Dennis Kimakia Kiura t/a Wasonga Kimakia & Associates Advocates v Njuki & another (Civil Case 30 of 2017) [2023] KEHC 24004 (KLR) (Civ) (23 October 2023) (Ruling)

Neutral citation: [2023] KEHC 24004 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 30 OF 2017

JN MULWA, J

OCTOBER 23, 2023

BETWEEN

DENNIS KIMAKIA KIURA T/A WASONGA KIMAKIA & ASSOCIATES ADVOCATES ..... PLAINTIFF

AND

LOUIS MUGAMBI NJUKI ..... 1ST DEFENDANT

LILIAN KAWIRA MUGAMBI ..... 2ND DEFENDANT

RULING

1. Before the court is the Defendants' Notice of Motion dated 20th April 2023 brought pursuant to Section 3A and 80 of the *Civil Procedure Act* and Order 45 Rules 1, 2 & 3 and Order 51 of the *Civil Procedure Rules*, 2010. The Defendants/Applicants seek for review of the judgment and of this court delivered on 28th January, 2020 together with the Decree, as well as costs of the application.

2. The application is predicated on the grounds set out on its face and supported by the 1st Applicant's Supporting Affidavit in whichhe asserted that he had previously moved this court with an application dated 1st December, 2020, asking for the same orders that are being requested in this current application. He further claimed that when the matter came up for directions, his advocates on file were notified that the court file was missing and that they had never received a hearing date, putting him and his wife in imminent danger of being committed to civil jail.

3. The application was opposed through a Replying Affidavit Sworn by Dennis Kimakia Kiura, the Respondent. He stated thatfor the Applicants, rather than filing two identical applications, they ought to have requested a hearing on the first one and not filed a second, identical one. He further argues that, as both applications are extremely similar, they should be dismissed because they constitute an abuse of the court system.

4. The only issue for determination is whether the Appellant has made out a case for review of this court's judgment dated 28/01/2020.

5. Section 80 of the *Civil Procedure Act* donates to courts the power to review their own decisions. It stipulates as follows:

> " 80. Any person who considers himself aggrieved-
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> i. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> ii. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

6. Order 45 Rule 1 of the *Civil Procedure Rules* 2010 provides for the grounds upon which review may be granted as follows;

> " (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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."

7. From the foregoing provisions, it is clear that a review may be granted by the court if there is a discovery of new and important matter or evidence; if there is a mistake or error apparent on the face of the record; or for any other sufficient reason, provided that the application is made without unreasonable delay.

8. As to the ground for review, the Appellant contends that there is an apparent error on the face of the judgment. What constitutes an error on the face of the record was aptly spelt out by the Court of Appeal in *Nyamogo & Nyamogo v Kogo* [2001] EA 174, as follows: -

> " 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal." [My emphasis]

9. In *Kanyabwera v Tumwebaze* [2005] 2 EA 86, the court stated that:

> " In order that an error may be a ground for review, it must be one apparent on the face of the record, i.e. an evident error which does not require any extraneous matter to show its correctness. It must be an error so manifest and clear, that no court would permit such an error to remain on the record. The "error" may be one of fact, but it is not limited to matters of fact and includes errors of law." [My emphasis]

10. The Applicants submitted that this current application is based on errors made by their previous advocates, who never showed up for court or gave notice of hearing dates. As a result of these errors, the applicants were not given a fair hearing and a judgement was entered against them.

11. This plea that the mistakes of counsel ought not be visited upon the client is a common one and any advocate who fails to perform a duty due to his client will invariably seek relief on the basis that the mistakes or errors of the Advocate ought not to be visited upon the client. In the case of *Belinda Muras & 6 Others v Amos Wainaina* [1978] KLR in which Hon Madan JIA (as) he then was defined what constitutes a mistake as follows:

> " A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate." [own emphasis]

12. Finally, on this point in *Shah v Mbogo & Another* [1967]6. A U7, the Court of Appeal for Eastern Africa held that: -

> " Applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused". [own emphasis]

13. Counsel submitted that that the mistake or error was on the part of the advocates and not caused by the indolence on the part of the Applicants and that they were condemned unheard in this instant suit and urge the court to grant them an opportunity to advance their cases upon merit by allowing the instant application. In the case of *Martha Wangari Karua v IEBC* Nyeri Civil Appeal No.1 of 2017 the Court of Appeal held as follows: -

> " The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be..."

14. The Respondent stated that the Applicants have admitted to having filed an Appeal against the said judgment and that having preferred an appeal, they lost their right to seek review orders. On the other hand, the Applicants submitted that the Respondent has relied on a Notice of Appeal dated 17/08/21.

15. In my view, the Court of Appeal case of *Yani Haryanto v E. D. & F. Man. (Sugar) Limited* Civil Appeal No. 122 of 1992 reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact, under Rule 77(1) of the *Court of Appeal Rules* it is provided

that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens, I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review.

16. For the above reasons, I am satisfied that the Notice of Motion dated 20th April, 2023 has merit. The same is hereby allowed and the judgment delivered on 28th January 2020 is hereby set aside, with all consequential orders. It is further ordered that the suit be retried on merits. The matter shall be listed before a judge for directions on the hearing of the suit on the 24/01/2024.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 23RD DAY OF OCTOBER 2023.

JANET MULWA

JUDGE