



**QPKA Limited v Kenya Hospital Association t/a Nairobi Hospital (Civil Case E648 of 2021) [2023] KEHC 19977 (KLR) (Commercial and Tax) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19977 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E648 OF 2021**

**EC MWITA, J**

**JULY 7, 2023**

**BETWEEN**

**QPKA LIMITED ..... PLAINTIFF**

**AND**

**KENYA HOSPITAL ASSOCIATION T/A NAIROBI HOSPITAL .... DEFENDANT**

**RULING**

1. This is an amended notice of motion by the plaintiff dated 25<sup>th</sup> November 2021, brought under Order 45 of the Civil Procedure Rules. The motion seeks review of the judgment of the court handed down on 18<sup>th</sup> November 2021, on grounds that there is an error apparent on the face of the record.
2. The motion is supported by the affidavit of Alfred Nyandieka, counsel for the plaintiff. According to the affidavit, the plaintiff filed the suit seeking Kshs. 1,180,000 being the balance of the purchase price for goods supplied, an order of specific performance requiring the defendant to requisition for the balance of the 4,000 PPE from the plaintiff and pay for the same.
3. In the alternative the applicant sought an order for Kshs. 32,800,000 as compensation for the loss the plaintiff had suffered due the defendant's breach.
4. The plaintiff states that the defendant was served with summons to enter appearance but failed to enter and defend. The applicant obtained interlocutory judgment and the suit went on to formal proof. Although counsel for the defendant appeared in court, he did not cross examine the applicant's witness.
5. The plaintiff filed written submissions but the defendant did not. The court reserved its judgment which was delivered on 18<sup>th</sup> November 2021. The court entered judgment in favour of the plaintiff and allowed the claim for Kshs. 1,180,000 with interest at court rates from the date of the judgment.



- The court also awarded costs of the suit to the plaintiff. The court, however, declined to allow the alternative claim for Kshs. 32,800,000 ( for compensation).
6. The plaintiff states that upon reading the judgment it was noted that the court did not address the alternative claim which was inadvertent or oversight. The plaintiff believes, therefore, that there is an error apparent on the face of the record which this court should remedy through its review jurisdiction.
  7. The application is opposed through grounds of opposition. The defendant argues that there is no error apparent on the face of the record; that the grounds raised in the application are not grounds for review and the court is functus officio upon delivering its judgment.
  8. Parties filed written submissions which the court has read and considered.
  9. This is an application for review of the judgment delivered on 18<sup>th</sup> November 2021 on grounds that there is an error apparent on the face of the record. The application is opposed.
  10. The jurisdiction of the court to review its decisions, is provided for under section 80 of the [Civil Procedure Act](#), while the grounds on which such an application may be made are provided for under Order 45 rule 1 of the [Civil Procedure Rules](#).
  11. Section 80 provides:  
Any person who considers himself aggrieved-
    - a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred: or
    - 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.
  12. Order 45 of the rules augments section 80, providing for grounds for review. The court may exercise its discretion and allow an application for review where an applicant shows that there is an error or mistake apparent on the face of the record; discovery of new and important matter that was not in the applicant’s knowledge, or for any other sufficient reason. The jurisdiction for review involves exercise of discretion which, like all other discretions, must be exercised judicially.
  13. In *Pankras T. Swai v Kenya Breweries Ltd* [2014] eKLR the Court of Appeal stated that a party cannot seek review on grounds of law since those are grounds of appeal and not review. The court then stated:  

(29) ...The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 [Civil Procedure Rules](#)) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.” The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the [Civil Procedure Act](#), Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.
  14. In *Benjob Amalgamated Ltd & another v Kenya Commercial Bank Ltd* [2014] eKLR, the Court of Appeal again stated:  

(26) The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that



may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice.

- (27) In the High Court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.
15. In *National Bank of Kenya Ltd v Ndungu Njau* [1977] eKLR, the Court of Appeal rendered itself thus:
- 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.
16. The jurisprudence emanating from these decisions is that an applicant must base his application for review on the three limbs in Order 45 rule or for any other sufficient reason.
17. In the application before this court, the argument is that the court did not consider the alternative prayer for Kshs. 32,800,000 for compensation. It is on that basis that the plaintiff has applied to have the judgment of the court reviewed so that the claim for Kshs, 32,800,000 is allowed.
18. I have gone through the judgment and, in particular, paragraphs 9, 10, 11, 13 and 14. The court addressed itself on the alternative prayer for specific performance and referred to decisions on the subject. The court then rendered itself thus:
- (13) My finding is that the court cannot compel the defendant to requisition for the balance of the 4000 PPE kits from the plaintiff and to pay for the same upon delivery according to the contract terms as it is clear that the defendant is not interested in continuing with the contract.
- (14) I find that the plaintiff is not entitled to the equitable remedy of specific performance as it is yet to deliver the 4000 kits and is therefore only entitled to the payment for the outstanding balance for the kits that it has so far delivered.
19. From these portions of the judgment, the court addressed itself fully on the issue of specific performance of the remaining part of the contract. The plaintiff did not show that there was an error or mistake apparent on the face of the record, or discovery of new and important matter, or further still, any other sufficient reason.
20. The plaintiff wants the court to review its judgment and have a fresh look at the issue that ad fully been addressed and determined. The plaintiff did not therefore show that this was a ground for review. The court having declined to allow the claim for specific performance because the plaintiff did not prove that it was entitled to that equitable remedy, could not turn to summon the aid of the review jurisdiction to try this luck.
21. As the court stated in *National Bank of Kenya Ltd v Ndungu Njau* (supra), “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”

22. In this application the grounds raised in support of the application are not grounds for seeking exercise of the court’s jurisdiction for review. The ground could at best support an appeal because failure to determine an issue raised in the pleadings is a substantive question of law or fact that lies only on appeal.
23. In the premise, the application is declined and dismissed with costs

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2023**

**E C MWITA**

**JUDGE**

