



**Initiative for Strategic Litigation in Africa v Mwangi & 2 others (Civil Appeal 507 of 2019) [2024] KEHC 3174 (KLR) (Civ) (2 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3174 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 507 OF 2019**

**AN ONGERI, J**

**APRIL 2, 2024**

**BETWEEN**

**INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA ..... APPLICANT**

**AND**

**WAMBUI MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**TONY MOCHAMA ..... 2<sup>ND</sup> RESPONDENT**

**SHAILJA PATEL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 8/9/2023 brought under section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, and Rules 16 and 17 of the High Court (Organization and Administration) (General) Rules, 2016 seeking review of paragraph 48 of the judgment of this court delivered on 8/5/2023.
2. The said paragraph states as follows;
 

“Although The Initiative For Strategic Litigation In Africa (ISLA) made an application to be enjoined as Amicus Curiae at appeal stage and the court in its ruling dated 11/11/2022 allowed the application, this court was not able to consider their submissions for reasons that they were not party in the Trial court.”
3. The application is based on the grounds the Initiative for Strategic Litigation in Africa (ISLA) was admitted as amicus curiae in these proceedings by way of a valid court order made on 11<sup>th</sup> November 2022.



4. That ISLA was admitted to the appeal as amicus curiae, after the Court affirmed that it satisfied all the elements of admission of amicus curiae, including that it was not biased or partisan, and that it could provide useful information that would aid the Court as it determined the appeal.
5. That ISLA intervened as amicus curiae as directed by the Court and filed its amicus brief with the court on the 17<sup>th</sup> March 2023.
6. The order of 11<sup>th</sup> November 2022 admitting ISLA into these proceedings has never been reviewed, appealed or set aside by any competent court.
7. That the Judgment in the matter was delivered on 8<sup>th</sup> May 2023, without notice to any of the parties.
8. That the finding at Paragraph 48 of the judgment of the Court, is to the effect that the amicus curiae's brief and submissions could not be considered by the High Court as ISLA was not a party to the subordinate court proceedings.
9. That this finding of the court amounts to setting aside of a valid court order made by a concurrent court on 11 November 2022 without jurisdiction or power.
10. That the finding of the court to exclude ISLA from the proceedings was a mistake and amounts to an error apparent on the face of the record.
11. That the decision of the Court, found at paragraph 48 of the judgment, leads to uncertainty and a lack of clarity in legal proceedings wherein the Court has admitted parties to participate as amicus curiae under Article 22(3)(e) of *the Constitution* of Kenya, 2010.
12. That the continued application of the finding made in paragraph 48 of the judgment creates a legal precedent that undermines the exercise of Courts' use of amicus participation in the appellate proceedings for the advancement of the rule of law and vindicating of constitutional rights.
13. That this court has jurisdiction and power to rectify the error on the record apparent in paragraph 48 of the judgment.
14. The appellant, Wambui Mwangi, filed grounds of opposition dated 23/10/2023 stating that the Applicant has not met the threshold for review as the court gave the reason behind the holding at paragraph 48 of the judgement. The Court cannot sit on appeal on its own reasoned decision.
15. Further, that the Applicant is estopped from applying for review of the judgement as an appeal has already been preferred against the said decision being Court Of Appeal Civil Appeal No. E546 OF 2023 - Tony Mochama Vs. Wambui Mwangi & Shailja Patel to the Court of Appeal.
16. That it is trite law that the extent of participation of Amicus Curiae in a matter is governed and limited by the court. As such, the application is fatally defective for want of leave to file the said application as the extent of participation of the Amicus herein was limited to filing its brief/submissions only.
17. The appellant also submitted that the Applicant is technically not a party in this appeal hence they lack the requisite locus standi to file the said application.
18. The 2<sup>nd</sup> respondent Tony Muchoma opposed the application vide his grounds of opposition dated 26/10/2023 in which he stated that the Application before court is an abuse of court process and in clear contravention of Order 45 of the Civil Procedure Rules as there is already in existence an appeal at the Court of Appeal being Civil Appeal No. E546 of 2023 – Tony Mochama Vs. Wambui Mwangi & Shailja Patel.



19. That the orders sought cannot be granted as the Honorable Court is now functus officio and that the orders sought cannot be granted by way of review as sought by the Amicus but only by way of an appeal.
20. That the Amicus does not have the locus standi to make the application before the honorable court.
21. The applicant filed further affidavit dated 31/10/2023 in which he stated that the Applicant/Amicus Curiae, ISLA has locus standi to make this application as a party to the proceedings before this court pursuant to an order made by this Honorable Court, Hon. Justice Serگون, a judge of concurrent jurisdiction, admitting the Applicant, ISLA, into these proceedings as an amicus curiae in a ruling made on 11<sup>th</sup> November 2022.
22. That the order made by Hon. Justice Serگون admitting ISLA to intervene into these proceedings as an amicus curiae has never been appealed or set aside by any court of competent jurisdiction.
23. That ISLA's application for review is limited in scope and application. It is made to rectify an error apparent on the face of the record as seen at paragraph 48 of the court's judgment dated 8<sup>th</sup> May 2023.
24. That under Order 45 of the Civil Procedure Rules, 2010, any party who is aggrieved by an order made by the Court has the standing to make an application to review if there is an error apparent on the face of the record. The error apparent here is the Court's finding at paragraph 48 of the judgment to the effect that ISLA's brief could not be considered since it was not a party to the proceedings at the lower court.
25. That ISLA does not, at this point, intend for this Court to consider the merits or otherwise of the amicus brief as filed, but instead asks the court to review the error on the face of the record at paragraph 48 of the judgment and rectify the error made that an amicus brief could not be considered if the amicus curiae was not a party to the proceedings in the court of first instance.
26. That this Court has the power legally and procedurally to review and rectify the error apparent on the face of the record contained at paragraph 48 of the judgement on the following grounds:
  - a. That this is the court that made the finding at paragraph 48 of the judgment in error;
  - b. That the finding at paragraph 48 of the judgment amounts to an error apparent on the face of the record;
  - c. That the error apparent on the face of the record at paragraph 48 is not a question or an issue capable of being addressed by the appellate court;
  - d. That in any event, the existence of an appeal to the Court of Appeal by the 1st Respondent (Tony Mochama) does not preclude this Court's power and jurisdiction to correct an error apparent on the face of the record;
  - e. That the error sought to be reviewed and rectified does not amount to an issue on the merits of the case.
27. The applicant further stated that the application by ISLA is necessitated by the need to address the impact and danger this precedent poses to amicus curiae interventions. This review is therefore necessary to safeguard the power of High Courts' jurisdiction in the consideration of amicus curiae interventions at different stages of the proceedings.



28. Further, that this Court has the power to grant the orders sought in the Notice of Motion dated 8<sup>th</sup> September 2023 and swear this affidavit in support of ISLA's application to review the judgment to the extent only that paragraph 48 of the Judgment of the Court be deleted and/or amended.
29. That the result of this review would find that the amicus participation was proper and that the court could consider the amicus brief, even it was not a party in the lower court, the court of first instance owing to the fact that ISLA had sought to be admitted in an application dated 13<sup>th</sup> July 2022 and was admitted in the proceedings as an amicus curiae through an order made on 11<sup>th</sup> November 2022.
30. Further, that granting the orders sought in this application does not in any way cause prejudice or cause any harm to the Appellant and Respondents in this matter. Infact, given the very limited scope of the review sought by the ISLA, the review will not affect or impact either the Appellant or the Respondents.
31. That it is therefore only just, fair and in the interest of proper administration of justice for this Court to grant the orders sought and rectify the error apparent on the face of the record at paragraph 48 of the judgment.
32. The parties filed written submissions as follows; the applicant submitted that the Applicant was admitted as amicus curiae in these proceedings by way of a valid court order made on 11/11/2022. As directed by this Court, ISLA intervened and filed its amicus brief in the appeal with the court on the 17/3/2023, and judgment in the matter was delivered on 8/5/2023. However, at Paragraph 48 of that judgment, this Court held that the amicus curiae's brief and submissions could not be considered by the High Court as ISLA was not a party to the subordinate court proceedings. This finding by the Court amounts to an error or mistake apparent on the face of the record.
33. The applicant submitted that the finding amounted to setting aside of a valid court order made by a concurrent court on 11/11/2022 without jurisdiction or power. It leads to uncertainty and a lack of clarity in legal proceedings wherein the Court has admitted amicus curiae in appellate proceedings. There is no legal basis for the statement that an amicus curiae should have been a party at the court of first instance.
34. The participation of amicus curiae is grounded under Article 22(3)(e) of *the Constitution* of Kenya, 2010. The continued application of the finding made in paragraph 48 of the judgment creates a legal precedent that undermines the exercise of all courts' use of amicus participation in appellate proceedings, and this leads to a situation that undermines the advancement of the rule of law and vindicating of constitutional rights.
35. The applicant argued that this error apparent on the record consists sufficient reason to warrant this court's intervention. Order 45(1)(b) of the Rules is instructive that it is any party who is aggrieved who can move the court for an order of review, party in question does not seek to appeal the decision.
36. In support the applicant cited HA v LB [2022] eKLR Civil Appeal No. 188 of 2021 where it was held:

“... the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so.”
37. The appellant submitted that the learned judge gave her reasoning behind the holding in paragraph 48 of the judgement. The Judge acknowledged the amicus submissions and went further to state the



reason why she would not consider them. The amicus cannot therefore challenge this reasoning by way of review for the mere reason that do not agree with it.

38. The appellant relied on the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR where Mativo, J stated as follows:-

“The starting point is that 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. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

.....

20. Review is impermissible without a glaring omission, evident mistake or similar ominous error. 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.”

39. The appellant submitted that the applicant seeks to have the court re-analyze its reasoning which would amount to exercise of the appellate jurisdiction which is not permissible as the court cannot sit on appeal on its own decision.

40. The appellant argued that Section 80 of the *Civil Procedure Act* is clear that any party can file an application for review but no appeal ought to have been filed against the said decision. The focus is on the decision and on the party filing either the appeal or the application for review. It is not in dispute that the 1<sup>st</sup> Respondent herein has already filed an appeal against the Judgement.

41. The appellant further argued that it is trite law that the extent of participation of amicus curiae in a matter is governed and limited by the court since they are not parties to the suit. That upon submission of the amicus brief the applicant was required to seek the leave of this court before filing any further documents/application or participating further in the proceedings. As such in the absence of such leave being granted by the court, then the amicus lacks the requisite locus standi to move the court.

42. The arguments that the applicant has no locus standi to make this application and also that the applicant required the leave of the court to file the application for review have no legal basis since Section 80 and Order 45 state that “any person considering himself aggrieved” by an order or decree of the court may apply for review.

43. It is not in dispute that ISLA made an application to be enjoined as Amicus Curiae and the court in its ruling dated 11/11/2022 allowed the application.

44. The issues for determination in the application dated 8/9/2023 are as follows;

- i. Whether the applicant has met the threshold for review of the judgment dated 8/5/2023.
- ii. Whether paragraph 48 of the judgement should be reviewed.



45. On the issue as to whether the applicant has met the threshold for review, the governing provisions are Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules which state as follows;

Review

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.

Application for review of decree or order [Order 45, rule 1]

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.
2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

46. The applicant, ISLA, is aggrieved by the statement this court made in paragraph 48 of its judgment dated 8/5/2023 where this court stated as follows;

“Although The Initiative For Strategic Litigation In Africa (ISLA) made an application to be enjoined as Amicus Curiae at appeal stage and the court in its ruling dated 11/11/2022 allowed the application, this court was not able to consider their submissions for reasons that they were not party in the Trial court.”

47. This case is pending appeal in the Court of Appeal but the applicant has not intimated that they have preferred an appeal.

48. The applicant therefore falls within the provision of Order 45(2) which states as follows;

“(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the



appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”.

49. I find that the applicant, ISLA, has not preferred an appeal from the judgment dated 8/5/2023 and I also find that the review of paragraph 48 only would not prejudice the parties in this case or change the findings of the court.
50. I find that there is an error apparent on the face of the record contained in paragraph 48 of the judgment dated 8/5/2023 since the applicant, ISLA, had been admitted as a proper party to participate in the appeal and the said ruling admitting ISLA as a party to the appeal had not been set aside.
51. In the said paragraph 48 this court clearly committed an error by stating that the reason for failing to consider the submissions of ISLA was that it was not a party in the trial court.
52. I find that this is an error on a substantial point of law because ISLA had already been properly admitted in the proceedings and therefore the only way to deal with such an error that “stares one in the face” is to correct it.
53. In the case of Nyamogo & Nyamogo Advocates Vs Kogo [2001] 1 EA 174, the Court of Appeal judges had this to say about an error apparent on the face of the record; “An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness in its very nature and it must be left to 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 an error apparent on the face of the record would be made out.”
54. In the case of Salim Bin Ahmed Hanji & Co Ashur Ahmed Transporters v Simon Kimtai Kiror & another [2 018] eKLR, the court made an error and/or omission in failing to award costs and in correcting the error, the court held as follows;

“In my judgment on appeal by the appellant, I found in favour of the Respondent, now applicant, and made a finding that the appellants did not demonstrate that the awards of damages in the trial court were in any way excessive. I proceeded to dismiss the appeal with no orders as to costs.

  7. Upon reflection and reconsideration of this judgment, I must admit that my exercise of discretion in the matter of the costs was not supported by any logical arguments or findings. I gave no explanation for denying the successful party its costs.

I agree that the failure to award costs to the applicant was an error that I must move to correct.”
55. In the current case, I have considered the submissions by all the parties and the court’s pronouncement on paragraph 48 and I find that it amounts to setting aside of a valid court order made by a concurrent court on 11/11/2022 and the same may lead to uncertainty and a lack of clarity in legal proceedings wherein the Court has admitted amicus curiae in appellate proceedings.
56. The reason given for failure to consider the submissions by Amicus curiae was that they were not a party in the trial court and this amounts to a clear error because it is not in dispute that ISLA was properly enjoined as a party to the appeal.



57. I find that the participation of ISLA was proper and that the court could consider the amicus brief, even if it was not a party in the lower court because the court had admitted ISLA through an order made on 11<sup>th</sup> November 2022.
58. The applicant, ISLA, was in support of the appeal and the appeal was allowed and their only concern is the ramification of the said words.
59. I agree with the applicant that there is no legal basis for the statement that an amicus curiae should have been a party at the court of first instance.
60. The application was filed without undue delay and I find that it meets the threshold for review of this court’s judgment only on paragraph 48.
61. The said review will not affect the decision of this court and therefore the parties will not suffer any prejudice.
62. The application dated 8/9/2023 is allowed in the following terms;
  - i. That Paragraph 48 of the judgment dated 8/5/2023 is corrected and the words “Although” and “this court was not able to consider their submissions for reasons that they were not party in the Trial court” are deleted from the said paragraph since the same amount to an error apparent on the face of the record.
  - ii. That the said paragraph is amended to reflect the correct position as follows;
    48. The Initiative For Strategic Litigation In Africa (ISLA) made an application to be enjoined as Amicus Curiae at appeal stage and the court in its ruling dated 11/11/2022 allowed the application.”
  - iii. That each party to bear its own costs of this application.

Orders to issue accordingly.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS  
2<sup>ND</sup> DAY OF APRIL, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

