



**Trustees of St. Joseph Parish Ngara (Suing Through the) Church Commissioners
of Kenya v Obura Meshack Okoth t/a Obura & Company Advocates (Civil
Case 273 of 2015) [2024] KEHC 6979 (KLR) (Civ) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6979 (KLR)

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

CIVIL

CIVIL CASE 273 OF 2015

JN MULWA, J

JUNE 12, 2024

BETWEEN

**THE TRUSTEES OF ST. JOSEPH PARISH NGARA (SUING THROUGH THE)
CHURCH COMMISSIONERS OF KENYA APPLICANT**

AND

**OBURA MESHACK OKOTH T/A OBURA & COMPANY
ADVOCATES RESPONDENT**

RULING

1. This ruling is in respect of the Plaintiff's Application dated 2/12/2022 brought under Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#) and Order 45, Rule 1, 2 and 3 of the [Civil Procedure Rules](#) (CPR).
The Applicant seeks review of orders made by Hon. Kamau J, on 22/12/2020 and the cost of the application upon grounds stated on its face and Supporting Affidavit of Rev. Alex Otieno a Vicar in the Anglican Church of Kenya duly authorized by the Plaintiff to swear the affidavit.
2. In response to the Application, the Respondent states to have filed a Replying Affidavit sworn on 3/03/2023 and a further Replying Affidavit but upon looking at them, they are undated and not commissioned by a Commissioner for Oaths.
3. Both parties have also filed their respective submissions.
4. Before I proceed to analyze the parties' pleadings, the application and responses thereto, I find it appropriate to render myself on the legality of the Replying Affidavits to the Application.



5. Order 51 Rule 3 (13) Civil Procedure Rules provides for the format and hearing of applications upon filing such application must be served upon the opposite party. Rule 14 thereof provides that if the Respondent wishes to oppose the application, he may file one or more of three documents: -

- i. A Notice of Preliminary Objection and or,
- ii. Replying Affidavit and or,
- iii. A statement of grounds of opposition.

Rule 14(4): if a Respondent fails to comply with Sub-Rule (1) and (2) the Application may be heard *ex-parte*.

6. The law is therefore that in the absence of either of the above stated at Rule 14 (a), (b) and (c) the Application may be heard Ex-parte.

7. I have perused the entire court file looking for the Replying Affidavit allegedly filed by the Respondent and I have found none. The CTS too shows no such affidavit having been filed. It is therefore save to state that the Respondent did not file a Replying Affidavit to the Application under review.

8. As to a Further Affidavit that has been filed, a perusal of the same shows that it is neither dated nor commissioned before a Commissioner of Oaths. So then, is the Application dated 2/12/2022 opposed in view of the evident flaws in the respondent's affidavits? Are these flaws capable of being cured by invoking Article 159 2(d) of the Constitution?

9. Under the Article the court is mandated to administer justice without undue regard to procedural technicalities reaffirmed by the Supreme Court of Kenya in Raila Odinga v IEBC & 4 others Petition No. 5 of 2013 When it stated that: -

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to triumph over the primary object of dispensing justice to the parties.....”.

I have stated that there is no Replying Affidavit dated 3/03/2023 to the application. There was also no leave obtained to file the Further Affidavit which though filed, is undated and not commissioned. These flaws cannot be wished away under the guise of substantive justice as expounded in the Raila v IEBC case (Supra).

10. The serious omission in the Jurat cannot be overlooked as stated in the Microsoft Corporation V. Mitsumi Computer Garage Limited & Another. Nairobi (Milimani) HCC. No. 810 of [2001] KLR 470; and cited Peeraj General Trading & Contracting Company Limited Kenya & another V. Mumias Sugar Company Limited [2016] e KLR.

11. The Respondent in my view had a perfect occasion to remedy the flaws as they had been raised in the applicant's submissions dated 15/02/2024. He could have arrested this ruling by seeking leave of court to rectify the Replying Affidavit or filing fresh opposing documents before filing his submissions dated 2/04/2024 in which he has urged this court to ignore the undated and uncommissioned affidavit based on the overriding objective of the Civil Procedure Act.

12. Upon the above, I am constrained to find and hold that the Notice of Motion dated 2/12/2022 stands unopposed. The further Replying Affidavit sworn by the Respondent is struck out.

In the same breath the Respondent's Submissions dated 2/04/2024 are struck out having no legal legs to stand upon.



The Notice of Motion Dated 2/12/2022.

13. Judgment of the court was delivered on 28/05/2019 in favour of the Plaintiff/Applicant. The decree is dated 28 /05/2019 and issued on 28/06/2022.
14. The impugned judgment reads at paragraph 31 (Disposition);
 1. That an order be and is hereby made that the Respondent do deliver a cash account in respect of all the monies paid to him as an advocate in respect of the purchase of land known as LR 209/ 12371 particulars whereof are within his knowledge.
 2. That the respondent do refund to the Applicant any monies that may be found to be due from him upon rendering the said account.
 3. That the Respondent do pay interest on all the monies found due from him at court rates from 5/09/2009 until payment in full.

Paragraph 32 : The Respondent shall bear the applicant's cost of the (OS) Originating Summons.

15. Pursuant to the above orders *vide* the judgment the court -Kamau J, the applicant filed an application dated 26/09/2019 seeking orders of review and/or rectification of court orders dated 27/11/2019 and issued on 22/12/2020 as hereunder: -
 1. That the judgment be and is hereby rectified to reflect Obura, Meshack Okoth t/a Obura & Company Advocates and not Standard Chartered Bank of Kenya Limited as the defendant as indicated in the said judgment on 25/05/2019
 2. That the Respondent do deliver a cash account in respect of all the monies paid to him as an advocate in respect of the purchase of the land known as LR. 209/12371 particulars whereof are within thirty (30) days from 27/11/2019.
 3. That in default of order No. 2 hereinabove, the Applicant to be at liberty to effect recovery of the full sum owed.
 4. That the costs of the application be in the cause.

It is this "Rectified Judgment by a review order" issued on 22/12/2020 that seeks an order to further review the judgment that is the subject of the instant application.

Issues for Determination.

16. Whether the Applicant meets the threshold for further review orders and rectification of orders dated 27/11/2019 and issued on 22/12/2020 to:
 1. Specify that the sums owed to be referred to as the full sum owed as Kshs. 1,450,000/=
 2. Specify that the sum of Kshs. 1,450,000/= to accrue interest at court rates from 5/09/2009 until payment in full as per the judgment dated 28/5/2019.
 3. Who bears the costs of the application?
17. By the Supporting Affidavit of the applicant it is deposed that a decree capable of execution cannot be drawn as the orders by the learned Judge Kamau J. and therefore an order of further rectification is required to specify the sums due from the respondent as per Clause (3) of the rectified orders as well as a need to reflect and provide payment of interest on the sums found to be due of Kshs. 1,450,000 from 5/09/2009 at court rates until payment in full.



18. I have perused the Decree drawn pursuant to the Orders of the court issued on 22/12/2020. It is a replica of the Rectified Court Orders reproduced at paragraph 14 above.
19. The threshold under order 1(b) of Order 45 for review orders are-

“Discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced at the time which the decree was passed; or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason...”

The application too ought to be made without unreasonable delay.

20. There are myriad Superior Courts’ decisions that support the court’s powers to review its orders whenever it considers it necessary on account of apparent error, mistake and/or omissions on the part of the court where such error, mistake or omissions are apparent on the face of the record. See *National Bank of Kenya Limited V Ndungu Njau* Civil Appeal No. 211 1996 [1997] eKLR.
21. Notably in *Republic V. Advocate Disciplinary Tribunal ex-parte Apollo Mboya* [2019] Mativo J. (as he then was) put together the following principles from a number of decisions;

“That a court can review its decision on either of the grounds enumerated under Order 45 Rule 1 and not otherwise.....

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 detailed examination”.

22. In *Chandralchant Joshibhai Patel V. R.* [2004] TLR, 218 it was held that an error apparent on the face of the record: -

“.... Must be such as can be seen who runs and reads, that is an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions”

23. On the matter of unreasonable delay, the Court of Appeal in *Francis Origo & Another versus Jacob Mungala* [2005] 2 KLR 307 held that together with the other grounds of appeal, discovery of new and important matter apparent mistake or error on face of the record the Applicant must make the application for review without unreasonable delay.

So when did the applicant discover the new and important matter, the error or mistake on the face of the record on the orders issued on 22/12/2022?

24. The Application dated 2/12/2022 arose from Orders of Court dated 22/12/2020. As at this date the Respondent had not rendered cash account in terms of the judgment delivered on 28/05/2019, which impaired the execution of the decree as delivery of the cash account was paramount in terms of the judgment delivered on 28/05/2019 that had been ordered to be done within 30 days of 27/11/2019.

What may be referred to and held to be the full sum owed was subject to the cash account being delivered.

25. I therefore find no unreasonable delay to making this Application, as the delay in my view was occasioned by the Respondent.



The Rectified Judgment/Orders dated 22/12/2020 and reproduced above in my view are clear on some aspects in terms of the correct defendant but at Order 2 thereof is subjective to a cash account being rendered by the Respondent. Without the accounts being taken, the amounts due for payment and for purposes of extraction of a decree would be an orderious task, as the orders do not specify the sums found to be due by the court.

In my view that was an omission and error by the trial court that need to be rectified as to arrive as to what will be deemed as the full decretal sum.

26. I have read the judgment delivered on 28/05/2019.

At paragraph 11 on the Respondent's case extracted also from the Replying Affidavit the Respondent admitted having received Kshs. 1,450,000= shillings from the Applicant as Trustee for the particular transaction. Upon cross-examination during the hearing he admitted having withheld the said sum but had never rendered a statement of accounts in the Advocate-Client relationship.

27. In addition, the court had at paragraph 28 of its judgment noted that the Respondent could not purport to exercise a lien over the sum at issue without having notified the applicant of the fees that were due to him. In my view therefore, that it is on the above basis that the Applicant seeks further rectification of the orders to reflect the sums due from the Respondent to the Applicant. I agree with the Applicant that no reasonable decree can be extracted for purposes of execution without the decretal sum, or the full sums owing are specified.

28. By the rectified judgment dated 22/12/2020, the Respondent was obligated at (2) to deliver cash account of the money received by himself from the Applicant and at Order (3) in default the Applicant to be at liberty to effect recovery of the full sum owed.

29. The Respondent having failed to show compliance with the rectified judgment by court Order dated 22/12/2020 the Applicant is left with no alternative but to invoke the default clause which without the orders sought is impossible. There is no better sufficient reason under the rules than the above as stated by the Applicant in terms of Order 45 Rule 1, any other sufficient reason.

Section 8 of the *Civil Procedure Act* also underpins the Court's powers to review its judgment for any other sufficient reason.

30. In *Shanzu Investments limited versus Commissioner for Lands (Civil Appeal No. 100 of 1993)* cited in *Omote & Another V, Ogutu* [2022] KLR, the court rendered that: -

“Any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the *Civil Procedure Act*, and that the other grounds set out in the rule did not in themselves form a genus or class of things Which the third general head Could be said to be analogous”.

31. Additionally, the Court in *Republic V. Cabinet, Secretary for Interior and Coordination of National Government Ex-parte* Abdullahi Said Said [2019] e KLR rendered that: -

“----- any other sufficient reasons mean a reason sufficiently analogous to those specified in the rule. Any other attempt except an attempt to correct an apparent error or an attempt not based on any ground set out ----- would amount to an abuse of the liberty given to the tribunal under the Act to review its argument.”

32. In such an Application it is upon the court to exercise its discretion to administer justice.



In respect to the Application before the Court, the orders sought for further review of the orders of 22/12/2020 fall within the purview of any other sufficient grounds to justify review of the judgment. I Have expressed myself why the order sought ought to be granted as without the review by rectification and clarification of the court orders, no decree would be drawn or extracted by which then the Judgment of the court would remain in limbo, to the prejudice of the Applicant.

33. I am therefore persuaded that the Applicant herein has met requirements stated under Order 45 Rule 1 of *Civil Procedure Rule* and Section 80 of the *Act*. The issues flagged for determination have been so made in the affirmative.

Consequently, the Application dated 2/12/2022 is merited. It is allowed in terms of prayers no. 2, 3 and 4 thereof.

A rectified decree shall be drawn to reflect the orders stated above.

The cost of this application shall be borne by the respondent.

Orders according.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JUNE, 2024.

JANET MULWA

JUDGE

