



**McLaughlin v S. Gichuki Waigwa & Associates (Commercial Case 18 of 2016)
[2024] KEHC 1482 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1482 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 18 OF 2016
JWW MONG'ARE, J
FEBRUARY 19, 2024
IN THE MATTER OF THE ADVOCATES ACT
-AND-
IN THE MATTER OF SALE/PURCHASE OF
NGONG/NGONG/63516
-BETWEEN-
BETWEEN
DAVID MCLAUGHLIN APPLICANT
AND
S. GICHUKI WAIGWA & ASSOCIATES RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 7th December 2021 filed pursuant to the provisions of Section 80 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules 2010* and all enabling provisions of the law. The Applicants seek the following orders –
 - i. That this Honourable Court be pleased to review its ruling of 22nd October 2019 and the orders emanating therefrom;



- ii. That an order be issued reviewing and amending the order in terms of disposition 1 of this Honourable Court’s ruling of 22nd October 2019 to read as follows –
 - “ In the absence of such evidence of instruction fees agreement and/or filing of Bill of Costs for taxation before the Taxing Master, the instant application succeeds.”
 - iii. That this Honourable Court be pleased to order the Respondent to meet the costs of this application.
2. The application is premised on the grounds set on the face of the motion and is supported by an affidavit sworn on the same day by MUKUNGI CHRISTOPHER, learned Counsel for the Applicant. In opposition thereto, the Respondent filed grounds of opposition dated 20th May 2022 on the following grounds: -
- i. The said Notice of Motion application dated 7th December 2021,(application) is misconceived, incompetent, bad in law and an abuse of court process;
 - ii. The said application offends the letter and spirit of the law the Honourable Justice M.W. Muigai pronounced herself on 22nd October 2019 and stated
 - “ In the absence of such evidence of instruction fees Agreement and/or filing of bill of costs for taxation before the Taxing Master, the instant application fails”;
 - iii. Considering paragraph two (2) hereinabove there is no apparent error on the face of the record of the Court’s Ruling;
 - iv. The Applicant has not established any ground for review of the said order and has not opted to file an appeal as against the ruling of the Judge aforesaid;
 - v. The cursory reading of the ruling aforesaid more specific of the said ruling reprinted as below appreciates the ruling of the Honourable Court;
 - ”...In the absence of such agreement that binds the parties on payment of instruction fees, the matter procedurally and legally ought to commence with a Bill of Costs filed for taxation before a Taxing Master/Deputy Registrar of the relevant division .”
 - vi. By virtue of contents of paragraph 5 herein above it is trite law that the Applicant ought to have challenged the decision of the Honourable Court by way of appeal;
 - vii. The Applicant’s Notice of Motion application dated 7th December 2021, hereof should on the grounds aforesaid be dismissed with costs;
3. The Applicant’s case is that he filed an Originating Summons application dated 18th December 2016 against the Respondent seeking orders inter alia that the Respondent be compelled to immediately tax his Advocates/Clients Bill of Costs as prayer No. 4. The application was in the interim prosecuted only in terms of prayer No.4. Subsequently, this Court on 22nd October 2019, delivered a ruling where it made the following orders:-
- 1. In the absence of such evidence of instruction fees agreement and/or filing of bill of costs for taxation before Taxing Master, the instant application fails.
 - 2. The Respondent shall file its Bill of Costs for taxation before the Taxing Master.



4. The Applicant contended that from the above, it is evident that the said application succeeded in terms of prayer No. 4 hence the Court's 1st disposition was in error as it ought to have read that the application succeeds. He averred that there is apparent contradiction between the Court's analysis, reasoning, the Order in terms of disposition 2, and the Order in terms of disposition 1, thus evidence of a mistake or an error apparent on the face of the record.
5. The instant application was canvassed by way of written submissions. The Applicant's submissions were filed on 31st October 2023 whereas the Respondent's submissions were filed on 8th November 2023.
6. Mr. Mukungi, learned Counsel for the Applicant, submitted that for the Court to grant an order for Review, an Applicant must meet the threshold set under section 80 of the *Civil Procedure Act*, and Order 45 Rule 1 of the Civil Procedure Rules, 2010. He further submitted that having found that the Respondent should file and serve its Advocate/Client Bill of Costs for taxation before the Taxing Master, the Court should have held that the Applicant's application succeeds as opposed to fails as captured in disposition 1. For this reason, there is an error apparent on the face of the record to warrant a review of the ruling dated 22nd October 2019.
7. Mr. Githui, learned Counsel for the Respondent cited the case of *Nyamongo & Nyamongo v Kogo* [2001] EA 174 and contended that an error apparent on the face of the record must be a self-evident error that does not require an elaborate argument to support it which is not the case herein. He asserted that there is no error in the ruling dated 22nd October 2019, the Court simply found that the application dated 18th December 2016 was not merited in the absence of a fee agreement between the parties herein. Thereafter, it directed the Respondent to file its Bill of Costs for the Taxing Master to determine its professional fees.

Analysis and Determination.

8. The law on Review Applications is found under Section 80 of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 45 of the Civil Procedure Rules 2010. The Court of Appeal in the case of *Sanitam Services (E.A.) Limited V Rentokil (K) Limited & Another* [2019] eKLR held as hereunder with regards to applications for review of an order or judgment -

“Jurisdiction to review a judgment or order of a court is donated by Section 80 of the *Civil Procedure Act* and Order 45 Civil Procedure Rules. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay”.
9. The Applicant herein is seeking for an order for review of this Court's ruling delivered on 22nd October 2019 on ground that there is an error and/or mistake apparent on the face of the record. The Applicant contended that it filed an Originating Summons application dated 18th December 2016. The said application was in the interim prosecuted only in terms of prayer No. 4 which sought for an order that the Respondent be compelled to immediately tax his Advocates/Clients Bill of Costs.



10. Subsequently, the Court delivered its ruling on 22nd October 2019 where it held that the application dated 18th December 2016 fails in the absence of evidence of instruction fee agreement and/or filing of a Bill of Costs and directed the Respondent to file its Bill of Costs for taxation before the Taxing Master.
11. It is now settled law that an application for review of an order or judgment is only made in instances where there was a mistake or error apparent on the face of the record. The Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR held as hereunder with regards to applications for review of an order or judgment -

“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”.
12. The Applicant is of the view that since this ruling was only in respect of prayer No. 4 which was granted, the Court should have found that the Applicant’s application succeeds as opposed to fails as captured under disposition No. 2. Furthermore, prayer No. 1, 2, 3, & 5 are yet to be prosecuted. For this reason, the Applicant is urging the court to find that there is an error apparent on the face of the record to warrant a review of the ruling dated 22nd October 2019.
13. I have carefully considered the record and the ruling subject matter of this application. Upon perusal of the said ruling dated 22nd October, 2019, it is evident that the said ruling was with respect to the entire application and not only prayer No. 4. This can be seen at page 7 & 8 of the said ruling where the Court denotes that the issue for determination before it is “whether by Originating Summons filed on 26th January 2016, it can declare that the agreed professional fees payable to the Respondent was Kshs.228,660/=, and whether the Respondent should refund Kshs.1,365,000/= to the Applicant.” The holding by the Court then was as follows: -

“...matters regarding ownership and use of land is within the jurisdiction of the Environment and Land Court hence cannot competently be determined by this Court...

In the absence of such agreements that binds the parties on payment of instruction fees, the matter procedurally and legally ought to commence with a Bill of Costs filed for taxation before the Taxing Master/Deputy Registrar of the relevant division of the High Court or Court of equal status. Thereafter after taxation of the Bill of Costs if any party is aggrieved with the outcome then the party may pursue a reference in the High Court.”
14. From the foregoing, I am satisfied that there was no contradiction in the Court’s analysis of the issues before it and the reasoning and dispositions of the same. To the contrary, there is consistency in the entire decision of the court. Accordingly, the assertion by the Applicant that the ruling dated 22nd October 2019 was only with regard to prayer No. 4 of the application dated 18th December, 2016 is not factual and was misguided.
15. In the end, I find and hold that the Applicant has not established that there was an error apparent on the face of the ruling issued by the court on 18th December 2016 to warrant this court interfere with it. The Ruling clearly directed the Applicant to move the Court appropriately by filing a Bill of Costs for determination in the ordinary course of events. As held by the Court of Appeal in the decision of *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 E.A 173, which binds me in the principle of stare decisis, a mere error or wrong view is certainly no ground for a review although it may be for an appeal.



16. The upshot of my findings is that the instant application is devoid of merit. Consequently, it is dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2024.

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Mukungi for the Applicant.
2. Mr. Githui for the Respondent.
3. Amos - Court Assistant

