



**Khalwale & another v Nyikuli & another (Jointly t/a Nyikuli,
Shifwoka & Co. Advocates) (Miscellaneous Civil Application
E009 of 2020) [2024] KEHC 2194 (KLR) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2194 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION E009 OF 2020**

PJO OTIENO, J

MARCH 1, 2024

BETWEEN

HON. SEN (DR) BONNY KHALWALE 1ST APPLICANT

WASHINGTON MZOZO SHIBO 2ND APPLICANT

AND

OLANDO JOSHUA NYIKULI 1ST RESPONDENT

MUCHERA CARLESTOUS SHIFWOKA 2ND RESPONDENT

JOINTLY T/A NYIKULI, SHIFWOKA & CO. ADVOCATES

RULING

1. For my determination is the 1st applicant's notice of motion application dated 18th December, 2023 seeking in the main that the Honourable Court be pleased to review, vary and set aside the first condition contained in the ruling dated 10/11/2022 and thereafter issue an order to extend and/or enlarge time within which the applicant to deposit a sum of Kshs 569,525/- within 30 days from the date of issue of the orders sought herein.
2. There is also an alternative prayer that the applicant be allowed to deposit an original logbook of his motor vehicle in court in compliance with condition (a) in the ruling dated 10/11/2023.
3. The application is supported by the grounds on the face of the application being the same grounds regurgitated in the affidavit of Hon. Senator Dr. Bony Khalwale sworn on 18th December, 2023. The grounds are that there is an error on the face of the record with the Court failing to consider that the orders issued on 28/7/2022 were complied with and a sum of Kshs 200,000/- paid to the Respondents and this was not factored by the Court. It is added that the Applicants filed an application dated 7/12/2023 which was pending determination and by the time the Court addressed the application



on 18/12/2023, the time for compliance with the ruling dated 10/11/2023 had lapsed. In addition, it is contended the Applicant is unable to raise the taxed costs at once and seek extension of 30 days to comply. As a sign of good faith, the Applicant seeks the court's indulgence to be allowed to deposit an original logbook as an alternative, pending taxation before the Deputy Registrar which was then fixed for 24/1/2024.

4. The application is resisted by the Respondents' Grounds of Opposition dated 19th December, 2023 in which it is averred that the application is bad in law, a non-starter, misconceived, unsustainable and that the Applicant has not demonstrated sufficient cause to warrant grant of orders sought since they have not complied with the Court's ruling of 10/11/2023.

Issues, Analysis and Determination

5. The Court has perused the application and the response thereto as well as oral Submissions by Counsel and discerns the issue for determination to be whether the threshold hold for review have been established and proved to the satisfaction of the Court.
6. A brief background of the proceedings culminating in the subject application is important. The Applicants contested and challenged the taxation of the bill of costs dated 23/9/2016 for lack of service. They therefore sought that the execution therefrom to be stayed and set aside. Vide a ruling dated 10/11/2023 the Court determined, after examination of the process server, that the Applicants had been duly served. The Court thus directed that: -
 - a. The clients shall deposit the taxed costs into an escrow account in the joint names of the advocates for the parties within 30 days from today.
 - b. Mention before the taxing officer forthwith, and not later than 14 days from today, for purposes of taking a date for taxation.
 - c. If there shall be failure to deposit as aforesaid, this order of setting aside shall lapse on the date of default, the application dated 29/3/2022 shall stand dismissed and the certificate of taxation shall stand reinstated with the consequence that the advocate shall be at liberty to execute.
7. The subject application is essentially anchored on the provisions of order 45 of the [Civil Procedure Rules](#) on review with the applicant asserting that there is an error apparent on the face of the record in foregoing directions by the Court. The error is asserted to be that it did not take consideration of a sum of Kshs 200,000/- which the applicant had sent to the Respondent.
8. An error apparent on the face of the record cannot be precisely and exhaustively defined because of the element of indefiniteness inherent in its very nature and must be left to be determined judicially on the facts of each case. A Court called upon to find an error on the face of the record must recognize a real distinction between a mere erroneous decision and an error apparent on the face of the record. An error on a substantial point of law which stares at one in the face, presents no reasonable two opinions but a single clear case of an error apparent and would invite review. If however an error has to be established by a long drawn process of reasoning or on points where there may conceivably be two or more opinions, the subject loses the face and character of an error apparent on the face of the record. It is also not apparent error on the face of the record if a view adopted by the court in the original record is a possible one even if another view need be a possibility.
9. The Court views its directions of 10.11.2023 to be unequivocal that the taxed costs of Kshs 769,525/- be deposited in an escrow account in full. It was a condition imposed as a price to be paid by a party who had been served but failed to attend Court. It was not a payment to the advocate but a deposit as a show of good faith that the client needed to be head at taxation.



10. Orders by Courts are not intended to be viewed as made in vain but ought to be obeyed. An order for review only issues when the prescribed parameters are met by the Applicant. The Court having found that there is no error apparent on the face of the record determines that the application is bereft of merits and a good candidate for dismissal. It is dismissed with costs to the Advocate/Respondent.
11. The question of some already paid to the Decree holder is a matter for accounts at the time of enforcement of the decree and not a basis for review.
12. The costs of the application must follow the event and thus awarded to the Respondent/Advocate.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 1ST DAY OF MARCH, 2024.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

No appearance for Parties and Counsel

Court Assistant: Polycap Mukabwa

