



**In re Estate of Gilbert Chienga (Deceased) (Civil Appeal
E137 of 2022) [2024] KEHC 8689 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8689 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E137 OF 2022
SM GITHINJI, J
JULY 9, 2024**

BETWEEN

KWEKWE CHARO MWANDONDO APPELLANT

AND

JANE GILBERT CHISENGA 1ST RESPONDENT

SICKLA KITI MWACHIRU 2ND RESPONDENT

JOYCE MASIKA MWACHIRU 3RD RESPONDENT

RULING

1. For determination is the Notice of Motion dated 11th December 2023 seeking the following orders;
 1. That the honourable court be pleased to review its judgment delivered on 26th October 2023 and determine the same on the basis that there was an inadvertent human error in indicating that the application coming for appeal in both the memorandum of appeal and appellant submissions was one dated 11th November 2021 and 12th November 2021 instead of the application dated 11th May 2022 and proceeded to determine the appeal on its merits.
 2. That upon grant of prayer 1 above or in the alternative, the court to proceed under Section 100 of the *Civil Procedure Act* to construe as amended the defects in both the memorandum of Appeal and the appellant submissions and determine this appeal on the application dated 11th May 2022 which ruling was delivered on 6th December 2022 on its merits with all necessary amendments being made for the purpose of determining the real question or issues raised by or depending on the proceeding on its full merits.
 3. That costs of this Application be provided for.
2. The Application is founded on the grounds on its face and the supporting affidavit of Kwekwe Charo Mwandondo who deponed that she is aggrieved with the ruling that was delivered on 26th October 2023



as she was not heard on merits. She deponed that the genesis of the error was misdating which occurred in the submissions in the lower court trial file which was carried over to the appeal file. That there will be no prejudice suffered by the Respondent.

3. In response to the application, the Respondents filed grounds of opposition on the following grounds;
 - a. The Appellant is guilty of inordinate delay.
 - b. There lies no sufficient reason for review of the judgment.
 - c. The application as brought does not meet the threshold for grant of review orders.
 - d. Having failed on appeal, the Applicant had already waived her right of review therefore guilty of knowledge and acquiescence.

Disposition

4. Review is provided for under Section 80 which provides 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); -

“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.”

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

“ 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”

5. Therefore, Order 45 of the [Civil Procedure Rules](#), 2010 is very explicit that a court can only review its orders if the following grounds exist:-

- a. There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- b. There was a mistake or error apparent on the face of the record; or
- c. There were other sufficient reasons; and

SUBPARA d.

The application must have been made without undue delay.

6. The pertinent issue for determination herein, therefore, is whether the Applicant has established any of the above grounds to warrant an order of review.

7. In *Muyodi v 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 v 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 and 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.”

8. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR held that:

“In *Francis Origo & another v. Jacob Kumali Mungala* (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review. This court stated: -



“our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the appellant’s application for review. We have therefore no option but to dismiss this appeal with costs to the respondent.”

9. We do not find it necessary to comment on the exercise of Court’s discretion on which counsel submitted because it was not an issue and in any case the appellant had not made out a case in that regard. Although the decision reached by Lesiit, J. was correct, it was however not based on the correct reasoning in that the application for review was premised on alleged error of law on the part of Njagi, J.

We think Bennett J was correct in *Abasi Belinda v Frederick Kangwamu and another* [1963] E.A. 557 when he held that:

“ a point which may be a good ground of appeal may not be a good ground for an application for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”

10. I have considered the reasons advanced by the Applicant for review. The Applicant states that the error was made while dating the applications aforesaid thus the ruling delivered on 26th October 2023 dismissed the appeal without being heard on merit. Having taken into account the reasons herein I am of the view that the court in its judgment dated 26th October 2023 rendered itself within the confines of the material placed before it. There is no apparent error on the face of the judgment nor is there any sufficient cause to warrant review. The reasons as raised point to housekeeping issues by the appellant which is not the courts fault. In the premise, I find that the application lacks merit and the same is hereby dismissed with no orders as to costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF JULY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

- 1. Mr Mwangunya for the Appellant**
- 2. Firm of Khaminwa are for the respondent – absent**
- 3. Mr Mwangunya;-I seek leave to appeal.**

Court; -Application is granted.

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S.M. GITHINJI

JUDGE

9/7/2024

