should have appealed against the consent order recorded in Nyeri HCCC No. E001 of 2024.

3. The 1st Defendant filed a Replying Affidavit sworn on 25.1.2025 by one Tom Julius Onyango. He opposed the application and reiterated that there was no error apparent on the face of the record. He stated that the finding of the court in striking out the suit was correct.

4. The 2nd and 3rd Defendants also opposed the application under protest. They filed a Replying Affidavit dated 16.1.2025 and sworn by Wachira Nderitu. It was their general deposition that there was no error apparent on the face of the decision that was being challenged.

5. The Applicant filed submissions. It was submitted that this is a proper application for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

6. It was also submitted that the Plaintiff herein had no legal capacity to appeal in Nyeri HCCC No. E001 of 2024 as he was not a party.

7. It was also submitted that the orders in Nyeri HCCC No. E001 of 2024 were orders in personam and not in rem. Reliance was placed on *Nzila Mwangi v Safari Lodges & Hotels Ltd* (2008) eKLR.

8. The 1st Defendant filed submissions dated 30.1.2025. They contended that no error was apparent on the face of the record. Reliance was placed on the case of *Ribiru vs Mwaniki & 2 Others* (2024) eKLR.

9. The 2nd and 3rd Defendants filed submissions dated 16.1.2025. It was submitted that there was no error apparent on the face of the record within the meaning of Order 45 of the *Civil Procedure Rules*.

Analysis

10. The issue for my determination is whether the Applicant has met the legal threshold for an order of review on account of the error apparent on the face of the record.

11. The Jurisdiction of this Court to grant review is well set out in the law. Section 80 of the *Civil Procedure Act* states that:

" 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".

Section 63(e) of the *Civil Procedure Act* states that:

"In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.

12. The said section is amplified under Order 45 of the *Civil Procedure Rules*, which provides for Review 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 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"

13. The issue of review was succinctly addressed by Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 where he posited as follows:

> "The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

14. The grounds for review are said to be an error on the face of the record when the Court found that the Plaintiff should have appealed against the consent order recorded in Nyeri HCCC No. E001 of 2024. I do not think this raises an error that can be reviewed within the meaning of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The position is that the underlying cause of

action in the suit that was struck out and Nyeri HCCC No. E001 of 2024 is the same. That position has not changed. The review will, therefore, not serve to give effect to this court's intention when making the decision. It was given a completely different intention. The Court of Appeal in *Mahinda vs. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

> "The Court has, however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made, for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgment or decision was delivered or made."

15. The question of rem was succinctly addressed in the case of *Abukar G Mohamed v Independent Electoral and Boundaries Commission* [2017] eKLR as follows:

    8. Therefore the mere fact that the applicant was neither a party to the petition nor a party on whose behalf the petition was instituted does not deprive it of the benefit of the said order as long as the same was a decision in rem. I further associate myself with the decision in *George William Kateregga vs. Commissioner for Land Registration & Others* Kampala High Court Misc. Appl. No. 347 of 2013 in which the Court while citing the South African case of *Nicholas Francois Marteemns & Others vs. South African National Parks*, Case No. 0117, expressed itself as follows:

    > "Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement in rem. A judgement in rem invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement in personam which only imposes personal liability on the defendant."

    9. Similarly in *Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd* [2008] eKLR it was held:

    > "It is trite law that ordinarily a judgement binds only the parties to it. This is known as Judgement in personam. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement in rem. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the jural relation of the person or thing to the world generally."

    10. I am also alive to the decision in *Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division)* [2006] UKPC 51 in which reliance was sought from *Jowitt's Dictionary of English Law* (2nd Edn.) p. 1025-6 to the effect that:

    > "A judgement in rem is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement in rem."

16. Therefore, the question whether this was a decision in rem or in personam is a question of law. Other than a question of substantive law, an error that has to be searched cannot be an error on the face of the record. In the case of *Multipurpose Co-operative Society Ltd v Server & 3 others* (Civil Appeal 160 of 2018) [2023] KECA 441 (KLR) (14 April 2023) (Judgment), the Court of Appeal (F. Sichale, F.A. Ochieng & W.K. Korir, JJA) stated as follows:

> " It is not in dispute that the ground that the appellant relies on to implore us to allow this appeal is that there was an error apparent on the face of the record where the impugned ruling was concerned. What then constitutes an error apparent on the face of the record? In *Nyamogo & Nyamogo v Kogo* (supra), this Court addressed that question as follows: "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 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."

43. Sir Dinshah Fardunj Mulla in Mulla, The Code of Civil Procedure, 18th Edition at page 3665 had this to say: "An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review……error contemplated under the rule must be such which is apparent on the face of the record and not an error which has to be fished out and searched. It must be an error of inadvertence. The scope of the power of review as envisaged under 0 47, r 1, Code of Civil Procedure (India's equivalent of our Order 45 of the Rules) is very limited and the review must be confined strictly only to the errors apparent on the face of the record. A re-appraisal of the evidence on the record for finding out the error would amount to an exercise of appellate jurisdiction, which is not permissible by the statute. …

17. The arguments by the Applicant are real that the court was wrong in its findings. The very reasons the court gave are the ones they believe otherwise. Such are not errors on the face of the court but errors of law and, in fact, which are amenable to appeal. In the circumstances, I do not find that there is any error apparent on the face of the record.

18. Therefore, I do not find any error apparent on the face of the record in so far as the order to strike out the suit. The order remains valid. The application fails and must be dismissed.

19. The only question is who is to bear costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(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.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

20. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

Determination

21. The upshot of the foregoing is that I make the following orders:-

a. The Notice of Motion dated 23.12.2024 lacks merit and is dismissed.

b. The Defendants are entitled to costs of Kshs. 15,000/= to each one of them to be taxed by the Honourable Deputy Registrar.

c. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 13TH DAY OF FEBRUARY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Jengo for the Plaintiff/Applicant

Mr. Nderitu for the 2nd & 3rd Defendants/Respondents

No appearance for the 1st Defendant/Respondent

Court Assistant – Mike Muriuki