



**Siganga v KCB Kenya Limited (Civil Appeal E014 of 2020)
[2024] KEHC 1130 (KLR) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E014 OF 2020
RE ABURILI, J
FEBRUARY 12, 2024**

BETWEEN

DAVE LUNG'AHO SIGANGA APPELLANT

AND

KCB KENYA LIMITED RESPONDENT

RULING

Introduction

1. The appellant moved this court *vide* an application dated 1st November 2023 to review its orders of 18th October 2023. He also prayed that the ruling of 21st September 2022 that dismissed the instant appeal be set aside and reinstate the appeal.
2. It was the appellant's case that the court relied on its proceedings of September 21st 2022 in which it erroneously noted that the appellant had not filed his record of appeal yet the appellant had filed the same on the 8.6.2022, before the mention of 21/9/2022.
3. The grounds in support reiterate the prayers, adding that as the respondent was not opposed to the application for reinstatement of the appeal, it will not be prejudiced in any way. That the application is made without undue delay and that it is in the interest of justice that the orders sought be granted.
4. The application is also predicated on the supporting affidavit sworn by Joan Neto Advocate on 31st October, 2023 deposing how on 18th October, 2023, this court delivered and ruling dismissing an application seeking to reinstate the appeal which was dismissed on 21/9/2022 for want of prosecution; that she filed a record of appeal on 8/6/2022; that the ruling in question relied on proceedings of 21/9/2022; that the appellant is ready to prosecute the appeal; that the applicant has a good case against the respondent and that it is in the interest of justice that the application be allowed.



5. In the oral submissions by Ms Ouma counsel for the applicant, she stated that she sought for review of orders of 16/10/2023 because the ruling relied on the proceedings of 21/9/2022 which erroneously noted that no record of appeal had been filed yet the same had been filed on 8/6/2022. That they were filing submissions when they learnt of the dismissed appeal hence the orders of 16th October, 2023 should be set aside.
6. In response, Mr Bwire counsel for the respondent simply stated that they were strangers to the application and proceedings after the appeal was dismissed..
7. In a rejoinder, Ms Ouma submitted that Mr Bwire was in court on 9/10/2023 and that they had served the application and even spoke to a Mr Ouru advocate who indicated that he had no objection to the application being granted.

Determination

8. Section 80 of the *Civil Procedure Act* Cap 21 provides for conditions that must be met for an order of review to be granted, in the following terms:

“ 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.”
9. On the other hand, Order 45 rule 1 of the *Civil Procedure Rules*, 2010 the procedural aspect of section 80 of the *Civil Procedure Act* provides that:

(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
10. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] e KLR it was held that:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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 unreasonable delay.”

11. In *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held that:

“Order 44 rule 1 (now Order 45 rule 1 in the 2010 *Civil Procedure Rules*) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason...”

12. Further, in *Sarder Mohamed v Charan Singh Nand Sing and Another* (1959) EA 793, the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion on the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

13. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR Mativo J (as he was then) culled out the following principles for review, from a number of authorities:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.



- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”
14. In the instant case, the appellant seeks review of this court’s orders of 18th October 2023. He also seeks that the ruling of 21st September, 2022 be set aside. I however note that there are no orders from this court made on the 18th October 2023. On this basis alone, this court is inclined to dismiss the appellant’s application on the basis that the Application seeks to review a non-existent order or ruling. Whether a formal order sought to be reviewed is extracted and annexed or not is not a big deal as this court is in custody of the entire court file and can view the orders made on record. In her oral submissions, the applicant’s counsel stated that they sought for review of the orders made on 16th October, 2023. No prayer for amendment of the application dated 1st November, 2023 to correct the date of the order referred to was made.
15. However, from my own perusal of the court file, as it appears that the appellant did not read the file before filing the application subject of this ruling, the only order which was made proximate to 18th October 2023 is that of 16th October 2023.
16. On the 16th October 2023, this court delivered a ruling dismissing the appellant’s application dated 13th April 2023 in which he had sought to set aside the court’s ruling and order of 21st September 2022 that dismissed the instant appeal for want of prosecution.
17. The appellant herein has grounded his application for review on the fact that this court relied on the proceedings of 21.9.2022 in making its ruling, which proceedings, according to the applicant, the court erroneously noted that the appellant had not filed his record of appeal yet the appellant had filed the same on the 8.6.2022.
18. I note that the ruling of 16th October 2023 was not based on the proceedings of 21.9.2022 but rather, the court gave the history of the conduct of the proceedings in the appeal since the appeal was lodged in this Court way back in 2020.
19. The alleged error cited by the appellant is not evident at all and thus cannot be treated as an error apparent on the face of the record justifying exercise of this court’s discretion under Section 80 of the *Civil Procedure Act*.
20. Be as it may, if there was an error in the proceedings of the 21.9.2022 as alleged, then, the applicant having filed an application seeking for review of the ruling of 21/9/2022, such error ought to have been canvassed in that application of 13th April, 2023, which application as dismissed vide the ruling dated 16th December 2023 has not been challenged by the appellant. This court cannot sit on appeal of the ruling of 21/9/2022 after a review application seeking to review that ruling was dismissed.
21. Additionally, on 21st September, 2022, this court dismissed the appeal herein for want of prosecution, the date having been taken by consent of both parties on 20/4/2022 when the appellant was by consent allowed three weeks to procure the signed decree. Even if the appellant had filed a record of appeal which was not available on record as at 21/9/2022, it was clear that the appellant had not complied with the directives of the court to file a decree within three weeks. As at that date of 21/9/2022 when the appeal was dismissed and to date, no decree was ever filed.
22. No court of law should ever be held at ransom to mention a case for further directions in perpetuity. On 21st September, 2022, this court sat from 9.am and throughout the day, no appearance was made by the appellant whether physically or virtually and no reasons were advanced for non-attendance.



23. It is not lost to this court that as at 9/2/2022, there was a Notice to show Cause why the appeal should not be dismissed for want of prosecution and on the even date, when the court ordered that the appellant do satisfy the court at the next mention which was on 20/4/2022 that he had taken steps to advance the appeal, in default, the appeal shall stand dismissed, and the court having exercised discretion on 20/4/2022 and allowed the appellant three more weeks to procure a signed decree but five months later, no such steps had been taken, what remained for this court, in the absence of the appellant to tell the court as to what he had done following the orders of 29/2/2022 and 20/4/2022 was to dismiss the appeal. Curiously, the extracted part of the record of appeal filed as an annexure to the affidavit in support of the application dated 1st November, 2023 does not annex any copy of decree which is listed in the index at page 170.
24. Taking all the aforementioned into consideration, I find that the instant application does not meet the conditions warranting orders of review of the orders complained of in the application dated 1st November, 2023 which is hereby dismissed with no orders as to costs.
25. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF FEBRUARY, 2024

R.E. ABURILI

JUDGE

