



Ochola ((Suing as Legal representatives of the Estate of Victor Omondi Onyango - Deceased)) v Marwa & another (Civil Appeal E069 of 2021) [2023] KEHC 738 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 738 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E069 OF 2021
KW KIARIE, J
FEBRUARY 9, 2023**

BETWEEN

**PHILIP OCHOLA APPLICANT
(SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF VICTOR
OMONDI ONYANGO - DECEASED)**

AND

**THOMAS MARWA 1ST RESPONDENT
SAMMY TRADERS LIMITED 2ND RESPONDENT**

RULING

1. On June 22, 2022 this court delivered a judgment on appeal in respect of this matter. The respondents were aggrieved and on July 28, 2022 they filed an application for review.
The application was by way of Chamber Summons (ex parte). It was brought under sections 1A, 1B, 3A & 3B of the [Civil Procedure Act](#), cap. 21 Laws of Kenya.
2. The application was premised on the following grounds:
 - a. That any delay in the determination of the said application will be detrimental to the applicants and will lead to substantial and irreparable loss to the applicants.
 - b. That the application in essence seeks to review the judgment dated 22nd June 2022 and which judgment has a mistake and/or error on its face and gravely prejudices the respondents/ applicants.
 - c. That the applicants are apprehensive that the appellant will proceed with execution proceedings to the formers detrimental.



- d. That unless this application is heard, stay of execution of the judgment dated July 21, 2021 in Homa Bay CMCC 87 of 2018 – Phillip Onyango Ochola (suing as the legal representative of the Estate of Victor Onyango Omondi v Thomas Marwa & Sammy Traders Limited, granted pending its hearing and determination, the applicants application will be rendered nugatory and they will suffer irreparable loss and damage from which they will never recover.
3. The respondent opposed the application on grounds that:
- a. The application is made in bad faith.
 - b. It does not satisfy the requirements of Order 45 Rule 1 of the [Civil Procedure Rules](#).
4. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides:
- (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.
5. The applicants’ have contended that my finding that they did not file submissions in the trial court was an error that may call for a review of my judgment. At paragraph 13 of the impugned judgment I delivered myself as follows:
13. The appellant had submitted that an award of Kshs. 4,940,000.00 would be adequate compensation. It would appear that the respondent had not filed any submissions. The learned trial magistrate said he could have awarded Kshs. 874,465.60. I have looked at the basis on which he arrived at the said figure and I have no reason to depart from it.
6. This was a fact which is clear from the record of appeal. I however did not place any premium on the lack of submissions. Submission cannot take the place of evidence. In *Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi* Nairobi HCCC No. 36 of 1993 Mwera J. stated:
- Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.
- This is not to say that they are not necessary; they act as a guide and persuade the court to see the case from the perspective of party submitting.
7. What is a mistake or error apparent on the face of the record? In the case of *Nyamongo and Nyamongo v Kogo* [2001] EA 174, the Court of Appeal stated;
- An error 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 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 out 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

8. In the instant case, even if we assume that the remark on the submissions was erroneous, it will not be an error that would be good reason for the review applied for. I therefore dismiss the application with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF FEBRUARY, 2023

KIARIE WAWERU KIARIE

JUDGE

