Mbaya v Evans & 3 others (Civil Appeal E060 of 2022)
[2025] KEHC 5802 (KLR) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL E060 OF 2022

REA OUGO, J

APRIL 24, 2025

BETWEEN

NAFTALY MBAYA .... APPELLANT

AND

LIVINGSTONE KAARA EVANS .... 1ST RESPONDENT

ERIC ORAO OTIENO .... 2ND RESPONDENT

STEPHEN NGASE AVOLA .... 3RD RESPONDENT

GALILEO INVESTMENT LIMITED .... 4TH RESPONDENT

(An Appeal from the Ruling of Hon. A.N. Makau (PM)
delivered on the 14th January 2022 in CMCC No. 5492 of 2014)

JUDGMENT

1. The appellant, vide a Memorandum of Appeal dated 11 February 2022, is challenging the Ruling dated 14 January 2022 in CMCC No. 5492, in which the trial court dismissed an application for review of an order.

2. A brief background of this matter is that the appellant filed suit against the 1st, 2nd, 3rd and 4th respondents. Interlocutory judgment was entered against the 1st, 2nd and 3rd respondents. The 4th respondent filed a defence on the 15th October 2015 and the appellant filed a reply to the 4th defendants defence on the 19th November 2015. At the formal proof hearing the trial court noted that the 4th respondent had not been served with the hearing notice. The appellant was ordered to serve the 4th defendant with the hearing notice. At the next hearing, the respondent testified and was granted an adjournment to call his witnesses. The matter was adjourned on various dates and on the 6th July 2021 the appellant testified. The appellant's application for an adjournment to call 2 witnesses the doctor and a police officer was declined and the appellant closed his case. The 4th defendant's witness testified

and closed their case. The trial court gave timelines on submissions at the close of the 4th defendant's case. On the 24th August 2021, the respondent filed an application seeking a review of the court order. The trial court heard the application and vide a ruling dated 14th January 2022 the application was dismissed the application with costs to the 4th respondent. The said Ruling is the subject of this appeal.

3. Parties canvassed the appeal by way of written submissions.

4. The appellant's Memorandum of Appeal has the following grounds of appeal:

   i. The Learned Magistrate erred in law and fact by not acting judiciously and failing to provide reasons for her decision.

   ii. The Learned Magistrate erred in law and fact to appreciate that on the 14th January 2020 the plaintiff's bundle of documents had already been admitted as evidence and marked plaintiff exhibit 1-10.

   iii. The Learned Magistrate erred in law and fact in failing to find that the Order of 14th January 2020 admitting the plaintiff's documents has never set aside.

   iv. The Learned Magistrate erred in law and fact for failing to find that there was an error on the face of the record to warrant an Order of review.

   v. The Learned Magistrate erred in law and fact by refusing to set aside the proceedings.

5. The appellant seeks the following; the Ruling and/or Order of 14th January 2022 be set aside, the appeal be allowed, the proceedings of 24th May 2021 be set aside and be heard by any other Magistrate other than the Hon. Agnes N. Makau and that the Respondents do pay the Appellant's costs of this Appeal.

6. The appellant submits as follows; the issues for determination are; what is the role of the Honourable Court given this is a first appeal and whether the appellant had met the threshold required for the grant of orders of review in the application. On the first issue, it was submitted that this Court must re-evaluate the evidence and make its own decision (see Evans Mudoga Matebwa vs Peter Asingira Ondiri [2021] eKLR). It was submitted that this court is required to re-evaluate the appellant's application its supporting documents and the respondents response, their written submissions and the impugned proceedings and Ruling. On the 2nd issue, it was submitted that the application for review is anchored on section 80 of the Act and Order 45 of the Civil Procedure Rules which sets out the specific grounds for an application of review. It was submitted that the appellant relied on the ground that there was an error on the face of the record. It was submitted that it is not in dispute that on the 14th January 2020 the appellant testified and produced a bundle of documents. These proceedings were not set aside to pave the way for the 4th respondent's advocate to object to the production of the appellant's bundle of documents and therefore by allowing the 4th respondent's objection on the 24th May 2021 in essence barred the appellant from relying on previously admitted documents, the learned magistrate issued conflicting orders which amount to an error on the face of the record. Reliance was made in the case of Muyodi vs Industrial and Commercial Development Corpoartion & Another[2006] 1EA where the Court of Appeal when faced with the same question held as follows:

> " In Nyamogo & Nyamogo -vs- 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 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. This laid down principle of law is indeed applicable in the matter before us."

7. The appellant also relied on the case of National Bank of Kenya Limited vs Ndungu Njau [1997] eKLR, where the Court of Appeal held that " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court". It was submitted that the trial court having admitted the appellant's bundle of documents as exhibits on the 14th January 2020 could not sustain the objection by the 4th respondent without first setting aside the proceedings. Further, there is no clarity as to whether or not the said bundle of documents was admitted into evidence. The 4th respondent will not be prejudiced if the Ruling and proceedings of 24th May 2021 are set aside. On inordinate delay it was submitted that on the 24th May 2021, the 4th respondent objected to the applicant's producing his bundle of documents and the application was filed on the 24th August 2021, hence there was no inordinate delay. Reliance was made on the case of the court observed that "there is no set rule as to what constitutes inordinate delay. Whether or not a party is guilty of inordinate delay depends on the circumstances of the case".

8. The 4th respondent submitted that the issue for determination is whether the appellant satisfied the grounds for review and or setting aside the proceedings and consequential orders. It was submitted that the appellant admitted having testified twice and therefore he was estopped from seeking a review having admitted that he testified twice before the trial court. The appellant is on a fishing expedition and is trying to cure holes poked in his case after the case was heard on merit. It was further submitted that the learned magistrate did not err in declining the appellant's application as the appellant sought to have admitted documents he did not make. Reliance was made in the case of Lwanga vs Ndote (ELC no 79 of 2010 [2021]eKLR and Section 35 of the *Evidence Act* cap 80 on the admissibility of documents.

Analysis and Determination

9. I have considered the lower court proceedings, the rival written submissions filed by the parties, and in my view, the issues for determination are;

    a. Whether the appellant satisfied the grounds for grant of a review in his application before the trial court

    b. Whether or not the trial court erred in dismissing the application.

10. This being the first appeal, this court has to subject the whole of the evidence to a fresh and exhaustive scrutiny and make an appropriate conclusion (see Selle v Associated Motor Boat Company Ltd [1968] EA 123).

11. This appeal is against the Ruling in respect of the application dated 24th August 2021 that was filed by the appellant seeking a review and or setting aside of the proceedings of 24th May 2021 and all consequential proceedings and orders arsing therefrom. The application was supported by grounds on the face of the application and the affidavit of the appellant dated the 24th August 2021. The application was opposed. The 4th respondent filed grounds of opposition stating the following; the application had failed to establish the essential requirements for granting the orders sought, the appellant did not have a good and sufficient cause for not filing the application in good time. The unreasonable delay of almost 2 years is ordinate and the appellant has not satisfactorily explained the same, the appellant has

not established how he will suffer substantial loss and damage unless the sought orders are granted, the appellant is not worthy of the court's discretion to grant the orders sought because there was no basis for application made other than ere allegations not proved and that application amounts to a fishing expedition in a desperate attempt to try and cure holes poked in the appellant's case after hearing where both parties were present testified and proceeded to close their case.

12. In a Ruling dated 14th January 2022 the trial court considered the application for review and or setting aside of all consequential proceedings and the orders arising from thereon. The learned magistrate noted that the appellant had sought a review of the court order on the ground that there was an error apparent on the face of the record. The learned magistrate made the following decision;

> " I have gone through the proceedings of the court and the entire record of proceedings. It is my finding that on the 14th January 2020 when the appellant testified and he produced all his documents (P Exhibits 1-10) he was then stood down when the court noted that the 4th respondent had entered appearance and there was no evidence that he had been notified of the hearing date. The days proceedings were stayed by the court she requested to allow after service of a hearing notice to the 4th defendant. The matter was given a further hearing date of 12th February 2020. The matter did not proceed then since the 4th respondent had not filed its documents. It was adjourned again on 4 other occasions until 24/5/2021 when the court took the evidence of the plaintiff. It was during his testimony in cross examination that he stated not to have attached evidence of payment for his medication after being assaulted.
>
> The plaintiff was re-examined. His advocates made an application for adjournment and a police officer (witness). They were indulged and the matter given a further date of 6/7/2021. The plaintiff witnesses never showed up and the counsel was forced to close the plaintiff's case.
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> The 4th defendant's witness (manager of the 4th defendant) thereafter testified and was cross-examined, the defence closed its case.
>
> Parties advocates agreed to file written submissions and were given up 25/8/2021. The plaintiff filed this application arguing there was an error apparent on the face of the record in that the plaintiff's document had earlier been produced.
>
> Having summarised the chronology of events/ proceedings of the matter especially in reference to what transpired on the 24th day of May 2019, it is my finding that the same was stayed by the court upon establishing the 4th defendant had not been notified of the hearing date.
>
> The said proceedings are not part of the evidence/ testimony of the appellant the court should be considering in the judgment after they were stayed.
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> Considering how the appellant had conducted himself in prosecuting the case, I find delay tactics had been ... applied and the same has caused unnecessary delay in disposing of the matter
>
> Having said as much, I find the application lacks merit and it is therefore dismissed with costs to the defendant. Parties to file their written submissions within 14 days".

13. The trial court did give reasons for not allowing the application. The learned magistrate stated that after considering the chronology of the events of 24.5.2021 the proceedings were stayed having noted that the 4th respondent was not notified of the hearing date. The learned magistrate further stated that

the stayed proceedings were not part of the evidence the court would be considering in the judgment and that the appellant had caused unnecessary delays in the matter.

14. Did the learned magistrate err in failing to appreciate that the plaintiff's bundle of documents had been produced on the 14th January 2020. The court stated that the said proceedings were not part of the proceedings to be considered whilst writing the judgment.

15. The appellant in an affidavit in support of the application avers that he testified on 14.1.2020 and his bundle of documents were admitted as exhibits and that the trial court erred on 24.5.2021 in allowing the objection to the production of his document. He claims that the court should have set aside the court of 14.1.2020 nor did the court direct that the matter starts afresh. That the objection raised to the admission of his documents should not have been allowed and that it is clear that there was an error on the face of the record which requires this court's intervention. The 4th respondent argues that the appellant testified twice and that the appellant is trying to cure his case after holes were poked into it and after the 4th defendant objected to the production of the documents.

16. Section 80 of the *Civil Procedure Act* (Act) and Order 45 of the Civil Procedure Rules (Rules) governs review applications. Section 80 of the Act empowers a party to apply for a review order and Order 45 Rule 1 sets out the specific grounds for an application 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.

17. The ground for review from the said Rule is clear. The appellant claims that there was an error on the face of the record. His main reason is that the learned magistrate admitted his documents when he first testified and upheld the 4th respondent's objection at the 2nd hearing. The error as per the appellant is that the learned magistrate did not set aside the previous proceedings nor indicate that the hearing was to start afresh. In the case of case cited by the appellant Muyodi vs Industrial and Commercial Development Corporation & Another(supra), the appellant court held 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 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". (emphasis mine).

18. It is not in dispute that on 14.1.2020 the appellant produced his document and thereafter the court stayed the proceedings until the next hearing date. On the 24.5.2021 the appellant testified adopted his

two statements filed on the 16/9/2020 and further statement of 24/10/2019. He testified that he filed documents in support of his case on the 16/9/2014 an on the 15/10/2019 and produced as exhibit P. Exhibit 1 (document 3 of further list was to be produced by Dr. Modi) – P. Exhibit 1-4. An error on the face of the record must be self-evident. In this case the trial magistrate failed to give directions after staying the proceedings. The trial court ought to have given directions on the status of the proceedings of 14.1.2020. The Court was either to set aside the proceedings and start the matter afresh or adopt the proceedings of 14.1.2020 with further directions on cross-examination. A stay of proceedings is not the same as setting aside the proceedings. Further, it is not clear which exhibits were produced. Is it the list of documents filed with the appellant's first statement or the further statement of 24/10/2019? I find that the learned magistrate erred failing to give directions on the proceedings of 14.1.2020. The appellant was prejudiced in the manner in which the court proceeded with the further hearing. The learned magistrate erred in failing to give directions of the proceedings of 14.1.2020 which had allowed all the documents the appellant was relying on. There was an error on the face of the record which should have been reviewed. There was sufficient cause too to review the order.

19. On inordinate delay in filing the application. The proceedings the appellant sought to review were held on 24.5. 2021 and the application was filed in August 2021 about three months later. In his supporting affidavit, the appellant explained that the delay in applying was occasioned by administrative restrictions of the Chief Magistrate Court Registry against perusal of court proceedings by parties representatives. Though there was no letter attached to the said request I will give the appellant the benefit of the doubt, and believe his explanation.

20. In conclusion I find that there is merit in the appeal. The appellant met the threshold for granting orders of review as sought in the application. The appeal is allowed, and the Ruling of 14th January 2022 is set aside. The proceedings of 24.5.2021 are set aside and the matter with be heard by any other Magistrate other than Hon. Agnes N. Makau. The appellant is awarded the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF APRIL 2025.

R.E.OUGO

JUDGE

In the presence of:

Miss Duru -For the Appellant

Respondent - Absent

Wilkister C/ A