



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Musimba (Civil Appeal 27 of 2017)
[2023] KEHC 867 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 27 OF 2017
RN NYAKUNDI, J
FEBRUARY 10, 2023**

BETWEEN

GEORGE OTIENO APPELLANT

AND

LILIAN ADOLWA MUSIMBA RESPONDENT

RULING

1. The applicant approached this court *vide* a notice of motion dated June 23, 2022 seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That the honourable court be pleased to review its judgment delivered on May 20, 2022.
 - d. Costs
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the application.
3. The applicant contends that pursuant to the court's directions that the appeal be heard by way of written submissions, the appellant /applicant file his submissions on April 14, 2022 and was issued with an official receipt attached to supporting affidavit dated June 23, 2022 to the application and marked annexure "A". pursuant to the court's directions that the appeal be heard by way of written submissions, the appellant /applicant file his submissions on April 14, 2022 and was issued with an official receipt attached to supporting affidavit dated June 23, 2022 to the application and marked annexure "A".



4. The applicant submitted that there was an apparent error on the honourable court's judgment delivered on May 20, 2022 wherein this honourable court stating that the appellant had not filed submissions and yet the court in the same judgement stated it perused the submissions filed by the parties, but later on went ahead to find that the appeal unmerited and dismissed the same. This constituted an error on the face of the record as pointed out under grounds (d) and (e) of the application.
5. The gist of the applicant's case is that there was an apparent error on the honourable court's judgment delivered on May 20, 2022 wherein this honourable court stating that the appellant had not filed submissions and yet the court in the same judgement stated it perused the submissions filed by the parties, but later on went ahead to find that the appeal unmerited and dismissed the same. This constituted an error on the face of the record as pointed out under grounds (d) and (e) of the application. Further, that by delivery of a contradictory judgment he was unheard as the appeal proceeded ex parte despite his submissions having been filed and served as per the court directions which is against the rules of justice and a fair hearing.
6. The applicant's case is that he has met the conditions for review the judgment delivered on May 20, 2022 and honourable court grants the orders sought.
7. The respondent opposed the application and cited order 45A of the *Civil Procedure Rules* with regard to the provisions of when a review is allowed. It is the respondent's case that the honourable court did analyse all the evidence in the subordinate court and also considered the appellants submissions in the subordinate court which were basically a replica of their submissions filed in the appeal. In any event non-existence of the appellants submissions cannot warrant the setting aside of the decree and rehearing of the appeal afresh. The parties' submissions are not binding to the court but only persuasive to enable the court reach a logical conclusion. There are no new and or important matters or evidence which after the exercise of due diligence were not within the knowledge of the appellant or could not be produced by them at the time the decree was passed or the order made. There is no mistake or error apparent on the face of the record or any sufficient reason to warrant the review and or setting aside of the decree issued by the appellate court. The honourable court having delivered its judgement it is functus officio and there is no basis to review the judgement given.
8. The court did also give the reasons for dismissing the appeal and the court made the judgement based on the evidence that was on record and did not introduce any extraneous matters that were not dealt with by the parties in the evidence. She asked that the application be dismissed with costs.

Analysis And Determination

9. Upon considering the pleadings and submissions filed by both parties, I have identified the following issue for determination.

Whether the court should review its judgment.

Section 80 of the *Civil Procedure Act* which provides that:

“ any person who considers himself aggrieved: -

- a. By a decree or order from which no 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.



10. 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.”

Order 45 rule 1 of the [Civil Procedure Rules](#) stipulates 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 an 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.”

11. An applicant seeking orders for review must satisfy the court with the following;

- a. There is a 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 or order was made.
- b. There is some mistake or error apparent on the face of the record.
- c. Or for any other sufficient reason.

12. The applicant filed his submissions on April 14, 2022. It is clear from the judgment that at paragraph 2, the court stated that there were no submissions on record for the appellant which contradicted paragraph 5 of the said judgment. In light of the foregoing, the applicant submitted that the court in failing to consider submissions which had already been filed had made an error apparent on the record worthy enough to warrant the review of its ruling. The profound decision in the case of: [Muyodi v industrial and Commercial Development Cooperation and Another \(2006\) 1EA 243](#) had this to say: “ 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. An error on review jurisdiction must be self evidence and apparent on the face of the record justifying the court to exercise its power of review as provided for under section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the [Civil Procedure Rules](#). The review is by no means an appeal and no applicant is allowed to disguise and appeal as review to correct substantial issues in the impugned judgement. If a case involves any substantial question of law it is not an error apparent on the face of the record. It



follows therefore, from the notice of motion which is supported by an affidavit and the issues canvassed before me the facts addressed fall within the ambit of order 45 rule 1 of the *Civil Procedure Rules*.

14. The application therefore succeeds to the extent that the honourable court corrects paragraph 2 of the judgment to read that “The appellant filed submissions on April 14, 2022.”

Each party to bear its own costs.

DELIVERED, SIGNED AND DATED AT ELDORET THIS 10TH DAY OF FEBRUARY 2023.

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R NYAKUNDI

JUDGE

