



REPUBLIC OF KENYA



Royal Group Industries Limited v Kithinji t/a Eringo Traders (Civil Appeal E130 of 2021) [2023] KEHC 19959 (KLR) (13 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E130 OF 2021
EM MURIITHI, J
JULY 13, 2023**

BETWEEN

ROYAL GROUP INDUSTRIES LIMITED APPELLANT

AND

GODFREY MWENDA KITHINJI T/A ERINGO TRADERS RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 26/4/2023, pursuant to Article 50 (1) & 48 of the *Constitution*, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 3A & 80 of the *Civil Procedure Act* and all other enabling provisions of the law, the appellant seeks that:
 1. Spent
 2. Spent
 3. This Honourable Court be pleased to review its judgment dated April 20, 2023 upon such terms as may be just in the circumstances.
 4. Costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Kisilah Daniel Gor, the appellant's advocate sworn on even date. He faults the court for deciding the appellant's appeal without considering its submissions which were on record. He avers that since the court directed that the appeal was to be canvassed by way of written submissions, consideration of the parties' submissions was the cornerstone of the fair and just adjudication of the appeal and a party whose submissions were not considered would justifiably feel disenfranchised and denied justice. He believes that the inadvertent oversight on the part of the court to consider the appellant's submissions is an error apparent on the face of the record which deprived the appellant the right to be heard. He believes that had the court considered the appellant's submissions which



comprehensively and conclusively addressed the issues raised in the memorandum of appeal, it would have arrived at a different decision. Owing to the aforesaid inadvertence, the appellant has been deprived its rights to access justice and fair hearing under Articles 48 and 50 (1) of the *Constitution*. It is in the interest of justice that the judgment be reviewed so as to allow the court to consider the appellant's submissions and render a new judgment based on all issues raised therein.

3. The respondent opposed the application vide his replying affidavit sworn on 15/5/2023. He avers that the application is misconceived and misguided since the appellant has miserably failed to meet the threshold for grant of the orders sought. He avers that a review cannot be sought merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. He is certain that even if the appellant's submissions were considered, the judgment would not have changed since they are a mere sham. In his view, the application is an afterthought and the appellant has not discovered any new evidence that was not within his knowledge at the time when the judgment was made. He has already obtained a decree and certificate of costs and he is entitled to enjoy the fruits of his successful litigation. He urges the court to bring the litigation herein to an end by dismissing the application with costs.

Analysis and Determination

4. Review is provided for under Order 45 Rule 1 of the *Civil Procedure Rules* as follows:

- “(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.”

5. Those conditions were reiterated by the Court of Appeal in *Francis Origo & another v Jacob Kumali Mungala* [2005] eKLR as follows:

“It is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”

6. At the time of writing the judgment sought to be reviewed, the court noted that the appellant had not filed any submissions as there was no submissions on the file. The court now learns with shock that the appellant had indeed filed its submissions on 8/7/2022, which either by mistake or design are not part of the court record. The fact that the court did not consider those submissions is what the appellant terms as an error apparent on the face of the record, to justify the review sought.



7. The duty of this court as the first appellate court, was to review the facts and the evidence on record in order to determine whether the conclusion originally reached upon by the trial court should stand. In doing so, the court duly analyzed the evidence led by the parties herein and particularly DW1 who admitted that the goods supplied to the respondent were not subjected to any quality quest in order to ascertain their quality, and there was no local purchase order to ascertain the quantity of goods supplied to the respondent. With such admission really, and even assuming the appellant's submissions were considered, the court was bound to invariably reach the decision it did. Having seen the submissions which the appellant says it had filed and court failed to consider, nothing therein affects the outcome of the appeal.
8. The appellant's submissions were never on the file, a fact re-established at the oral argument of the present application. Besides, courts have innumerable held that submissions are merely a guide because they are neither pleadings nor evidence.
9. With respect, this court itself so finds, that it duly exercised its appellate jurisdiction by properly re-evaluating the evidence afresh in reaching the decision it did.
10. Counsel are advised and encouraged to ensure by checking with the registry before any matters are reserved or set for ruling or judgment that any supportive written documents in the nature of submissions, reports, exhibits, affidavits and pleadings as the court may require to consider are in the court file.

ORDERS

11. Accordingly, for the reasons set out above, the court finds the application dated 26/4/2023 to be without merit and it is dismissed.
12. The Appellant shall pay the costs of the application to the Respondent.

Order accordingly

DATED AND DELIVERED THIS 13TH DAY OF JULY, 2023.

EDWARD M. MURIITHI

JUDGE

APPEARANCES

Ms. Aoko Advocate for the Appellant/Applicant.

Mr. Maranya Advocate for Respondent.

