



**TDF Advertising v Impact Africa Limited (Civil Appeal
E604 of 2021) [2024] KEHC 132 (KLR) (19 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E604 OF 2021
AN ONGERI, J
JANUARY 19, 2024**

BETWEEN

IMPACT AFRICA LIMITED APPELLANT

AND

IMPACT AFRICA LIMITED RESPONDENT

RULING

1. The respondent/applicant filed the application dated 28/8/2023 seeking the following orders;
 - i. That this Application be certified as urgent and the same heard ex-parte in the first instance;
 - ii. That this Honourable Court be pleased to Stay, Review and/or Set aside its own judgment delivered on 18/08/2023;
 - iii. That Trial court's judgment dated 31/08/2021 be reinstated;
 - iv. Any other relief or order that the Honourable Court may deem just to grant.
2. The application is based on the following grounds;
 - i. That this application be certified as urgent and the same heard ex-parte in the first instance.
 - ii. That this honourable court be pleased to stay, review and/or set aside its own judgment delivered on 18/08/2023.
 - iii. That trial court's judgment dated 31/08/2021 be reinstated.
 - iv. Any other relief or order that the honourable court may deem just to grant.
3. The application is supported by the affidavit of George Keango in which he stated as follows;



- i. The appellant cannot be prejudiced, whether in law or fact if ordered to pay for services that they have consumed and already benefited from.
 - ii. On 18/8/2023, the learned High court Judge delivered a judgment allowing an appeal and setting aside a judgment and decree meritoriously awarded by the trial court.
 - iii. That the honourable Judge mentioned, as part of the reasons for her decision which did not factor in the circumstance behind the wording or the judgment of the trial court the word “Conditional” judgment as used by the trial court.
 - iv. The learned honourable Judge erred in fact, by assuming that the word “conditional” was antecedent to awarding the decretal sum before proof, whereas the plaintiff’s trial bundle already had all the invoices, and the context of the wording was, supplying the same to the appellant again, since they had denied having received the same, not denied the contractual works being done.
 - v. In any case, the invoices formed part of the documents used during examination and cross examination during the hearing of the primary matter before the trial court.
 - vi. Further the learned high court Judge disregarded the sections of the record of appeal – pages 12, 21-26, 43-58, 70-84 all of which form the third party invoices, which the learned Judge overlooked, and concluded that here was insufficient evidence, whereas the entire bundle was right there in the record of appeal, and upon any doubt, nothing stopped the learned Judge from calling for the original trial court file which should ideally have all the records, including correspondences.
 - vii. The learned High court Judge erred in fact and law by disregarding the direct evidence of admission by the appellant’s witnesses on the existence of the invoices and the actual proof of work done, as captured both in the typed proceedings at page 124 of the record of appeal and the judgment at page 138 of the record of appeal, all of which satisfies the burden of proof.
 - viii. The learned high court Judge erred in fact and law in setting aside the monetary award in the judgment of the trial court, which is a direct payment against works already done and approved as satisfactorily by the appellants, and not disputed.
 - ix. In fact, the appellant/respondent made partial payment of USD112,266/- made on 28/03/2017 how then is it possible that the burden of proof has not been met? So what was the partial payment for and this payment is not being denied.
4. The application was opposed by the replying affidavit of Susan Mbithe who deponed that the applicant is misrepresenting the judgement of the court by claiming that the learned judge alleged that the invoices were never produced while they were expressly stated in the judgement. The claim that they were disregarded is therefore unfounded, inaccurate and misleading.
 5. She deponed that both the trial court noted that the applicant had not produced the 3rd party invoices which are in accordance to the agreement between the parties. The Respondent demonstrated aptly throughout the proceedings touching on this subject matter that the purported invoices produced by the Applicant are inaccurate, incorrect and not the 3rd party invoices. That furthermore the grounds referring to the learned judge’s alleged error in fact and in law amount to grounds of an appeal.
 6. The parties filed written submissions as follows; the applicant submitted that section 80 of the [Civil Procedure Act](#) grants this court power to make orders for review. Order 45 of the [Civil Procedure Rules](#)



sets out the jurisdiction and scope of review by hinging review to discover of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

7. The applicant contended that there were errors apparent on the face of the record as the court had allowed the appeal and set aside the Judgment and Decree meritoriously awarded by the Trial court on grounds that the Applicant had not produced third party invoices during the trial of the primary suit whilst the applicant trial bundle already had all the invoices. The said invoices formed part of the documents used during examination and cross-examination of witnesses at the hearing of the primary suit.
8. The applicant argued that there was direct admission by the respondent's witness on the existence of the invoices and the actual proof of work done. She further stated that the work had been partially paid, that USD 12,266 was paid. the appellant/ respondent never disputed the outstanding payments. That the dispute herein was on whether or not the appellant/respondent should reimburse the respondent applicant the exact amount as per the 3rd party invoices or settle the respondent/ applicant's invoices that factor in the mark up fees for the services rendered.
9. The appellant/respondent submitted that the respondent/ applicant has attempted to steer this court to the position that their application falls under the ground for any sufficient reason. They have however failed to accurately capture what the reason is aside from their ranting on the contents of their claim, which has been litigated and re-litigated.
10. The appellant/respondent submitted that there has been no new evidence discovered and presented before this court, there has been no error substantiated or demonstrated on the face of the record. On the allegation that the court failed to consider the evidence before it, the judgement delivered on 18/8/2023 captures the arguments by both parties and mentions in paragraph 8 of the same. The court fairly captured the same and in its ensuing pronouncement held that the respondent/ applicant did not comply with the condition agreed upon before the appellant would pay.
11. The appellant/respondent argued that it has been its contention that the invoices produced are inaccurate and cannot be relied on to demand payment. This position transcends the ground that provides for any sufficient reasons as a requisite for review to be granted. The respondent/ applicant has therefore not met the threshold for an application for review.
12. The issues for determination in this ruling are as follows;
 - i. Whether the court should review the judgment delivered on 18/8/2023.
 - ii. Whether the appellant admitted the respondent's claim.
13. On the issue as to whether this court should review its judgment, the governing provisions are Section 80 of the [Civil Procedure Act](#) and Order 54(1) of the Civil Procedure Rules which states 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”

14. I find that there is no condition established upon which to review the judgment dated 18/8/2023.

15. The judgment is explicit that the trial court gave a conditional judgment which stated that;

- “ a. The plaintiff is awarded USD68,753 being the outstanding invoices unpaid from the date of filing suit with interest at court rates. However, the amount can only be granted upon tendering the third party invoices which carry the said amount.
- b. The plaintiff is awarded costs of the suit at court rates from the date of judgment.”

16. The applicant should appeal to the court of appeal if dissatisfied with the judgment of this court.

17. I find that the applicant/respondent is asking this court to sit on appeal on its own judgment.

18. On the issue as to whether the appellant admitted t/he claim, I find that there is no dispute that the appellant made partial payment.

19. The claim of USD68,753 was not proved since the 3rd party invoices were not produced.

20. The trial court’s judgment was set aside because it was awarded on condition that the 3rd party invoices are produced.

21. I find that there is no basis for reviewing the judgment of this court dated 18/8/2023.

22. The application dated 28/8/2023 is dismissed with no orders as to costs.

23. I grant the respondent/applicant leave to appeal to the Court of Appeal against this ruling.

24. The appeal to be filed within 30 days of this date.



**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
19TH DAY OF JANUARY, 2024.**

A. N. ONGERI

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

..... for the Appellant

..... for the Respondent

