REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. CAUSE NO.20 OF 2018

EVALINE CHEPTOO.....PLAINTIFF

VERSUS

FLAMINGO CO. LTD.....1st DEFENDANT

COSMAS KOECH.....2nd DEFENDANT/APPLICANT

COUNTY GOVERNMENT OF KERICHO.....3rd DEFENDANT

RULING

1. Via an application dated the 10th December 2019, brought pursuant to the provisions of Section 99, 80, 3 and 3A of the Civil Procedure Act and Order 45 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules, the 2nd Defendant/Applicant herein seeks for a review of the court's ruling delivered on 27th September 2019 in terms of the order for costs of the main suit, together with the cost of the application dated 10th May 2019 plus interest therein.

2. The said application was supported by the grounds on the face of it and an Affidavit, sworn on the 10th December 2019 by Cosmas Koech the Applicant/2nd Defendant herein.

3. Pursuant to service of the said application the Plaintiff/Respondent via their Notice of Objection dated 13th February 2020, deponed that the said application was bad in law, that there was no Decree or Order from which the review was sought. That the 2nd Applicant/Defendant was not entitled to costs as he had acted in person save for the application to strike him out of the proceedings in the matter.

4. They further deponed that the firm of Obondo Koko and Company Advocates were wrongly before court and all proceedings and documents filed by them were irregular as there had been no notices of appointment and/or leave to file additional amended defences or any documents at all.

5. That the provisions of Order 9 Rule 7 of the Civil Procedure Rules provided that where a party had been acting in person and (s)he appoints Counsel subsequently, the filing of a Notice of such appointment was mandatory.

6. That costs are awarded at the discretion of the court and that in this particular instant, the court had exercised its discretion properly in not awarding costs in respect of a party who was acting in person and the matter had not proceeded to hearing. That pleadings and proceedings by an incumbent Counsel who had not adhered to the said provisions ought to be expunged from the record. Notice to file or leave to amend cannot be retrospective.

7. On the 2nd March 2021, by consent parties sought to dispose of the Application by way of written submissions.

Applicant's submissions.

8. Vide his submissions dated the 22nd June 2021, the 2nd Defendant/Applicant submitted that pursuant to an application dated 10th May 2019, a ruling had been delivered on 27th September 2019, striking out the suit against the 2nd Defendant wherein the court only awarded costs for the application and inadvertently failed to indicate or award costs for the entire suit together with interest.

9. It was his submission that costs normally followed the event unless for a reason which must be given by the court, and therefore a party was entitled to costs of the suit after the matter had been struck out or was successful in the circumstance.

10. The Applicant framed his issues for determination as follows:

i. Whether the application dated 10th and December 2019 is merited.

ii. Who bears the cost of this application?

11. On the first issue for determination and while relying on the provisions of Order 45 rule 1 (i) (b) of the Civil Procedure Rules and on the decided case in **Stephen Gathua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR,** the Applicant submitted that there was an error apparent on the face of the ruling delivered on 27th September 2019 wherein the court neither awarded nor denied costs of the main suit which had been sought in prayer 3 of the application dated 10th May 2019.

12. The Applicant further submitted that it was a principle of the law which had stood the test of time that costs would normally be awarded to a successful litigant unless there were compelling reasons to depart from these same principles. That in the present case, after the court had struck out the suit against the 2nd Defendant, it did not make a determination on the costs of the main suit as had been sought by the 2nd Defendant in his application. That the 2nd Defendant was entitled to costs which he had incurred in attending various court sessions, filing of pleadings including Memorandum of Appearance, defence, amended defence, the application for striking out suit, submissions among others and the instruction fee for his advocate. The Applicant relied on the decided case of **Cecilia Karuru Ngayu vs. Barclays bank of Kenya & Another [2016] eKLR**.

13. That pursuant to the provisions of Section 27 of the Civil Procedure Act, costs of any matter including the striking out of the suit against the 2nd Defendant ought to follow the event unless there were reasons for departure which was not forthcoming in the present circumstance.

14. That this matter was first commenced in the Chief Magistrate's Court as Civil Suit No. 79 of 2015 where the Plaintiff had filed numerous applications before filing an application dated 4th August 2019 for the transfer of the suit to this court wherein he continued to file applications for amendment of the Plaint among others which in turn called for the 2nd Defendant's response. That the proceedings were clear on the attendance of the 2nd Defendant's Advocate on numerous occasions which ought not to go in vain. The Applicant sought that the court allows their application.

Plaintiff/Respondent's submission.

15. The Plaintiff/Respondent's written submissions filed on 19th March 2021 in opposition to the Applicant's application was that via their grounds of objection dated 13th February 2020, it was clear that the 2nd Defendant/Applicant had acted in person wherein he had entered appearance and filed the defence in person. That the subsequent appearance and conduct of the application to strike out the 2nd Defendant from the suit was totally irregular as the rules of procedure under Order 9 rule 7 of the Civil Procedure Rules made it mandatory for the filing of a Notice of Appointment which would then be served on all parties concerned. The 2nd Defendant failed to comply with the said provisions of the law.

16. That the firm of Obondo Koko and Company Advocates were never on record until the pleadings closed. That they had gate crushed and purported to file an amended defence and an application to strike out the 2nd Defendant from the proceedings without the leave of court and in breach of legal procedural requirements.

17. That from the impugned ruling of the court, the Respondent/Plaintiff had been condemned to pay costs of the application wherein costs of the suit was not allowed. There had been no Appeal preferred. That the awarding of costs was at the discretion of the court and discretion in the present circumstance appeared to have been exercised fairly since the 2nd Applicant/Defendant had been acting in person throughout.

18. That the court should not continue to entertain any further representation by the firm of Obondo Koko and Company Advocates until the rules of the procedure were complied with in regard to filing of notices of appointment and leave to amend pleadings.

19. That the issue of costs having arisen following the ruling of Lady Justice J M Onyango, the application was essentially to review her orders and ordinarily another judge should not interfere with another's ruling. There was no error apparent on the face of the ruling which was specific and well thought out. The Respondent/Plaintiff sought for the Applicant's application to be dismissed with costs as the same was incompetent and un-procedural.

Determination.

20. I have carefully considered the grounds in support of and against the application as well as the submissions by both parties, the relevant law and authorities and the peculiar facts of this case. In my considered opinion the key issue that emerges for determination is w*hether the Applicant has satisfied the conditions set down for review.*

21. Order 45 Rule 1 of the Civil Procedure Rules, provides the circumstance under which an application for review of decree or order may be brought and provides as follows:-

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."

22. Order 45 Rule 2 of the Civil Procedure Rules, under which the application is brought is clear as to whom the applications for review may be made to, and provides as follows;

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

23. Section 80 of the Civil Procedure Act provides as follows:-

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.

24. From the above provisions, it is clear that whereas Section 80 of the Civil Procedure Act gives the court the power to review its orders, Order 45 Rule 1 of the Civil Procedure Rules sets out the rules which restrict the grounds upon which an application for review may be made. These grounds include;

i. 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;

ii. on account of some mistake or error apparent on the face of the record, or

iii. *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

25. In order to appreciate the provisions of Order 45 of the Civil Procedure Rules and the reason given by the Applicant/2nd Defendant to the effect that the court in its the ruling delivered on 27th September 2019, striking out the suit against the 2nd Defendant, inadvertently failed to indicate or award costs for the entire suit together with interest, I shall have to revisit the proceedings before court.

26. It is clear that this suit was forwarded to the Environment and Land Court from the Magistracy court vide a letter dated the 8th March 2018 wherein it was placed before my sister Lady Justice Onyango for the first time on the 21st May 2018. The matter was then fixed for hearing on 9th July 2018 with orders for the Defendants to be served with a hearing notice. Leave was also granted that they file their documents and witness statements before the hearing date.

27. On the said date, the 2nd Defendant/Applicant was present in person wherein on subsequent dates being 22nd October 2018 and 10th December 2018 he was not present. Then on 14th February 2019, Mr. Koko Advocate appeared in court and informed the court that although the 2nd Defendant was his client in other matters, yet he had never instructed him in this particular matter.(emphasis added)

28. Subsequently the matter was fixed for hearing on the 10th June 2019 wherein Mr. Koko Advocate informed the court that during the pre-trial, he had discovered that the 2nd Defendant/Applicant had been wrongly sued to which he had filed an application dated 7th June 2019(sic) seeking to have the 2nd Defendant struck out from the suit. The 3rd and 4th Defendants did not oppose the application wherein the court directed the Plaintiff and 2nd Defendant/Applicant to file their submissions. The matter was then slated for mention on the 8th July 2019 on which day Counsel for the 2nd Defendant/Applicant was present and a date for the ruling was fixed.

29. At this juncture it is important to point out that from the Court's record the said Application is dated 10th May 2019 and not 7th June 2019. That further the application had been filed alongside the 2nd Defendant/Applicant's amended statement of defence and list of supporting documents all dated the 10th May 2019.

30. On the 27th September 2019, the impugned ruling was delivered wherein the application was granted and the suit against the 2nd

Defendant was struck out with costs, of the Application.

31. While it is not disputed that this Court has supervisory jurisdiction over subordinate court matters, such jurisdiction has to be exercised in a structured manner. This means that it is not open for a Judge to preside over matters that was before the subordinate court, unless on Appeal. From the chronology of the facts as herein presented, it is clear that after the matter was forwarded to this court, the 2nd Defendant/Applicant had been representing himself, there was no Notice of Appointment of the firm of Obondo Koko and Company Advocates, there had been no pleadings filed by the 2nd Defendant/Applicant and/or leave granted to the 2nd Defendant/Applicant to file additional, amended defence or any documents which were filed at the last minute together with the Application to strike out the 2nd Defendant/Applicant from the suit.

32. Order 9 Rule 7 of the Civil Procedure Rules provides as follows:

> *Where a party, after having sued or defended in person, appoints an advocate to act in the cause or matter on his behalf, he shall give notice of the appointment, and the provisions of this Order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications.*

33. With this in mind, can we therefore say that there was an apparent error or omission on the part of the Court, in its ruling, in not awarding costs, together with interest for the entire suit, to the 2nd Defendant/Applicant, and therefore the said ruling ought to be reviewed? The answer is definitely in the negative.

34. The Court of Appeal had the following to say in an application for review in the case of **National Bank of Kenya Ltd vs Ndungu Njau**. **[1996] KLR 469**

> *"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."

35. The Court of Appeal further held that;-

> *"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).*

36. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:

> *" In **Nyamogo & Nyamogo -vs- Kogo (2001) EA 174** this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."(emphasis mine)*

37. Having looked at the reasons herein advanced by the 2nd Defendant/Applicant seeking that this court reviews the ruling of 27th September 2019 in terms of the order for costs of the main suit together with the cost of the application dated 10th May 2019 plus interest therein I find that the same did not meet the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules. I therefore to dismiss the application dated 10th December 2019 with costs to the Plaintiff/Respondent.

Dated and delivered via Microsoft Teams this 28th day of September 2021.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE