



**Wango & another v Bata Shoe Company Ltd & 4 others (Civil Suit
1095 of 1999) [2023] KEHC 2511 (KLR) (Civ) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2511 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 1095 OF 1999

JK SERGON, J

MARCH 24, 2023

BETWEEN

JOHN NJAAGA WANGO 1ST PLAINTIFF

VIRGINIA GATHONI WANGO 2ND PLAINTIFF

AND

BATA SHOE COMPANY LTD 1ST DEFENDANT

CHARLES WACHIRA 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

GEORGE BUNDI 4TH DEFENDANT

AYUB MASIBO 5TH DEFENDANT

RULING

1. The 1st to 5th defendants/applicants herein brought the notice of motion dated November 1, 2022 supported by the grounds laid out on its face and the facts stated in the affidavit of advocate Luchemo Brenda Akhonya. The applicants sought for the following orders:
 - i. That the orders made in the judgment delivered on October 21, 2022 by this Honourable Court be varied or reviewed for being ambiguous as follows:
 - ii. That the issue of liability as addressed at paragraphs 53, 54 and 55 of the said judgment lies squarely against the 3rd, 4th and 5th defendants.
 - iii. That liability as against the 1st and 2nd defendants was not established or proved as per a clear reading of the judgment.



- iv. That the wording of paragraph 53 on the issue of liability creates an ambiguity/contradiction in view of paragraphs 2 and 3 above, hence an error apparent on the face of the record.
 - v. That the award on special damages has an error apparent on the face of the record as the same has been made twice in favour of each plaintiff yet the figure pleaded was combined for both plaintiffs.
 - vi. That in view of paragraph 2 above, the order on costs is equally unclear on the extent each defendant is liable to contribute.
 - vii. That the costs of the application be provided for.
2. The plaintiffs/respondents put in the replying affidavit sworn by advocate Harun Muturi Njoroge on January 16, 2023 to resist the Motion.
 3. At the interparties hearing of the instant motion, the parties' advocates chose to rely on the documents filed.
 4. I have considered the grounds set out on the face of the Motion together with the facts deponed in the affidavits supporting and opposing the Motion.
 5. A brief background of the matter is that the respondents instituted the present suit and sought for reliefs in the nature of general damages for assault, battery and trespass to property; special damages in the sum of Kshs.3,687,828/=; costs of the suit and interest thereon. The suit was defended.
 6. Upon hearing the parties, this court vide the judgment delivered on 21st October, 2022 entered judgment in favor of the respondents and against the applicants by awarding general damages in the sum of Kshs.700,000/= to each plaintiff; aggravated/exemplary damages in the sum of Kshs.600,000/= to each plaintiff; special damages in the sum of Kshs.861,055/= thereby totaling the sum of Kshs.2,161,055/= costs of the suit and interest on the total award for each plaintiff from the date of judgment until payment in full.
 7. The applicants are now seeking the substantive order for a review of the above judgment through the instant Motion.
 8. To support the order for review sought, the applicants state that there is a mistake/error apparent on the face of the judgment since the liability as against the 1st and 2nd applicants was not established or proved.
 9. The applicants further state that there is a mistake/error apparent on the face of the judgment since the award on special damages was made twice in favour of each respondent and yet the same was sought as a combined figure in the pleadings.
 10. It is also the assertion by the applicants that the order on costs is ambiguous in the sense that it does not clearly state the extent to which each applicant is to cater for the costs of the suit.
 11. In response, the respondents through advocate Harun Muturi Njoroge state that there is no error apparent on the face of the record since this court clearly found the applicants jointly and severally liable and hence the issue on liability cannot again be raised; otherwise, the applicants are calling this court to sit on appeal against its own decision.
 12. Consequently, the respondents urge this court to dismiss the Motion with costs.



13. The germane principles to guide this court in deciding whether to review its decision are found under order 45 of the *Civil Procedure Rules*, 2010 and reaffirmed under section 80 of the *Civil Procedure Act* cap. 21 Laws of Kenya and set out in the manner below:

“ 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.”

14. The following are the instances in which a court can review a decision already in place:

- a. the discovery of new and important matter or evidence, or
- b. some mistake or error apparent on the face of the record, or
- c. any other sufficient reason.

15. From my study of the instant Motion, it is clear that the applicants have come under the principle of “error apparent on the face of the record” on three (3) separate subjects.

16. The Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR had the following to say regarding an error on the face of the record:

“ 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.”

17. From my consideration of the explanation given by the applicants to support their argument that there is an error apparent on the face of the record as relates to the issue on liability against the 1st and 2nd applicants, I am of the view that the purported error in the present instance cannot be termed as being so self-evident as to not require further arguments or elaborations.

18. In my view, it is apparent that the applicants are essentially asking this court to sit on appeal against its own finding on liability, under the guise of an apparent error. It is noteworthy that an order for review is distinguishable from an appeal and the circumstances under which a review can be sought and granted are clear-cut, and have been set out hereinabove.

19. The Court of Appeal in the case of *National Bank of Kenya Limited* (supra) as well as the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR states inter alia as follows:-

“ Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn process of reasoning on points



where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.”

20. In view of all the foregoing circumstances, I am not satisfied that there is any error apparent on the face of the judgment delivered on June 17, 2022 on the issue of liability and which would warrant a review of the same.
21. On the subject of costs of the suit, upon my perusal of the judgment, I note that upon finding the applicants jointly and severally liable and which liability would extend to manner in which the costs of the suit would be shared.
22. In view of the foregoing circumstances, I am not convinced that the order on costs is ambiguous so as to require a review.
23. This brings me to the subject on special damages awarded. Upon my study of the record, I note that in their pleadings, the respondents sought for the sum of Kshs.3,999.294.25 under the head of special damages.
24. Upon my perusal of the judgment, I observed that the respondents were awarded the sum of Kshs.861,055/= on special damages and that this sum was tabulated for each respondent in the total award.
25. In view of the foregoing circumstances, I am satisfied that there is need for the award on special damages to be reviewed since it was sought as a combined figure.
26. The upshot therefore is that the notice of motion dated November 1, 2022 partially succeeds only to the extent of the tabulation arising out of the award made on the special damages. Consequently, the award arising out of the judgment delivered on October 21, 2022 is hereby varied with an award to read as follows:
 - i. Special damages Kshs.861,055/=
 - ii. General damages Kshs.700,000/= for each plaintiff
 - iii. Aggravated & exemplary Damages for each plaintiff Kshs.600,000/=
 - iv. The plaintiffs shall have costs of the suit and interest on the total sum arising out of the general and aggravated damages (Kshs.1,300,000/=) each at court rates from the date of judgment until payment in full. The plaintiffs shall also have interest on the special damages (Kshs.861,055/) at court rates from the date of filing suit until payment in full.
 - viii. In the circumstances, I hereby make an order that each party bears its own costs of the motion.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 24th day of March, 2023.

J. K. SERGON

JUDGE



In the presence of:

No Appearance for the 1st and 2nd Plaintiffs/Respondents

Miss Luchemo for the 1st to 2nd Defendants/Applicants

