



**Directline Assurance Co Ltd v Ogalle & 2 others (Civil Appeal
E154 of 2022) [2024] KEHC 9153 (KLR) (Civ) (15 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9153 (KLR)

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

CIVIL

CIVIL APPEAL E154 OF 2022

JN MULWA, J

JULY 15, 2024

BETWEEN

DIRECTLINE ASSURANCE CO LTD APPELLANT

AND

DAVID OGALLE & 2 OTHERS & 2 OTHERS RESPONDENT

RULING

1. The Respondent/ Applicant filed the Notice of Motion dated 13th October 2023, brought under Orders 45 Rule 1 of the Civil Procedure Rules, Sections 1A & B, 3A, 80 & 99 of the [Civil Procedure Act](#) seeking the following orders:
 1. That the application hereby be heard ex-parte in the first instance and be certified as urgent and the Honourable Court be pleased to stay further proceedings herein until the hearing and determination of this application.
 2. That the court be pleased to review and set aside part of its Ruling and Order of 27th October 2022 and Order thereof in so far as it relates to the appellant's application dated 16th day of March 2022 and proceed to confirm its decision only in so far as it relates to the Respondent/ Applicant's Preliminary Objection dated 20th April 2022 as per the directions and proceedings herein.
 3. That the court do proceed to make directions on the disposal of the appellant's application dated 16th March 2022.
 4. Costs be provided for.
2. The application is based on grounds that the said ruling was made in error of the court's directions of 18/5/2022 and proceedings, oral arguments of 15th June 2022 and thus irregular on the face of



the court record. The applicant in his supporting affidavit states the court was to make a ruling on the respondent's preliminary objection dated 20th April 2022, however, the court proceeded to make a finding on both the respondent's preliminary objection and the appellant's application dated 16th March 2022. The applicant states that it is apparent that the application dated 16th March 2022 was never argued before the court or at all.

3. The application is vehemently opposed by the Appellant's Replying Affidavit sworn on 30th October 2023. The Appellant submits that the Respondent in this application is trying to relitigate and argue his Preliminary Objection for a second time yet the court had already considered the grounds raised therein and made a finding. Further, it is their deposition that the application for review on the grounds that there was an apparent error on the face of the record is misplaced as the Honourable Court considered the preliminary objection and the grounds therein and there is no error apparent on the face of it.
4. The applicant seeks the Honourable Court to review and set aside part of its ruling and reinstate the suit for hearing. Under Order 45 of the Civil Procedure Rules, a party to be entitled to an order of review must satisfy the court that:-

Rule 1 (i) :

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 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 order made, or on account of some mistake or error 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 judgement to the court which passed the decree or made the order without unreasonable delay.
5. The grounds for application of review were stated in the case of Republic v Public Procurement Administrative Review Board & 2 others (2018) eKLR where it was held that:-

“ 12. Section 80 gives 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 an unreasonable delay.”



6. On what amounts to an error on the face of the record the case of Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR, states that;

“The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act.”(Emphasis added)

7. Further, in the case of Nyamongo & Nyamongo Advocates v Kago (2001) eKLR states as follows;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 error apparent on the face of the record would be made out. 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.

8. In National Bank of Kenya Limited v Ndungu Njau (1996), it was held 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.”

9. In Mahinda vs. Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 the court expressed itself as follows:

“The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgment or decision was delivered or made.”

10. Additionally, as held in the case of Civil Appeal No. 103 of 2000, Evan Bwire vs Andrew Nginda, the court held that:-

“An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh.”



In the instant suit, the Applicant claims that it is apparent that the application dated 16th March 2022 was never argued before the court or at all.

11. On 27th October 2022, the Honourable Court delivered its ruling on both the application and the Preliminary Objection by stating as follows;

“The upshot is therefore that the application dated 16/03/2022 is merited, and succeeds partially upon the following terms:

- a. That the trial court's ruling delivered on the 16/03/2022 is stayed and varied as shall be shown here below, pending hearing and determination of the appeal.
- b. That the money deposited at Kericho CMCC NO. 353 of 2016, in the sum of Kshs. 1, 292,942/= be released to the 1st Respondent David Ogalle within 21 days of this ruling.
- c. That the 1st Respondent having been paid by Applicant a sum of Kshs. 704,893/= in part payment of the decretal sum, pursuant to the decree dated 9/06/2021, makes a total payment by the Appellant of Kshs. 1,997,635/=.
- d. That the sum of Kshs. 1,000,000/= (One million) deposited in court as a conditional stay by the Appellant on the 06/04/2022 be released to the depositor, the Appellant Direct Line Assurance Co. Ltd.
- e. That the Record of Appeal be filed within 60 days of this ruling.
- f. Costs of this application to abide the outcome of the appeal.”

12. In opposition, the Respondents relied on grounds of opposition dated 30/10/2023, and in particular stated that the motion was argued and a ruling delivered on 27/10/2022 allowed the application, that what the applicant is seeking is to relitigate the said application.

13. Upon consideration of the parties arguments and cited authorities in respect of review under Order 45 (1), I find no apparent error on the ruling of the court dated 27/10/2022 as the said ruling was in respect of both the PO dated 20/04/2022 and the application dated 16/03/2022.

For a court to be satisfied that there is an error apparent on the record, such error must be evident and need not and does not require detailed examination, scrutiny or elucidation either of the facts or legal position. It must be self-evident as held in the case of Paul Mwaniki vs National Hospital Insurance Fund Board (Supra).

14. Further, there is a clear distinction between an erroneous decision and an error apparent on the face of the record. An error which has to be established by a long drawn process of reasoning cannot be said to be an error apparent on the face of the record- Nyamongo & Nyamongo Advocates- (Supra). What is clear by the application under review is that the applicant was dissatisfied with the court’s findings, ruling and therefore its recourse lies, in the court’s opinion, under an appeal and not in an application for review.

15. I therefore find no merit in the motion dated 13/10/2023. It is dismissed with costs.

DATED SIGNED AND DELIVERED THIS 15TH DAY OF JULY 2024

JANET MULWA

JUDGE

