



**John v Sindani (Miscellaneous Civil Application 84 of 2022)
[2023] KEHC 21497 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21497 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPLICATION 84 OF 2022**

RPV WENDOH, J

JULY 18, 2023

BETWEEN

DANIEL KIMANI JOHN APPLICANT

AND

DAVID NYABUTO SINDANI RESPONDENT

(Migori HCCA No. 84 of 2022)

RULING

1. The appellant filed an application dated 8/3/2023 seeking the following orders:-
 1. That this court be pleased to regularize and/or rectify the record and/or proceedings herein.
 2. Upon grant of prayer (1) above, this court be pleased to rectify/review and/or set aside the judgement of the court delivered on the 16/2/2023.
 3. Costs of this application be provided for.
 4. Such further orders as this court may deem fit and expedient.
2. The application is based on the grounds on its face and the supporting affidavit of Irene Kusa Advocate, practising in the firm of Khan & Associates. Counsel deposed that the suit herein together with HCCA No. 82 of 2022 and HCCA No. 83 of 2022 arose from the same cause of action; that the appellant being dissatisfied with the findings of the trial court in all three matters simultaneously lodged appeals vide Migori HCCA No. 82 of 2022 Daniel Kimani John vs Pamela Akinyi Otieno, Migori HCCA No. 83 of 2022 Daniel Kimani John vs Joseph Otieno Oyoo and Migori HCCA No. 84 of 2022 Daniel Kimani John vs David Nyabuto Sindani.
3. Counsel further deposed that the appellant interchanged HCCA No. 83 of 2022 with HCCA No. 84 of 2022 such that the Memorandums and Records of Appeal served upon their offices indicate that



- the respondent in HCCA No. 83 of 2022 is David Nyabuto Sindani while in HCCA No. 84 of 2022 is Joseph Otieno Oyoo; that Counsel proceeded to file submissions in favour of Joseph Otieno Oyoo believing that he was the respondent as per the Memorandum and Record of Appeal that was served upon them.
4. It was further deposed that at the time of lodging a notice of appeal they were advised at the registry that the person listed as the respondent in the notice as Joseph Otieno Oyoo was not a party herein and the notice could not be lodged; that their office clerk was of the view that the error in the parties was due to their typist and went ahead to prepare another notice with David Nyabuto Sindani as the respondent but then they discovered the error was also in the court record; that even though the memorandum of appeal and lower court file relates to the respondent herein David Nyabuto Sindani, the record of appeal filed therein relates to Joseph Otieno Oyoo; that the court's judgement seems to be founded on the record of appeal therein as the substance of the judgement relates to Joseph Otieno Oyoo who is the respondent in HCCA No. 83 of 2022 and not David Nyabuto Sindani.
 5. It was further contended that the judgement indicates that Joseph Otieno Oyoo is the appellant in the appeal herein yet he is not a party herein not even a respondent as earlier believed; that due to the mix up, it is not clear who the respondent is since the memorandum of appeal, the record of appeal and the court judgement give different parties as the respondent and it is impossible to lodge an appeal before the court of Appeal; that it is therefore necessary to regularize the record of appeal, proceedings and judgement delivered on 16/2/2023 and reflect the correct parties so as to give an opportunity to the aggrieved party to appeal against the court finding.
 6. The application was opposed. The respondent filed grounds of opposition dated 10/3/2023. The grounds are as follows: -
 1. That the application as presented is incurably defective, misconceived and hinged on the wrong provisions of the Law and Procedure.
 2. That the application is wanton of the court process, scandalous, frivolous, vexatious and intended to embarrass the court and the legal process.
 3. That the application does not meet the evidentiary threshold of granting the orders sought.
 4. That the application should be dismissed with costs.
 7. This court's understanding of the issues raised in the application is on the confusion of the names of the parties which stems from the time when the record of appeals were filed. In HCCA No. 83 of 2022, the court considered the record of appeal which was meant to have been for HCCA No. 84 of 2022 and vice versa.
 8. I have considered the parties in each of the appeals. The memorandum of appeals in both HCCA Nos. 83 and 84 of 2022 were filed on 15/7/2022. The memorandum of appeals were filed as follows: -
 - a. In HCCA No. 83 of 2022 the parties are Daniel Kimani John as the appellant while Joseph Otieno is the respondent.
 - b. In HCCA No. 84 of 2022 the parties are Daniel Kimani John as the appellant while David Nyabuto Sindani is the respondent.
 9. The judgement dated and delivered on 16/2/2023 by Odera J in HCCA No. 84 of 2022 indicates that Joseph Otieno Oyoo is the appellant while Daniel Kimani John is the respondent. The record of appeal filed in HCCA No. 84 of 2022 bears the lower court record of the proceedings which were done in Civil Suit No. 21 of 2020 Joseph Otieno Oyoo vs Daniel Kimani John.



10. According to annexure “IK- 1(a)” the memorandum of appeal shows that the parties in HCCA No. 84 of 2022 are Daniel Kimani John vs Joseph Otieno. This is an interchange from the original parties of the memorandum of appeal filed on 15/7/2022 in HCCA No. 84 of 2022 in which the parties are Daniel Kimani John vs David Nyabuto Sindani. The same case applies in the annexure “IK-1(b)” where the parties in HCCA No. 83 of 2022 Daniel Kimani John vs David Nyabuto Sindani are different from the parties in the original memorandum of appeal HCCA No. 83 of 2022 filed on 15/7/2022 the parties therein being Daniel Kimani John vs Joseph Otieno.
11. Therefore, there is likelihood that there would have been a mix up in the records of appeal and hence confusion in the entire proceedings. The question therefore becomes whether the mix up is enough to move this court to reconsider the proceedings afresh and rewrite the judgement.
12. Order 45 rule 1 (b) of the Civil Procedure Rules allows this court to review its decree or order on account of some mistake or error apparent on the face of the record or for any other sufficient reason.
13. As earlier observed, the record of appeal contains the proceedings of the trial court in Rongo Civil Suit No. 21 of 2020 Joseph Otieno Oyoo vs Daniel Kimani John. The trial court awarded a sum of Kshs. 1, 200,000/= as general damages, future medical expenses and special damages which were the subject of appeal before this court.
14. I have carefully considered the substance of the memorandum and record of appeal filed as HCCA No. 84 of 2022 Joseph Otieno Oyoo vs Daniel Kimani John. The grounds of appeal mainly challenged the findings of the trial court on quantum. A careful reading of the judgement delivered on 16/2/2023 by Odera J shows that the Learned Judge considered the arguments of both parties and reached her own findings on the issue of quantum. Even if there was an interchange in the parties on the heading of the judgement and/or the entire appeal case numbers, I find that the substance of the judgement does not necessarily need to be reviewed and/or rectified by this court.
15. If this court was to set aside and/or rewrite the judgement afresh only on the basis that the parties and the appeal numbers have been interchanged, it will be akin to sitting on its own appeal which is improper before the law. The only contention is the naming of the parties in the heading of the judgement and the appeal number itself. The substance of the judgement does not change.
16. In the end, I find that the application succeeds to the extent that the heading of the Judgement and Decree dated and delivered on 16/2/2023 will be interchanged to reflect Daniel Kimani John as the appellant and Joseph Otieno Oyoo as the respondent. The case number of the appeal will also be rectified to read HCCA No. 83 of 2022 as this was the original intention.
17. Since the court writing this ruling did not have the opportunity to write the judgement delivered on 16/2/2023, the file will be placed before Odera J for the necessary rectification of the heading of the judgment to reflect the correct names of the parties and the appeal number.
18. The following orders do issue:-
 - a. The judgement dated and delivered on 16/2/2023 be and is hereby amended to reflect the proper names of the parties and the appeal numbers as follows: -

HCCA NO. 83 of 2022 Daniel Kimani John vs Joseph Otieno Oyoo.
 - b. The appellant is hereby directed to file and serve afresh a proper record of appeal reflecting the correct names of the parties and the appeal number.



- c. The same orders will also apply in HCCA No. 82 of 2022 and HCCA No. 83 of 2022 if the judgements in them have been already delivered.
- d. The files will be transferred and placed before Odera J at the Nakuru High Court for the necessary rectification . Mention before J. Odera on 27/9/2023.
- e. There will be no orders as to costs.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 18TH DAY OF JULY, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:

Mr. Kisia for the Applicant

No appearance .for the Respondent

Emma and Phelix Court Assistants

