



**Lowland Service Organisation v Kiptarus (Civil Appeal
122 of 2021) [2024] KEHC 1001 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 122 OF 2021
RN NYAKUNDI, J
FEBRUARY 8, 2024**

BETWEEN

LOWLAND SERVICE ORGANISATION APPLICANT

AND

ABRAHAM KIPTOO KIPTARUS RESPONDENT

RULING

1. The applicant approached this court vide an application dated 9th December 2002 seeking the following orders;
 - a. That this Honourable court do review its judgment delivered on 29th November, 2022.
 - b. That this Honourable court be pleased to set aside the ruling of the trial magistrate Hon. Linus P. Kassan in Eldoret Civil suit No. 61 of 2016 delivered on 17th September, 2021 in its entirety with costs to the Appellant and in its place make a final judgment on the appeal.
 - c. That costs of this application be provided for.
2. The application is premised on the grounds set out therein and the contents of the supporting affidavit sworn by Mathew Chesaina.

Applicant's Case

3. The applicant's case is that the main issue before this court is whether it should review its judgment delivered on 29th November, 2022 and set aside the ruling of the trial magistrate Hon. Linus P. Kassan in Eldoret Civil suit No. 61 of 2016 delivered on 17th September 2021 in its entirety, with costs to the Appellant and in its place make a final judgment on this appeal.



4. Counsel for the appellant urged that review is governed by section 80 of the *Civil Procedure Act*. Further, that the court of appeal described an error apparent on the record in the case of *Muyodi -v- Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243.
5. It is the applicant's case that the judgment delivered by his Lordship Justice Ogola on 29th November, 2022 has a mistake and an error apparent on the face of the record. This is due to the fact his Lordship set aside the ruling of the trial court and substituted it in the following terms;
 - a) Stay of execution granted on the condition that the respondent deposit half the decretal amount in a joint interest earning account in the names of both the parties' advocates within 30 days from today.
 - b) Costs to abide the outcome of the appeal.
6. The Applicant urged that the error apparent on the face of the record in this matter is twofold;
7. The first error lies in the fact that whereas this appeal was against the ruling of court allowing stay of execution of warrants of arrest against the respondent, there was no other pending issue to be determined by this Honourable court on Appeal. The learned judge however went ahead to hold that costs to abide the outcome of Appeal, yet there is no pending Appeal between the Appellant and the Respondent. Clearly, such an error constituting stay of execution pending appeal when in fact there is no appeal pending between the parties herein is an error that stares one in the face, and there could reasonably be no two opinions. Counsel submitted that the learned judge made his decision under the mistaken belief that there was a pending appeal between the parties herein hence he issued orders to the effect that costs to abide the outcome of the appeal which is not the case. That the truth of the matter is that there is no ongoing appeal between the appellant and the respondent herein as this appeal was purely against the ruling of Honourable Linus P. Kassan in Eldoret CMCC No.61 OF 2016 delivered on 17th September, 2021.
8. Learned counsel submitted that the second error apparent on the face of the record lies in the fact that the learned judge failed and/or omitted to address the main issue for determination between the parties to the Appeal herein, which issue was duly raised in the appellant's submission, as to whether there was a pending suit between the Appellant and the Respondent in Eldoret CMCC No. 362 of 2020 so as to warrant the grant of the orders of stay of execution of warrant of arrest against the respondent herein. He urged that for his Lordship to have adequately and/or properly determined the issue of whether the orders of the learned magistrate Honourable Linus P. Kassan, allowing stay of execution of warrants of Arrest issued against the Respondent on 26/22/2020, any further proceedings and/or any further proceedings and/or execution against the respondent ought to be maintained or not, then the learned judge ought to have addressed the issue of whether civil suit No.362 of 2020 is a suit pending between the Appellant and the Respondent. He maintained that the learned judge failed to address that issue hence fell into error in coming up with his final decision and orders. Had he considered the submissions on record and made a determination of whether civil suit no. 362 of 2020 and civil suit 61 of 2016 is pending between the same parties or not, then he would have been able to make a determination on whether the ruling by Honourable Kassan, which was and still is the subject of this appeal, would be set aside or not.
9. Counsel submitted that it is clear that this Honourable court is neither functus officio as the learned judge did not adequately address the main issue for determination between the parties herein, nor is the application by the appellant herein inviting this court to sit as an appellate court against its decision. Counsel urged that unless this Honourable court reviews its judgment issued on 29th November,



2022 and addresses itself on the real issue in controversy between the parties, the appellant will suffer prejudice.

10. The applicant's case is that it is therefore in the interest of justice and fair play that this honourable court do review its judgment delivered on 29th November, 2022, set aside the ruling of Honourable Linus Kassan in Eldoret Civil Suit No. 61 of 2016 delivered on 17th September, 2021 in its entirety with costs to the Appellant and in its place make a final judgment on this appeal.

Respondent's Case

11. There are no submissions on record for the respondent.

Analysis & Determination

12. Upon considering the application, the following issue arises for determination;
 1. Whether the court should review its judgement delivered on 29th November 2022

Whether the court should review its judgement delivered on 29th November 2022

13. The High Court has a power of review, but such power must be exercised within the framework of Section 80 *Civil Procedure Act* and Order 45 Rule 1. Section 80 of the *Civil Procedure Act*^[4] provides as follows:-

80. 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

14. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 provides as follows:-

- 1) Any person considering himself aggrieved-
 - (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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

15. The upshot of the foregoing is that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds-

- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;



- (b) on account of some mistake or error apparent on the face of the record, or
 - (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.
16. The crux of the application is that the there are errors apparent on the face of the record.

Whether there was an error apparent on the face of the record

17. In *Nyamogo & Nyamogo v Kogo* {2001} EA 170 discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 a long-drawn 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

18. The appeal resulting in the impugned judgement was from the judgement and decree of Hon. L. Kassan delivered on 17th September 2021. The learned magistrate granted the application for stay of execution pending the hearing and determination of Civil Suit 322 of 2020. The ruling was the subject of the decision by my brother Honourable E.K Ogola. Upon considering the application, he granted the stay of execution and directed that the costs would abide the outcome of the appeal.
19. I have perused the judgement and in my interpretation of the same is that the orders on costs were in reference to the appeal that the learned judge had just determined. In essence, the costs were to be granted to the successful party in the appeal, this being the appellant therein. This is in tandem with the principle that costs follow the event, buttressed by the provisions of section 27 of the *Civil Procedure Act*. It is my considered view that the applicant misinterpreted the orders to mean that the costs were pending the outcome of the appeal.
20. The second error the applicant raised is that the learned judge failed to address the issue for determination, said issue being that there was a pending matter between the parties in Eldoret CMCC 362 of 2020. The impugned ruling that resulted in the appeal granted orders for stay of execution pending the determination of Eldoret CMCC 362 of 2020. Honourable Ogola, in his wisdom, upon finding that the trial court had not given conditions for security, found it prudent to issue conditions for the stay of execution. By setting out the legislative provisions applicable to the application for stay, being Order 22 Rule 25, the learned judge clearly took the issue of the pending civil suit into consideration.
21. In the premises, I find that the application is misconceived and unmerited. The applicants misinterpreted the judgement and I believe the same is now clear as per the contents of this ruling.
22. The application is dismissed in its entirety with costs to the respondent.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 8th DAY OF FEBRUARY 2024



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R. NYAKUNDI

JUDGE

Coram: Before Justice R. Nyakundi

M/S Nyambegera & Co. Advocates

M/S Bundotich Korir & Advocates

