**Patmose Technical Service (K) Ltd v Rural Electrification Authority (Civil Case 541 of 2012) [2024] KEHC 10596 (KLR) (Commercial and Tax) (10 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10596 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**CIVIL CASE 541 OF 2012**

**A MABEYA, J**

**SEPTEMBER 10, 2024**

**BETWEEN**

**PATMOSE TECHNICAL SERVICE (K) LTD ..... PLAINTIFF**

**AND**

**RURAL ELECTRIFICATION AUTHORITY ..... DEFENDANT**

**RULING**

1. Before me is an application dated 24/7/2023. The same is brought under sections 1A, 1B and 3B of the *Civil Procedure Act*, Order 45 rules 1&2, Order 51 rule 1 of the Civil Procedure rules 2010. It seeks the review of the orders of the Court made on 22/5/2023 by which it was ordered that a sum of Kshs. 45,000,000/- be released to the firm of Nyasani E.N & Co Advocates for and on behalf of the plaintiff.

2. In support of the application, the applicant relied on the grounds set out on the face thereof and the supporting affidavit sworn by DONALD.B. KIPKORIR on 24/7/2023. It was contended that at the time the orders of the court were issued on 22/5/2023, there was an application on record challenging the plaintiff's legal representation.

3. It was posited that Kshs. 50,000,000/- held in a joint interest earning account was pursuant to a court order given on 4/2/2016. That the applicant had filed a notice of appeal against the judgment and decree of the Court and had been unable to proceed with the appeal since the court file was being reconstructed. That the orders granted on 22/5/2023 were prejudicial to the hearing of the intended appeal as it would render it nugatory. That this was a proper case for review and the application was timeously filed.

4. In response to the application, the respondent filed a replying affidavit sworn by SAMEET PATEL on 28/8/2023. It was deponed that, at the time the Court issued the orders of 22/5/2023, the applicant was represented by a competent advocate who did not object to the request for release of the security

deposit. That the application was filed two months after the order for the release of funds suggesting it was an afterthought.

5. It was further contended that the application did not disclose any grounds for review. The respondent also claimed that as a result of the delay in prosecuting the appeal, the respondent had been subjected to prejudice as it has been 8 years since the judgment was delivered.

6. The application was canvassed by way of written submissions which I have considered. The applicant submitted that the orders of 22/5/2023 had been made without any formal application to set aside the orders of the Court dated 4/2/16. That release of the monies to the firm of Nyasani E.N& Co Advocates was a mistake or error apparent on the face of record since there was an issue of representation involving the firms of Nyasani E.N& Co Advocates and Stanley Henry Advocates. It was submitted that the release of the funds would greatly prejudice the applicant as the respondent was unlikely to refund the decretal sum.

7. On the part of the respondent, it was submitted that the application was intended to delay the respondent from enjoying the benefits of the judgment, which had been delivered on18/11/2014. The respondent's counsel pointed out that the case file had been reconstructed by orders of Justice Kasango, contradicting the applicant's claim. That the applicant's assertion that the orders were issued without a formal application could be a ground for appeal rather than review as the applicant was essentially challenging the Court's decision.

8. I have considered the pleadings, the submissions as well as the authorities cited. The core issue is whether there has been established a proper case for review.

9. The Court's jurisdiction for review stems from section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. The rule provides: -

> "(1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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".

10. The present application seeks the review of the orders of the Court made on 22/5/2023. The order directed the release of Kshs. 45,000,000/- together with interest to the firm of Nyasani E.N & Co Advocates. The applicant argued that there was an error apparent on the face of record since the orders

were granted without a formal application and that there was a question before the Court on legal representation of the respondent's advocates.

11. In response, the respondent argued that the applicant was essentially challenging the judge's orders, and therefore, the appropriate course of action would be to file an appeal rather than seek a review.

12. The application is based on the ground that there was need for review as there was an error apparent on the face of record. 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 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."

13. In view of the foregoing, for an application for review to succeed on the ground that there is an error apparent on the face of record, it should be demonstrated that there was a clear and obvious mistake that appears directly in the court record or judgment. The mistake need no extensive analysis or re-examination of the entire face or the record such as a misapplication of the law, a clerical error, or a failure to consider a key piece of evidence or a legal principle.

14. In the present case, two issues were raised that is, the absence of a formal application and the ongoing dispute over the respondent's legal representation. Upon careful consideration of the record, the Court notes that, on the material day, there was only exchange between the advocates representing the respondent.

15. The Court was made to believe that what was in dispute was the representation for the respondent, as to who between the Law Firms of Stanley Henry Advocates and Nyasani EN Advocates should be appearing for the respondent and therefore liable to receive the amount deposited in Court. The Court did not give the applicant's advocate an opportunity to address it on the matter.

16. This is so because all that seemed to simmer, was the bills of costs belonging to the firm of Stanley Henry Advocates amounting to slightly over Kshs. 4million that were in dispute. That is why the Court ordered the balance of Kshs.45million be released to the advocates who were coming on record for the respondent. The Court was not aware that the amount was so deposited in Court as security for stay pending appeal. That was never brought to the attention of the Court. Obviously, if it was, the Court would have sought the views of the applicant's advocates. The order was obviously made in error.

17. Accordingly, I find that the application is meritorious and I allow the same. I will not make any order as to costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF SEPTEMBER, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**