**Monalisa Hotel Limited v Telephone & another (Suing as the Administrators and Legal Representatives of Fransis Spinks Komora - Deceased) (Civil Appeal 60 of 2019) [2023] KEHC 23714 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23714 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MALINDI**

**CIVIL APPEAL 60 OF 2019**

**SM GITHINJI, J**

**OCTOBER 16, 2023**

**BETWEEN**

**MONALISA HOTEL LIMITED ..... APPELLANT**

**AND**

**BETTY NAKADOBHOYO MATSEKI ..... 1ST RESPONDENT**

**ELIZABETH HABIN TELEPHONE ..... 2ND RESPONDENT**

**SUING AS THE ADMINISTRATORS AND LEGAL REPRESENTATIVES OF FRANSIS SPINKS KOMORA - DECEASED**

**RULING**

1. The application for determination is a Notice of Motion dated 1st March 2022 filed by the Appellant on 4th March 2022 under the provisions of article 159 (2) (d), article 163(1), section 807 (*sic*), of the *Civil Procedure Act* and Order 45 Rule 7 of the *Civil Procedure Rules*, 2010. The Appellant seeks the following orders; -

    1. Spent.

    2. That this court has inherent powers to review its judgment so as to meet the ends of justice.

    3. That the court be pleased upon review of its judgment delivered virtually on the 22nd June 2021 to clarify its said decision and in particular to give meaning and directions of its order that cost be shared equally by the parties.

    4. That the court be pleased to direct the Respondents and or the firm of Ameli Inyangu and Partners to refund Kshs. 105,106.00 to the Appellant, monies erroneously and inadvertently collected as costs by the Respondents and/or firm of Ameli Inyangu and Partners Advocates.

5. Any other order that the court deems fit to award/direct.

2. The application is supported by the affidavit of Joseph Karanja, a legal claims officer at CIC General Insurance, sworn on 1st March 2022 wherein he deposed that this appeal was successfully determined and the award for loss of dependency varied from Kshs. 2,968,840/- to Kshs. 1,484,420/- in the judgment dated 22nd June 2021 by my brother Nyakundi J. In that judgment, the honourable judge rendered the appeal partially allowed with costs to be shared equally by the parties.

3. Mr. Karanja added that the Respondents through the firm of Ameli Inyangu and Partners submitted erroneous tabulations suggesting that they were entitled to costs of the appeal amounting to Kshs. 105,106/-. That the said sum was subsequently paid to the Respondent's advocates together with the decretal sum. In total, the Appellant paid the Respondent the sum of Kshs. 1,984,206/-. Mr. Karanja further deposed that the order of the court that costs be shared equally meant that each party should bear their own costs, therefore, the amount of Kshs. 105,106/- was erroneously disbursed.

4. The Respondents opposed the application. They filed a Replying affidavit on 8th April 2022 sworn by Elizabeth Telephone who deposed that the said Mr. Karanja was a stranger to these proceedings and had not demonstrated any authority to swear the affidavit. She added that through a letter by her advocates, dated 26th June 2021, the Respondents proposed to have the matter settled at Kshs. 1,983,209/-. That the Appellant's advocates, Musinga and Company Advocates approved the settlement and requested for a draft consent which was forwarded to them via email on 22nd July 2021. The Appellant approved the terms of the consent as drafted. Subsequently, parties proceeded to execute the consent dated 23rd July 2021 and the decretal amount together with costs were released by the bank to the Respondent.

5. Ms. Elizabeth further deposed that the total costs of the appeal were Kshs. 210,031.02, therefore the Respondents were rightly entitled to Kshs. 105,015/-. She added that the judgment was clear on the issue of costs and that there has never been any demand for a refund of the same as averred by the Appellant.

6. The application was canvassed by way of written submissions which I have carefully considered and find that the sole issue for determination is whether the Appellant is entitled to an order for review of the judgment dated 22nd June 2021.

**Analysis and Determination**

7. I must first point out that review as a remedy is anchored under section 80 of the *Civil Procedure Act* (the Act) and Order 45 rule 1 of the *Civil Procedure Rules* (the Rules). Section 807 of *Civil Procedure Act*, and Order 45 rule 7 of *Civil Procedure Rules* as cited by the Appellant are non-existent provisions. Section 80 of the *Act* reads; -

> 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.

Order 45 rule 1 of the *Rules* further provides; -

> 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 *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held: -

> " Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds;
>
> (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
>
> (b) on account of some mistake or error apparent on the face of the record, or
>
> (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay."

9. The Appellant's argument is that the application fell under the category of 'any other sufficient reason'. Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 had this to say: -

> " the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked 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 establishing it. It may be pointed out that the expression "any other sufficient reason" ... means a reason sufficiently analogous to those specified in the rule"

10. The Appellant wants this court to give meaning to the order that "cost be shared equally by the parties" as stated in the judgment. I have perused the said judgment and find that there is nothing ambiguous about that order. The logical interpretation is that whatever costs that would have otherwise been assessed by the taxing officer, were to be shared equally between the Appellant and the Respondent.

11. In this case, it is undisputed that parties compromised the issue of costs. The correspondence between the advocates reveals that the Appellant agreed to have the costs of the entire appeal at Kshs. 210,031.02. This meant that each party was to get from the other 50 percent of that amount, as observed in the agreed tabulation of costs. I agree with the Appellant's argument that ordinarily this would practically

mean that each party bore their own costs, however I see no basis for filing the present application for review. Having 'inadvertently' disbursed the 50 percent to the Respondent, all the Appellant was expected to do was to demand its own share of the costs from the Respondent but not file an application for review. This court's order on costs was clear and unambiguous. In the ultimate, I find that this does not amount to sufficient reason to warrant this court to review the judgment dated 22nd June 2021.

12. In any case the application was unreasonably delayed. Order 45 rule 1 is clear that whatever the ground, there is a requirement that the application has to be made without unreasonable delay. In this case, the application was filed on 4th March 2022, approximately 8 months' post judgment. This in my view amounts to unreasonable delay.

13. The upshot is that the Notice of Motion dated 1st March 2022 is unmerited. It is hereby dismissed with costs to the Respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 16TH DAY OF OCTOBER, 2023.**

**S.M. GITHINJI**

**JUDGE**

In the presence of:-

1. Mr. Okoko for the applicant

2. The firm of Ameli Inyangu are for the Respondent (Absent)