Kenyan Alliance Insurance Company Limited v Nyaribari; Nyamongo (Interested Party) (Civil Case 1 of 2019) [2023] KEHC 3304 (KLR) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3304 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CIVIL CASE 1 OF 2019

WA OKWANY, J

APRIL 20, 2023

BETWEEN

KENYAN ALLIANCE INSURANCE COMPANY LIMITED ..... PLAINTIFF

AND

EUNICE NYABOKE NYARIBARI ..... DEFENDANT

AND

CLEOPHAS NYAMONGO ..... INTERESTED PARTY

RULING

1. The plaintiff/applicant herein filed the application dated November 21, 2022 seeking the following orders: -

    1. Spent

    2. Spent

    3. That this Honourable Court be pleased to review and set aside its ruling dated November 15, 2022.

    4. That this Honourable Court be pleased to take into account and consider the Plaintiff's/ Applicant's submissions dated July 11, 2021 and filed in court on August 1, 2022 in considering and making a ruling on the application dated June 3, 2022.

    5. That this Honourable Court be pleased to write a fresh ruling respecting the Plaintiff's application dated June 3, 2022 having considered and taking into account the Plaintiff's/ Applicant's submissions dated July 11, 2021 and filed in court on August 1, 2021 in support of the application dated June 3, 2022.

    6. That the costs hereof be in the cause.

2. The application is supported by the affidavit of the Applicant's Advocate, Mr. Paul Murimi Kiongo, and is premised on the grounds that:-

    1. That in a ruling dated November 15, 2022, this court dismissed the plaintiff's/applicant's application dated June 3, 2022 challenging the Deputy Registrar's/Taxing Master's ruling dated June 2, 2022 on defendants and interested party's bill of costs.

    2. That in making the ruling dated 15th November, 2022, the court found that the plaintiff/applicant had not filed submissions on the application dated June 3, 2022 and in the court's view the application dated June 3, 2022 and not been supported by submissions and relevant grounds.

    3. That there is an apparent error on the face of the record as the plaintiff/applicant did file submissions dated July 11, 2021 on August 1, 2021 in support of the application dated June 3, 2022.

    4. That the court staff at Nyamira Law Courts advised the plaintiff's counsel that the submissions dated July 11, 2021 and filed in court on August 1, 2021 will indeed be put in the court file.

    5. That upon transfer of Justice Esther Maina from Nyamira High Court, the court file was handed over to Justice Ochieng for handling at Kisumu High Court.

    6. That all filings were done at Nyamira High Court registry while the physical file remained with Hon. Justice Ochieng at Kisumu High Court.

    7. That it is now apparent that filings being done at Nyamira High Court including the plaintiff's submissions dated July 11, 2021 and filed in court on August 1, 2021 were not put in the court file at Kisumu High Court nor handed over to the Judge.

    8. That at the time the Judge made his ruling on November 25, 2022, the said submissions had not been handed over to him at Kisumu High Court hence his conclusions that the plaintiff/applicant never filed submissions in support of the application dated June 3, 2022 and hence in his view the application was not supported.

    9. That there is an error apparent on the face of the record as indeed the plaintiff/applicant filed submissions dated June 11, 2021 on 1st august, 2021 at Nyamira High Court.

    10. That failure of the submissions dated July 11, 2021 and filed in court on 1st August, 2021 to find their way to the court file and to be brought to the attention of the Judge was occasioned by the staff at the Nyamira High Court.

    11. That the plaintiff should not be condemned for something it has nothing to do with.

    12. That the task of ensuring that submissions find their way to the court file and or brought to the attention of the Judge is and was the task of the staff at Nyamira High Court.

    13. That it will be a travesty of justice for the plaintiff to be condemned on account of having not filed submissions whereas it is clear that the court file was taken to Kisumu High Court while all filings continued at Nyamira High Court and the task of ensuring smooth filing of all papers and proper transmission to Kisumu High Court, the court file and to the Judge was all the responsibility of the staff at Nyamira High Court.

14. That it is only appropriate that the ruling dated November 15, 2022 be reviewed and a fresh ruling on the application dated 3rd June, 2022 be made taking into account the plaintiff's submissions dated July 11, 2021 and filed on August 1, 2021.

15. That there are sufficient grounds for review of the ruling dated November 15, 2022 otherwise extreme hardships will be occasioned to parties condemned courtesy of internal issues that are fully in control of the court staff and which parties have no control over.

16. That execution can ensue any time now and it is only appropriate that stay orders be granted pending determination of the application.

3. The Defendant opposed the application through the replying affidavit dated December 9, 2022 wherein she states that the application is an abuse of the process and a scheme to further delay her realization of the decretal sum.

4. She faults the Applicant for filing numerous unsuccessful applications with the intention of impeding the settlement of the decretal sum.

5. She states that having filed a reference against the decision of the Deputy Registrar, which reference was dismissed, the Applicant cannot return to this court to challenge the subject decision through a review.

6. The Respondent avers that the Applicant should have appealed against the dismissal of the reference instead of seeking a review. She adds that there was no evidence to show that the Applicant's submissions were not considered by the court.

7. Parties canvassed the application by way of written submissions which I have considered.

8. The main issue for determination is whether the Applicant has made out a case for the granting of an order for review.

9. Section 80 of the *Civil Procedure Act* stipulates as follows: -

> " 80. Any person who considers himself aggrieved-
>
> a) By a decree or order in which an appeal allowed by this Act, but from which no appeal has
>
> 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.

10. Order 45 rule 1 of the *Civil Procedure Rules* provides as follows: -

> " 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."

11. From the above provisions it is clear that while Section 80 of the *Civil Procedure Act* gives the court the power to review its own decisions, Order 45 sets out the jurisdiction and the scope of review as follows: -

    a) Discovery of new and important matter or evidence.

    b) Mistake or error apparent on the face of the record.

    c) Any other sufficient reason.

12. In the instant case, the Applicant seeks the review of the ruling delivered on November 15, 2022 on the basis that there was an error on the face of the record. According to the applicant, the error is in the finding that the applicant had not filed its submissions on the application that was the subject of the ruling yet the same had been filed. The applicant therefore faulted the court for failing to consider its submissions filed on August 1, 2022.

13. The question that begs an answer is whether the failure to consider submissions amounts to an error on the face of the record. The answer to the question calls for the interrogation of the purpose of submissions in any proceedings. In *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another* [2014] eKLR the Court of Appeal discussed the import of submissions in proceedings and held that: -

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

14. From the above decision, it is clear that submissions merely constitute each parties position or views and are for the purpose of persuading the court to make a finding in their favour. Submission do not and cannot take the place of pleadings and evidence by the parties. Indeed, the filing of submissions is not a mandatory requirement as there are instances where the court may determine a case based on the pleadings and the evidence without hearing the submissions of the parties.

15. Courts are however enjoined to consider submissions on record even if they will not be bound by them. This is the position that was taken in *Paul Odhiambo Onyango & Another vs Kalu Works Limited* [2020] eKLR it was stated:

> " Failure to take into account submissions which are not on the court record is not an error apparent on the face of the record. It would have been only if the submissions were on record but in error the court failed to consider the same."

16. In *Nyamogo & Nyamogo v Kogo* (2001) EA 170 it was held: -

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 pinions, 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 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 possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal." (Emphasis Mine)

17. In the instant case, it was not disputed that the submissions, even though filed, were not placed on the court file for reasons that the applicant highlighted on the grounds in support of the application. To my mind, the failure to place the submissions on the court file on time or at all, and by extension, the failure by the court to consider the submissions that were not on the file in the first place cannot be said to be an error on the face of the record.

18. My finding is that even assuming, for argument's sake, that there was an error in failing to consider the submissions, the said error is not so fatal as to warrant a review of the decision. Courts have held that submissions are merely intended to persuade the court and are not binding on the court in arriving at its determination which are made based on the facts of the case and the law. I am guided by the decision in *Bernard Kiiru Mwangi vs Faulu Microfinance Bank Limited* [2021] eKLR where it was held that: -

> " It is further worthy to note that submissions are not pleadings and the failure to consider the same would not be fatal if the Court has considered all the facts and issues that arise from the pleadings."

19. Having found that submissions merely present the parties' view or opinions, it follows that where there are no submissions on record, whether by the failure on the part of the party to file them or other, that does not constitute an error apparent on the face of the record.

20. A perusal of the impugned ruling reveals that despite the fact that the applicant's submissions were not on the court file, the court still considered the merits of the reference together with the supporting affidavit before arriving at its determination. The court rendered itself, in part, as follows: -

> " By the time I was writing this ruling, the plaintiff/applicant had not filed its submissions. In effect, the plaintiff did not prosecute the application. Nonetheless, the court decided to take into consideration the contents of the reference together with the supporting affidavit. It is noted that in its letter dated June 3, 2022, the plaintiff's advocates notified the learned Taxing Officer that it had objections to the rulings on taxation. The said objections did not specify the particular items on the respective bills of costs which were objectionable."

21. I have also perused the submissions that the applicant filed on August 1, 2021 and I am of the view that even if they would have been on record, at the time of writing the ruling, the Court would not have arrived at a different decision. I note that the court found that since the applicant failed to seek the reasons for the taxation, the court could not arrive at the conclusion that the decision of the Taxing Officer was arbitrary or excessive or contrary to the provisions of the *Advocates Remuneration Order*.

22. For the reasons that I have stated in this ruling, I find that the application dated November 21, 2022 is not merited and I therefore dismiss it with costs to the respondent.

23. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 20TH DAY OF APRIL 2023.

W. A. OKWANY

JUDGE