



Gathuri & another v Diamond Trust Bank Kenya Ltd & another; Mohamed & another (Interested Parties) (Commercial Suit 113 of 2016) [2024] KEHC 9389 (KLR) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL SUIT 113 OF 2016
DKN MAGARE, J
JULY 22, 2024**

BETWEEN

PETER THUO GATHURI 1ST PLAINTIFF

NELLY NGONYO KAMAU 2ND PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LTD 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

AND

MWANAISHA KIRIALE MOHAMED INTERESTED PARTY

MBARAK HAMISI MBARAK INTERESTED PARTY

RULING

1. This matter was concluded in May 2023. I made a decision on 8/5/2024. Immediately thereafter, the applicant filed an application dated 25/7/2023. The said application sought the following orders:-
 - a. ...
 - b. ...
 - c. ...
 - d. This court be pleased to review its order of 8/5/2023 and set the same aside.
2. Before I proceed, I need to show that there is an inherent problem with the file. It is a civil file but registered on the CTS twice. The first one being civil 113 of 2016. In this matter only the Applicant filed their documents, in this portal. The respondent filed their documents in a portal for 113 of 2016 under commercial division. I had to navigate the two portals for this ruling. I also had to synchronize



their dates to facilitate delivery. There was a slight delay in delivery of ruling due to some intervening circumstances beyond my control. The same fell on holidays or days set apart by generation Z for public demonstrations.

3. The said application is supported by the 1st Applicant's affidavit. The Applicant stated that the purpose of the suit was to preserve the subject matter of ELC 129 of 2010. They sought to set aside the orders of 8/5/2023 on grounds that the orders offend certain provisions of the law.
4. Replying affidavit by Mbarak Hamisi Mbarak dated 5/8/2023. They opposed the application dated 25/7/2023 stating that there were no orders staying HCCC 129 of 2010 and as such paragraph 13 is false.
5. The application challenged most of the ruling on points of law. The Applicant was of the view that the court should not have issued orders that were issued. It was their case that the court erred in law in issuing the orders it did. In other words, they were asking, how could the court issue such orders?

Analysis

6. The matters raised go to the root of the ruling given on 8/5/2023. It goes to the question whether the court can assess costs or not. It is that the court misapprehended the law governing the matter resulting in the ruling of 8/5/2023.
7. The matter is supposed to be review but in essence Appeal of the orders of the court to the same court. Section 80 of the [Civil Procedure Act](#) states that:

“ 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”.

Section 63 (e) of the [Civil Procedure Act](#) states that:

In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient.”

8. Order 45 of the [Civil Procedure Rules](#) provides for Review and it states as follows:

“(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”

9. I associate myself with the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and another* Kisumu HCCC No 191 of 1994 where he opined that:

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by him at the time when the ruling was made.”

10. Review does not entail re-examining the very foundations of the ruling and coming to a different finding. The doctrine of finality requires that the court cannot second guess itself. It can be true that the court can be truly wrong. Even make a decision that no reasonable court can be expected to make. However, our courts are arranged in a hierarchy of wisdom. The courts below reach their limit of wisdom. The courts above then infuse wisdom by euphemism of what we call errors of law.
11. In reality, it is a finding that the court was wrong. Recently, in Petition No E018 of 2023- *Republic v And Joshua Gichuki Mwangi and 4 others*, the supreme court (Koome CJ & P, Ibrahim, Wanjala, Njoki & Lenaola SCJJ) addressed the question of errors by the court of Appeal and stated as doth:

“[50] As we have stated before, this Court recognizes and respects the constitutional competence of courts in the judicial hierarchy to resolve matters before them. We have also settled that for an appeal to lie to the Supreme Court from the Court of Appeal under Article 163(4)(a), the constitutional issue must have first been in issue at both the High Court and then the Court of Appeal for determination. We have stated so in a myriad of cases including *Peter Oduor Ngoge vs Francis Ole Kaparo & 5 others*, SC Petition No 2 of 2012 [2012] eKLR and *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board*, SC Petition No 5 of 2012 [2012] eKLR. It was subsequently summed up in *Gladys Wanjiru Munyi v Diana Wanjiru Munyi*, SC Petition No 31 of 2014 [2015] eKLR thus:

“In *Peter Ngoge v Francis Ole Kaparo & 5 others*, Sup. Ct. Petition No 2 of 2012 [2012] eKLR, we signaled the guiding principle that the chain of Courts in the



constitutional set-up, running up to the Court of Appeal, do SC Petition No E018 of 2023 24 indeed have the competence to resolve all matters turning on the technical complexities of the law, and that only cardinal issues of law, or of jurisprudential moment, deserve the further input of the Supreme Court.” We reiterate the above guiding principle and would dissuade courts below from exceeding their mandate under the erroneous view that they have been confronted by a jurisprudential moment.”

12. The court is not supposed to be infused with new wisdom. I have not seen a question capable or amounting to error apparent on the face. In the case of *Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party); Kingángá (Exparte)* (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated)) [2021] KEHC 298 (KLR) (Judicial Review) (16 November 2021) (Ruling), Mativo J, as he then was stated as follows:-

“It is Paragraph (a) part of the rule deals with a situation attributable to the applicant, while paragraph (b) deals to an action attributed to the court which is manifestly incorrect or on which two conclusions are not possible. However, neither of them postulates a rehearing of the dispute. The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case is not a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy so the court should exercise the power to review its order with the greatest circumspection.

37. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

38. 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.”

13. The application is thus an Appeal to the same court disguised as review. The court has no power to sit on appeal from its own decision. The points raised can be serious points, but only if raised in the Appellate court. Parties must learn to approach higher court for infusion of judicial wisdom, which the court usually refer to as guiding the lower courts.

14. In the case of *Omote & another v Ogutu* (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling), F Gikonyo, held as follows: -

“From the submissions made by the applicant, he believes he was the successful party and ought to have been awarded costs of the appeal. This is akin to asking the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have reached a different conclusion or that the decision was erroneous are matters fit for appeal



rather than review which is limited in scope. Notably also, courts have held that; “the process of reasoning cannot be treated as an error apparent on the face of the record justifying the exercise of the power of review.” And that; “an erroneous order/decision cannot be corrected in the guise of exercise of the power of review.”

20. In the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR, Mativo J stated:-

“The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

15. Having raised questions of law, this court must eschew jurisdiction to decide on the review on points of law. The application dated 25/7/2023 lacks merit and is accordingly dismissed with costs of Kshs 20,000=.

Determination

16. The court makes the following orders: -

- a. The application dated 25/7/2023 lacks merit and is accordingly dismissed with costs of Kshs 20,000=.
- b. Interim orders issued are vacated.
- c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF JULY, 2024.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Plaintiffs

No appearance for the Defendants

Mr. Kioko for the Interested Parties

Court Assistant – Jedidah

