



REPUBLIC OF KENYA



**Mbindiyo v Mbindyo & 3 others (Civil Appeal E118 of 2021)
[2024] KEHC 107 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 107 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E118 OF 2021
FR OLEL, J
JANUARY 17, 2024**

BETWEEN

MILCAH KAMEME MBINDIYO APPLICANT

AND

BENJAMIN NDOLO MBINDYO 1ST RESPONDENT

YVONNE KOKI 2ND RESPONDENT

CHARLES STEPHEN MBINDYO 3RD RESPONDENT

MARY MUNYEKE 4TH RESPONDENT

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 9th May 2023 brought pursuant to provisions of Section 1A, 1B, 3A, 63(e) and 80 of the *civil procedure Act*, Order 22 rule 22, Order 45 Rule (1) and Order 51 rules 1,2,3, 4 & 10(2) of the *Civil Procedure Rules* and all other enabling provision of law. By the said application, the applicants seek for orders that;
 - a. That this application be certified urgent and it be heard Ex parte in the first instance.
 - b. That an order do issue staying execution of the Judgment delivered on 28.03.2023 by this court and all other consequential orders and/or decree therein pending the hearing and determination of this application.
 - c. That the court do review, vacate and/or set aside its decree given on 28th March 2023 and more specifically the limb assessing the costs of the appeal at Kshs150,000/= to each of the Respondents
 - d. That costs of the application be awarded to the applicant.



2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the applicant Milcah Kamene Mbindyo dated the even date. The applicant avers that this court erred in assessing costs for each respondent at Kshs 150,000/= as taxation/assessment of cost was the special jurisdiction of the registrar of the high court as provided for under Rule 10 of the Advocates Remuneration Order. Jurisdiction was conferred by legislation and could not be assumed and thus this court erred to assume a jurisdiction it did not have, while assessing costs payable. This was an error on the face of the record, which warranted granting of the orders as sought.
3. The Respondents did oppose this application vide, their Replying affidavit sworn by one Yvonne Koki dated 13th June 2023 and Philip M Mulwa advocate for the 1st respondent dated 12th June 2023. They both averred that the application as filed was frivolous, scandalous and a non-starter for the court had jurisdiction under Section 27 of the *civil procedure Act* to award costs and determine the extent of the costs to be paid. Rule 10 of the *Advocates Remuneration order* only referred to Bills, which are to be taxed by the deputy registrar of the High court. In this suit there was no bill of costs pending nor did the court tax any bill of costs. The court rightly assessed the extent of the costs to be paid to the counsels of the respondents herein.
4. The respondents further averred the application as filed was an appeal as against the decision of the court and did not meet the basic requirements of Order 45 Rule 1(1)(b) of the *Civil procedure Rules*. The only option available to the applicant was to thus file and appeal. The application was thus ripe for dismissal and should be dismissed.

B. Determination

5. I have carefully considered the Application, Supporting Affidavit, the Respondent's relying affidavit and both sets of submissions filed. The only issue for determination is whether this court should review its orders dated 28th March 2023 specifically the limb relating to assessment of each counsels' costs at Kshs 150,000/=.
6. On the first issue, Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows: -

Section 80. Review

“ 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.”

[Order 45, rule 1.] Application for review of decree or order.

“ 1. Any person considering himself aggrieved—

- (1) 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”

7. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

8. The Court of Appeal had the following to say in an application for review in the case of *National Bank of Kenya Ltd vs Ndungu Njau*.

“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.”

9. In *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record 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.”(emphasis mine).



10. Further in In *Chandrakhant Joshibhai Patel -v- R* [2004] TLR, 218 it had been held that an error stated to be apparent on the face of the record:

“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions.”
11. To the statutory grounds, the court may also add instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see *Serengeti Road Services -v- CRBD Bank Limited* [2011] 2 EA 395. Also, to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see *Benjob Amalgamated Limited & Another vs. Kenya Commercial Bank Limited* (supra).
12. It is the applicant’s contention that there is an error apparent on the face of the said judgment dated 28th March 2023, specifically with regard to the order assessing the respondent’s advocates costs at Kshs 150,000/= each. It was her contention that under Rule 10 of the advocates Remuneration order, the same ought to have been taxed by the deputy registrar of the high court. The court thus acted without jurisdiction and to that extent the order on costs should be set aside. The respondents on the other had did content that the court was within its powers to assess the costs based on section 27 of the *civil procedure Act*.
13. The Respondents observation is obviously the right proposition in law. First and foremost, under Article 165(3)(a) of the *constitution*, the court has wide, original and unlimited jurisdiction to deal with civil matters, this provision as read together with Section 1A, 1B, 3A of the *civil procedure Act*, allows/mandate’s the court to expeditiously and proportionately determine proceedings efficiently and in a timely manner. Further nothing limits or otherwise affect the courts inherent power to make such orders as any be necessary for ends of justice and/or to prevent abuse of the court process.
14. The *Civil Procedure Act* at section 27 provides that;

Section 27(1) subject to such conditions and limitations as maybe 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 powers 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 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.”
15. Based on the above provision, It is crystal clear that court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid and this court was therefore not wrong to assess costs as it so did no 28th March 2023. Rule 10 of the *Advocates Remuneration Order* in the circumstances does not apply and would only be applicable where either party has filed their bill of costs for taxation in which event, the same has to be taxed by the deputy registrar of the high court. Further such assessment is carried out to expeditiously dispose of matters and avoid unnecessary and winding taxation process when the parameters for the conducting the same are clear.



16. Finally, having found that the court has the jurisdiction to assess costs at the end of the trial/appeal, the same did not constitute an error and its decision cannot be review. The applicant's only option was to appeal as against the same.

Disposition

17. The application dated 9th May 2023 is therefore wholly misconceived and is without merit. The same is dismissed with costs to the Respondents.

18. The costs are assessed at Kshs 30,000/= all-inclusive to each of the respondent's advocates.

19. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS ON THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Mr Musili for Applicant

Mr Kimeu and Mr. Mutinda for 1st – 4th Respondent

