Sphikas v Advocates Disciplinary Tribunal of the Law Society of Kenya & 4 others (Judicial Review Application E068 of 2021) [2025] KEHC 8942 (KLR) (Judicial Review) (24 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E068 OF 2021

RE ABURILI, J

JUNE 24, 2025

BETWEEN

CONSTANTINE GEORGE SPHIKAS ..... APPLICANT

AND

ADVOCATES DISCIPLINARY TRIBUANAL OF THE LAW SOCIETY OF KENYA ..... 1ST RESPONDENT

ADVOCATES DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA ..... 2ND RESPONDENT

CHAIRMAN OF THE DISCIPLINARY COMMITTEE OF THE LAW SOCIETY OF KENYA ..... 3RD RESPONDENT

JOHN WAMITI NJAGI ..... 4TH RESPONDENT

GEORGE PETER OPONDO KALUMA ..... 5TH RESPONDENT

RULING

1. On 29th September, 2023, Justice Ngaah delivered judgment in this matter striking out the exparte applicant's application filed by way of Notice of motion dated 4th June, 2021. The reason for striking out the Notice of motion was that upon the applicant being granted leave to file the substantive notice of motion on 25th May 2021, which was a Monday, the Court directed that the substantive notice of motion be filed and served within seven days of the date of leave, among other directions on the disposal of the substantive motion.

2. In other words, the applicant upon being granted leave and being given timelines within which to file and serve the substantive notice of motion, the applicant went to slumber and filed the substantive

Notice of motion on the 10th day instead of filing within seven days granted by the court. The application ought to have been filed by 1st of June 2021 which was a Tuesday but because of the timelines and as the public holiday was not on a Monday or a Sunday, the applicant ought to have filed the motion by 2nd June, 2021 which was a Wednesday and the other directions complied with accordingly.

3. The learned Judge is striking out the substantive notice of motion cited Order 53 Rule 3(1) which provides that:

> When leave has been granted to apply for an order of mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of motion to the High Court, and there shall, unless the judge granting leave has otherwise directed, be at least eight clear days between the service of the notice of motion and the day named therein for the hearing.

4. The learned Judge also stated at page 2 of his judgment that if sfor any reason, the applicants could not file the application within the stipulated timeline, the could have applied for extension of time considering the 21 day window period prescribed by Rule 3(1) had not lapsed as at 11th June when the substantive notice of motion was filed but that they did not and instead just filed the application out of time.

5. The learned judge found that as the application was filed outside the expired timelines granted, the application was a nullity and hence, proceeded to strike it out with costs to the respondents and interested party.

6. Vide Notice of motion dated 2nd April 2024, the applicants have approached this court with an application seeking for a reconsideration of the judgment of Ngaah J delivered on 29th September, 2023 striking out the exparte applicant's substantive notice of motion for having been filed outside the timeline given in the leave granted on 25th may 2021.

7. The lengthy writeup by the applicants which are in the form of submissions with authorities and statutory and judicial pronouncements all speak the same thing being, that the court does set aside the said judgment because the striking out was mistaken and contrary to Order 53 Rule 3 of the Civil procedure Rules and the *Constitution* and *FAIR Administrative Action Act* and sections 8 and 9 of the *Law reform Act* and that the seven days period given was mistakenly ordered since there is excusable reasons for filing the Notice of motion dated 4th June 2021 on 11th June, 2021.

8. The applicants urge this court to render a new ruling on the substantive notice of motion and that the taxation of party and party bills of costs be stayed.

9. According to the applicants, they were unable to file the notice of motion in time because they were unable to secure the ruling of 25th May 2021 in time as the court registry was closed for fumigation due to covid-19 pandemic and that although the notice of motion was ready and dated 4th June, 2021, it was not until 11th June 2021 that it was filed.

10. Further, that in any event, Order 53 Rule 3(1) provides for 21 days within which to file the application and that the applicants saw no reason to apply for extension of time since they could still obtain copy of the ruling on leave to apply by 11th June, 2021.

11. The application for reconsideration of the judgment of 29th September, 2023 is supported by the affidavit sworn by Lenah Ajwang Advocate on 2nd April 2024 and restating the many submissions as grounds which I have summarized above.

12. The 4th Respondent opposed the application and filed a replying affidavit sworn on 17th May 2024. He deposes that the application is an afterthought intended to derail the taxation of his party and party bill of costs served on the applicants on 28th February 2024. That the application was also intended to derail the disciplinary proceedings before the tribunal. That the ruling of 25th May 2021 was published in the e-portal of the Judiciary the same day as shown by the electronic stamped copy hence the allegation that the ruling on leave could not be accessed due to fumigation cannot be true. That the applicant is guilty of laches and that the delay has not been explained to court. That the applicant having failed to appeal against the decision, has not demonstrated any new matter or error apparent on the face of the judgment and or sufficient reason to warrant a review of the judgment of the court.

13. The parties filed submissions to support their respective positions. The 4th respondent also highlighted submissions which I have considered.

14. The issue for determination is whether this court should review and set aside the judgment in issue.

15. The applicant cited so many provisions of the law and the *Constitution* in the body of the Notice of motion seeking to set aside the judgment. However, what I find relevant is whether the application is merited.

16. Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules provide for review of judgment or orders.

17. In this case, the applicant is seeking a setting aside of the judgment because the court was mistaken in striking out the substantive notice of motion yet the applicant had excusable reasons for filing it beyond the seven days granted in that he could not access the ruling in the registry which was closed for fumigation. Secondly, that Order 53 Rule 3 of the Civil Procedure Rules provide for 21 days for filing of the substantive notice of motion therefore since the 21 days were not over, the time for filing of the substantive motion had not lapsed and that therefore the court was mistaken in striking out the application.

18. What the applicant is telling the court is that it should have granted him 21 days and not 7 days. However, there is no application for enlargement of time from 7 days to the 21 days and the learned judge did indeed state so in his impugned judgment.

19. It is not contested that the last day of filing of the substantive motion was on 1st of June 2021 which was a Tuesday and therefore the applicant had until 2nd June 2021 to file the motion. Instead, he says that by 4th June, the application was ready but he did not see the need to apply for enlargement of time because the 21 days were not yet over.

20. There is no doubt that the ruling for leave was uploaded on the CTS on 25th May 2021 and therefore this court does not understand what the applicant was looking for in the registry which was closed during corona pandemic for fumigation.

21. Order 50 Rule 3 of the Civil Procedure Rules, 2010 provides that:

> Where the time for doing any act or taking any proceeding expires on a Sunday or other day on which the offices are closed, and by reason thereof, such act or proceeding cannot be done, or taken on that day, such act or proceeding shall so far as regards the time of doing or taking the same, be held to be duly done or taken if done or taken on the day on which the offices shall next be open.

22. In computing time, section 57 of the *Interpretation and General Provisions Act* provides that:

> In computing time for the purposes of a written law, unless the contrary intention appears-
>
> A period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;
>
> If the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;
>
> Where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;
>
> Where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

23. Order 50 Rule 5 gives this court power to extend time, it states as follows:

> "Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

24. The above provisions acknowledge that the court may fix a time for doing something such as filing of pleadings and where such time is fixed and it elapses, the court may, on application, enlarge such time. The court can enlarge time upon such terms as the justice of the case may require.

25. However, the applicant has not sought for enlargement of time fixed by the Court in granting leave. He claims that the judge was mistaken meaning, he erred in law in granting seven days instead of 21 days and that the question of enlargement does not arise and neither did he find it necessary to seek for such enlargement in view of the 21 days stipulated under Order 53(3) (1) of the Civil procedure Rules.

26. That being the case, can this court set aside or review judgment where it has made an error of law without the court finding itself on the offensive of sitting on appeal of its own judgment?

27. In my humble view, supported by sufficient judicial pronouncements and public policy, what the applicant should have done, was to appeal against such error of law allegedly made by the learned judge who is no longer in the Division and any attempt by this court to set aside that judgment amounts to sitting on appeal of a decision of a judge of concurrent jurisdiction.

28. In National Bank of Kenya Ltd. v. Ndungu Njau - Civil Appeal No.211 of 1996 (unreported) the Court of Appeal had the following to say on question of review:-

> "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. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be 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.

Misconstruing a statute or other provision of law cannot be a ground for review".

29. Order 45 of the Civil Procedure Rules provides for three circumstances under which an order for review can be made. To be successful, the applicant must demonstrate to the court that there has been 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. A party may successfully apply for review, secondly, if he can demonstrate to the court that there has been some mistake or error apparent on the face of the record. The third ground for review is worded broadly: an application for review can be made for any other sufficient reason.

30. In Muyodi v Industrial and Commercial Development Corporation & Another (2006) 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated 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 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."

31. In Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR, it was said:

> " ... 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. 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. Misconstruing a statute or other provision of law cannot be a ground for review."

32. The court further stated that:

> " 37. 37.The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal

on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.

38. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it."

33. From the above decisions, it is clear that the error the subject of the application for review ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long-drawn out 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. Further, the applicant waited until he was served with bills of costs for assessment then he filed the application for setting aside the judgment, after over six months, and with delay not explained. I further find no other reason upon which I can set aside judgment of the court, noting that the issues raised are pure points of law which could be canvassed on appeal.

34. In the end, I find the application by the applicant to be devoid of any merit and the same is hereby dismissed with costs to the 4th respondent assessed at Kshs 50,000.

35. I so order

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF JUNE, 2025

R.E. ABURILI

JUDGE