Trustees of Archdioceses of Kisumu v Samwel Owino Nyauke t/a Nyauke & Co. Advocates (Civil Miscellaneous 212 of 2018) [2025] KEHC 8795 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8795 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL MISCELLANEOUS 212 OF 2018

A MABEYA, J

JUNE 20, 2025

BETWEEN

THE TRUSTEES OF ARCHDIOCESES OF KISUMU .... APPLICANT

AND

SAMWEL OWINO NYAUKE T/A NYAUKE & CO. ADVOCATES .... RESPONDENT

RULING

1. This ruling is in respect to the application dated 5/3/2025. The applicant sought the review and setting aside of the orders made on the 7/2/2025 by this Court, Shariff J. It was brought under Articles 159 of the *Constitution*, Sections 1A & 1B, 63 (e) of the *Civil Procedure Act*, Orders 45 Rule 1, Order 9 Rule 9 &10 and Order 22 Rule 22 of the *Civil Procedure Rules*.

2. The applicant contended that there was an error apparent on the face of the record. The alleged error was that; first, the Court had held that the applicant had sneaked in an affidavit after the application had been filed and, secondly, the ruling set to be delivered on 13/2/2025 was on the preliminary objection dated 12/3/2024 but the Court determined the Motion dated 12/2/2024 on merit.

3. It was contended that the ruling was not ready on the designated date of 30/1/2025 and was set for delivery on 7/2/2025. That on the latter date, the Court stated in summary that the application was dismissed with costs of Kshs. 25,000/-. That as such, the applicant's advocates presumed that it was preliminary objection that had been dismissed. That although the applicant's advocates applied for a copy of the ruling on the same date, the same was only uploaded to the CTS on 26/2/2025 by which time the period for appeal had expired.

4. It was contended that although the Motion dated 12/2/2024 bore that date, it was actually filed on 19/2/2025 and was supported by an affidavit of Lucy Marucha of even date.

5. The application was opposed by the respondent vide Grounds of opposition dated 17/3/2025. The respondent contended that; the application was time barred within the meaning of the *Civil Procedure Rules*; that the application disclosed no new evidence and that the application cannot be granted without the leave of the Court to extend time for the time of filing the same.

6. The parties argued the application orally and their respective submissions are on record which this Court has carefully considered.

7. This is an application for review of a ruling of this Court made on 7/2/2025. Order 45 of the *Civil Procedure Rules* sets out the parameters for an application for review. These are that an applicant must demonstrate 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 or order made. Secondly, that there is some mistake or error apparent on the face of the record. And, thirdly, any other sufficient reason. In addition, such an application must be made timeously.

8. I propose to consider these parameters seriatim. In the present case, the order sought to be reviewed was made on 7/2/2025. The present application was made on 5/3/2025, 26 days later. Was this timeous?

9. The respondent contended that the applicant should have applied to file the Motion out of time. This Court observes that there are no timelines set within which an applicant should lodge an application for review. It therefore depends on the circumstances of each individual case.

10. In the present case, there was a period of 26 days between the date of the order and the date of the application. In the view of this Court, a period of 26 days cannot be said to be inordinate. This is so because, it is unlikely that a litigant in any proceeding would have so radically changed his/her position within such a period as to be effected by a review. In any event, there was evidence that although the applicant applied immediately for a copy of the ruling, it is not until 26/2/2025 that copies of the same were availed.

11. Accordingly, the Court finds that the application was made timeously.

12. The applicant brought the application on the basis that there was an error apparent on the face of the record. The error was allegedly two-fold. That the Court erroneously held that the application was not supported by any evidence as the Supporting affidavit of Lucy Marucha was filed subsequent to the filing of the Motion and that, the Court ruled on the Motion yet what was slated for ruling was the Preliminary Objection by the respondent dated 12/3/2024.

13. The respondent's contention was that there was no new evidence that had been produced to warrant a review. That the Court having found that the Preliminary Objection was successful it was entitled to deal with and dismiss the Motion as it did.

14. I should point out here that, the contention by the respondent was misplaced. The application before Court was not that there was new material to warrant a review, but that there was an error, (as I have set them out above) which warrant a review.

15. In *National Bank of Kenya Ltd v Ndungu Njau* Civil Appeal No. 211 of 1996 (UR) as quoted in the case of *Ribiru v Mwaniki & 2 others* (Civil Appeal 37 of 2023) [2024] KEHC 10417 (KLR) (23 August 2024) (Ruling), the Court of Appeal held: -

> "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."

16. Similarly, in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR, the court stated: -

> "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 provisions of law cannot be a ground for review.
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> ...
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> 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 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 purposes 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. 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."

17. The first alleged error was that the Court made a determination on the Motion which had not been argued. That the ruling should have been only on the Preliminary Objection dated 13/3/2024.

18. I have seen the record of the proceedings of 14/3/2024 before Shariff J. The directions given on that date was that, the parties were to file submissions on the Preliminary Objection. Indeed, the submissions that were filed were in respect of the Preliminary Objection and not the Motion dated 12/2/2024.

19. In paragraph 7 of the ruling, the Court observed: -

> "Vide Court directions given on 14/3/2024 the respondents/advocates preliminary objection was canvassed by way of written submissions. Both parties complied".

20. It is therefore clear from the foregoing that, what was argued before the Court was the respondent's Preliminary Objection. That Objection was only in respect of prayer no. 6 of the Motion. The Motion itself was never argued and it follows that, no order as to its merit could be made. It would have been for striking out.

21. However, at paragraph 18 of the ruling, the Court not only upheld the Objection, it also addressed the merits of the Motion and ended dismissing the same. Had the Court restricted itself to the Objection only, it would have only struck out the Motion and not dismissed it.

22. When a Court determines a proceeding on a technicality and does not consider the same on merit, such as when it upholds a preliminary point of law, the end result is either to dismiss the objection or uphold it. If it upholds the objection, the Court would strike out such pleading or proceeding. In such cases, the issues raised in such a pleading or proceeding are determined peremptorily and not on merit. There would be room to breath life into such a proceeding. Such a party is given an opportunity to return with a compliant pleading or proceeding.

23. However, once a matter is considered and determined on merit (or the merits of the issues raised are considered) the end result is either to dismiss it or allow it. Such a determination invites the application of the res-judicata rule in subsequent proceedings.

24. In the present case, the issues before the Court were to stay the execution of the decree dated 23/8/2023, set aside the ruling of the Court adopting the decree as the order of the Court and to refer the matter to the taxing officer for re-taxation.

25. I have carefully considered the entire record of the 4 Miscellaneous Application Nos. 209, 210, 211 and 212 of 2018. I did not see any application under Section 51(2) of the *Advocates Act* by which any Certificate of Costs was turned into a decree for execution. It is therefore unclear which decree was being executed yet the Deputy Registrar had set aside all the decrees which she found to have been unprocedurally and prematurely issued in these matters.

26. Further, the issue of client-advocate had been raised and determined by Kamau J in her ruling of 29/3/2023. That was the issue that was res-judicata which prayer no.6 of the Motion raised. The prayer to refer the matter for re-taxation had not been raised as the bills were only taxed on 24/4/2023 after the ruling of Kamau J of 29/3/2023.

27. Accordingly, in having dismissed the entire application without hearing the said issues on merit, the applicant was prejudiced. That was an error

28. The other alleged error alluded to is the observation that the Notice of Motion dated 12/2/2024 was not supported by any affidavit as the supporting affidavit of Lucy Marucha sworn on 19/2/2024 was filed subsequent to the Motion. The applicant relied on the CTS extracts to prove that contention.

29. I have considered the CTS that was produced. It shows that a Notice of Motion was lodged with the Court on 19/2/2024 and was actioned to the Deputy Registrar Hon. Barasah who gave directions on the same. There is no evidence that any supporting affidavit was filed subsequent thereto.

30. A look at the e-filing Court stamp that is embedded on the Notice of Motion dated 12/2/2024 and the supporting affidavit sworn on 19/2/2024 shows that, both were filed on 19/2/2024 at 12:45:25 hrs and a total fee of Kshs.2350.00 was paid for those documents. Accordingly, it was an error apparent on the face of the record to have held that the Motion was not supported by any evidence. That error led to the dismissal of the Motion.

31. It was argued by the respondent that since the Court upheld the Preliminary Objection, there was no prejudice suffered by the Motion being dismissed as the same was in any event incurably defective. That may be true as the Motion may not have been in accordance with the provisions Rule 11 of the *Advocates Remuneration Order*. However, by dismissing the Motion without a hearing, the applicant was denied an opportunity to take remedial measure or advantage of Rule 11(4) of that *Remuneration Order*.

32. In view of the foregoing, I find the application dated 5/3/2025 to be meritorious. I allow the same. I review that part of the order of 7/2/2025 dismissing the Motion and substitute therefor with an order striking out the Motion. I will not disturb the order for costs. Each party do bear own costs of the Motion. This order applies to all the series in this matter.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF JUNE, 2025.

A. MABEYA, FCI Arb

JUDGE