



AM (Suing Through Next Friend and Father JA) v Kimilu (Civil Appeal 107 of 2018) [2024] KEHC 1264 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1264 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 107 OF 2018
PJO OTIENO, J
FEBRUARY 9, 2024**

BETWEEN

**AM APPLICANT
SUING THROUGH NEXT FRIEND AND FATHER JA**

AND

MICHAEL MUEMA KIMILU RESPONDENT

(Being an appeal from the Judgment and decision of Hon. T. A. Odera (PM) in Mumias PMCC Case No. 438 of 2013 delivered on 13th July 2018)

RULING

1. By a Judgment dated 2.6.2023, Musyoka J, allowed the appeal by setting aside the trial Court’s determination dismissing the Appellants suit with costs and substituted therefor a Judgment finding the Respondent 100% liable and assessing damages in the aggregate sum of Kshs. 510,850. The Judgment was silent on costs of both the appeal and those before the trial Court.
2. That decision aggrieved the Appellant and elicited the current application dated 21.7.2023 seeking that the Judgment be reviewed by the Court awarding to the Appellant both costs of the appeal and those of trial.
3. The application is premised on the provisions of section 27 and 80 of the Civil Procedure Act and Order 45 Rule 1 of the Rules.
4. Being an application for review, an Applicant is bound and mandated to fit himself within the defined parameters of their being an error or mistake apparent on the face of the record; the discovery of new and important matter of evidence that was not available and could not be availed by the Applicant, due diligence notwithstanding, at the trial, and any sufficient cause.



5. Here, the Applicant mounts his application on the limb that there is an apparent error on the face of the record. With that position the determination of the application must revolve around the question of what the expression, ‘error apparent in the face of the record’ means.
6. The Court of Appeal in *Nyamogo & Nyamogo -vs- Kogo* [2001] EA 74 set the law to be that: -
“...mere error or wrong view is certainly no ground for review although it may be for an appeal.”
7. The same Court had established the position on the boundaries of review and appeal in *National Bank of Ltd -Vs- Ndungu Njau* [1997] eKLR that the possibilities that another Judge could have come to a different conclusion or that a Judge proceeded on an incorrect exposition of the law and reached an erroneous conclusion cannot be grounds for review but may be for an appeal.
8. In this matter, the Court is faulted for failure to award costs both at trial and on appeal to the Appellant as the successful party. It is in dubitable that an award of costs is at the discretion of the Court subject to the principle of law that costs follow the event. A failure by the Court to exercise its discretion one way or the other is an error of law challengeable by an appeal and not by review. An error of law calls for correction by a higher Court but never a reason to seek an get an order for review.
9. In conclusion, the Court determines that there is no error apparent on the face of the record to merit an order for review. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 9TH DAY OF FEBRUARY, 2024.

PATRICK J. O. OTIENO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Siwolo for the Respondent

No appearance for Mwebi for the Appellant

Court Assistant: Polycap Mukabwa

