



**Nyamogo v Telkom Kenya Limited (Civil Suit 1736 of 1993)  
[2023] KEHC 17309 (KLR) (Civ) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17309 (KLR)

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

**CIVIL**

**CIVIL SUIT 1736 OF 1993**

**CW MEOLI, J**

**MAY 4, 2023**

**BETWEEN**

**NYAMODI OCHIENG NYAMOGO ..... APPLICANT**

**AND**

**TELKOM KENYA LIMITED ..... RESPONDENT**

**RULING**

1. For determination is the motion by Nyamodi Ochieng Nyamogo (hereafter the Applicant) dated 06.08.2020 seeking *inter alia* that the court be pleased to review and set aside the ruling delivered on 14.05.2020 by Githua, J. The motion is expressed to be brought under Section 80 of the [Civil Procedure Act](#) and order 45 rules 1 of the [Civil Procedure Rules](#) among others. On grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant.
2. To the effect that the court in its ruling delivered on 14.05.2020 failed to address one of the prayers sought in the motion dated 05.07.2019 particularly seeking that the court ensures compliance with the ruling of Odunga, J (as he then was) delivered on 20.12.2012. That the directions that were given in the foregoing ruling once complied with would have settled the issue of the decretal amount arising from the judgment delivered by Nambuye, J (as she then was) on 22.06.2012.
3. He deposes further that the court did not decide on the pension that he ought to receive every month despite expert evidence, by way of an accountant's report, presented to aid the court in determining the issue; that the court failed to consider the said evidence on grounds that the report was not signed yet the same was duly signed and dated, and therefore authentic; and that the directions of the court in the ruling dated 20.12.2012 on settlement of the terms of the decree arising out of the judgment delivered on 22.06.2012 are yet to be complied with. In conclusion, he asserts that the evidence of the accountant was tendered to assist the court in making a just and fair determination.



4. Telkom Kenya Limited (hereafter the Respondent) opposes the motion by way of grounds of opposition dated 16.10.2020. The Respondent takes issues with the motion on grounds that the same is misconceived, frivolous and vexatious; that it is devoid of any merit; that it is bad in law and an abuse of the court process; that the motion does not satisfy the requirements of Order 45 of the [Civil Procedure Rules](#) to warrant review; and that it is in the interest of justice for litigation to come to an end.
5. The motion was canvassed by way of written submissions. Counsel for the Applicant after restating the history of the matter argued as follows. Concerning the expert report in question addressed at paragraph 23 in the ruling dated 14.05.2020 he asserted that it was duly signed and the court's failure to consider it was sufficient ground for review of the said ruling. Citing section 34 of the [Evidence Act](#), he contended that the court erred by disregarding the report. Counsel further cited section 80 of the [Civil Procedure Act](#), Order 45 of the [Civil Procedure Rules](#), the decision in [Republic v University of Nairobi & another Ex-Parte Nabiswa Wakenya Moses](#) [2016] eKLR among others, to submit that there was an error apparent on the face of the record concerning the drawn-up decree in the instant matter. The court was thus urged to allow the motion as prayed.
6. On behalf of the Respondent, counsel argued that the Applicant is barred from seeking review of the ruling of the court delivered on 14.05.2020 having preferred an appeal by lodging a notice of appeal in this matter. That the grounds relied on in support of the motion do not rise to the threshold warranting review of the decision delivered on 14.05.2020. In conclusion, it was contended that the Applicant's remedy lies in an appeal if he is aggrieved. Moreover, that it was too late in the day to challenge the Deputy Registrar's computation in respect of the decree in question. The court was urged to dismiss the motion with costs.
7. The court has considered the material canvassed in respect of the motion. The Applicant's motion before this court is anchored on the provisions of Order 45 (1) of the [Civil Procedure Rules](#) which provides that: -

“(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.”

8. In [Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited](#) [2020] eKLR the Court of Appeal stated that an application for review, involves exercise of judicial discretion. There is a long line of authorities on the principles that govern a motion brought under Order 45 (1) of the [Civil Procedure Rules](#). In the judgment of Okwengu JA in [Associated Insurance Brokers v Kenindia Assurance Co. Ltd](#) [2018] eKLR the Court of Appeal pronounced itself as follows: -

“It is clear that Order 45 rule 1(1) of the [Civil Procedure Rules](#) provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In [National Bank of Kenya Ltd v Ndungu](#)



*Njau* [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent 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. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.” (Emphasis added)

In *Nyamogo and Nyamogo Advocates v Kogo* [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:

“An error apparent on the face of the record cannot be defined precisely and 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 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.”

9. Further, in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the Court of Appeal held that:

“It bears emphasizing that the phrase “mistake or error apparent” by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

“The courts in India have for many years had to consider what is constituted by “an error apparent on the face of the record” in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions “manifest” and “apparent”. The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be



two opinions [State of Gujarat v Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v Neki (1922) 3 Lah. 127]...”

10. The Applicant’s review motion appears to be primarily premised on the ground of error or mistake apparent on the face of the record. Seemingly, confined to two issues. Namely, the court’s failure to consider and or address the prayer seeking an order to the effect that the directions of the court in the ruling of 20.12.2012 be adhered to in totality and the court’s failure to consider the expert report on alleged erroneous basis that it was not signed.
11. Therefore, to contextualize the Applicant’s contestation, it would be apposite to set out the pertinent history. The Applicant filed a motion dated 05.07.2019 seeking among other orders that the Respondent be compelled to settle the decree arising from the judgment of the court dated 22.06.2012; that the Respondent do pay to the Applicant the amount of KShs.106,510,392.11 without any further delay; that the direction of the court in the ruling of 20.12.2012 by Odunga J be adhered to in total; and that court do issue an order directing the judgment debtor to pay future monthly pension as it fell due. Githua, J upon hearing the motion, dismissed it with costs.
12. In her ruling delivered on 14.05.2020 captured hereunder in extenso, she addressed herself as follows; -
  - “9. I have given due consideration to the application, the affidavits on record together with their numerous annexures, the respondent’s grounds of opposition as well as the parties’ rival submissions. I have also carefully read the lengthy court record.
  10. In my view, there is no dispute regarding the awards that were made in favour of the applicant against the respondent in the judgment delivered by this court on 22<sup>nd</sup> June 2012 and that out of the money accruing to the applicant in the said awards, he has already received a sum of KShs.37,000,000. What is in dispute is whether the payment of KShs.37,000,000 fully satisfied the decretal amount or whether there is still more money outstanding under the decree which the respondent should be compelled to pay the applicant as sought in the application.
  - ...
  13. It is worth noting that though the court specified the rate of interest that was to accrue on the award of damages for loss of salary and increments for 117 months, the rate of interest applicable to the rest of the awards was not stated.
  14. It is apparent from the court record that after pronouncement of the judgment, a dispute arose regarding a decree that had been extracted which dispute was resolved by Odunga J in his ruling dated 20<sup>th</sup> December 2012 and directions issued on 6<sup>th</sup> February 2013. In a nutshell, Justice Odunga directed the Deputy Registrar to extract a decree in the usual manner but leaving out particulars of interest accruing on the different awards and recurring or periodical payments such as monthly pensions which were to be dealt with in the warrants of attachment given that unlike decrees, warrants of attachment can easily be amended to reflect the amount payable at the time of execution.
  15. Following Justice Odunga’s directions, an amended decree dated 14<sup>th</sup> July 2015 was issued on 23<sup>rd</sup> September 2015 whose validity is apparently uncontested.



....

23. The applicant contends that the respondent owes him a total sum of KShs.106,510,392.11 in unpaid pension. The allegation is based on an accountant's report annexed to the supporting affidavit whose authenticity is doubtful given that it is neither dated nor signed by the alleged accountant. The criteria used in the calculations made therein is also not clear. The report was not made pursuant to any court order and in my view, it lacks any legal foundation and is unworthy of any consideration by this court.
24. In view of the foregoing, I am persuaded to find that the applicant has failed to prove his claim that the respondent owes him KShs.106,510,392 under the decree issued in this suit. It is thus my finding that the Notice of Motion dated 5<sup>th</sup> July 2019 is devoid of any merit and it is accordingly dismissed with costs to the respondent.”
13. Has the Applicant has demonstrated an error or mistake apparent on the face of the record by his present motion? Drawing guidance from the dicta in *National Bank of Kenya Ltd (supra)*, it is evident that Githua J addressed herself to the directions in respect of the ruling delivered in 20.12.2012 and determined that “Following Justice Odunga’s directions, an amended decree dated 14<sup>th</sup> July 2015 was issued on 23<sup>rd</sup> September 2015 whose validity is apparently uncontested”. In my view, the court’s finding on the issue at hand and about which the Applicant was obviously aggrieved, does not amount to an error or mistake apparent on the face of the record.
14. Secondly, concerning the purported expert report allegedly erroneously disregarded by the court, this court took the liberty of perusing the motion dated 05.07.2019 and the said expert report as attached thereto (See-annexure marked NON-3). A perfunctory perusal of the same reveals that it bears a date and signature. However, a closer scrutiny of the said report reveals some anomalies; while the report was supposedly prepared and used as a representation of facts as of 31.07.2019, the same was purportedly executed on 03.07.2019. However, the copy of the report attached to the present motion indicates that the same was prepared and was a representation of facts as of 31.06.2016. The date of execution is illegible.
15. The glaring disparity between the two reports is unexplained and cannot be wished away. Further to the foregoing, even if for argument’s sake the report was duly executed, the court having pronounced itself substantively on the question of its probative value, the findings can only be challenged on appeal.
16. Therefore, it is the court’s finding that no error or mistake apparent on the face of the record has been demonstrated. The court agrees with the Respondent’s submissions that the Applicant’s contestation belongs to an appeal rather than a review motion. Recently, the Court of Appeal in *Solacher v Romantic Hotels Limited & another* (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR) cited with approval the decision of Bennett J in *Abasi Belinda v Frederick Kangwamu and Another* [1963] EA p.557 to the effect that: -
- “ A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal.”
17. It is therefore the Court’s considered view that the Applicant’s motion is without merit. The motion is hereby dismissed with costs to the Respondent.



**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF MAY 2023.**

**C. MEOLI**

**JUDGE**

In the presence of:

For the Applicant: N/A

For the Respondent: Ms. Mbaabu

C/A: Carol

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