



**Waithaka v Bashaeki & 2 others (Civil Appeal 91 of 2018)
[2024] KEHC 12791 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12791 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 91 OF 2018
SM MOHOCHI, J
OCTOBER 17, 2024**

BETWEEN

PHILIP KARIUKI WAITHAKA APPLICANT

AND

NAAMAN BASHAEKI 1ST RESPONDENT

PETER NJOROGE 2ND RESPONDENT

JOHN WAHOME NDEGWA 3RD RESPONDENT

RULING

1. Through Notice of Motion dated 9th October, 2023 dated 10th June 2016, brought under Order 45 of the Civil Procedure Rules, Section 80 of the Civil Procedure Act and Article 159 of the Constitution, the Applicant seeks the following orders:
 - a. That the Honourable Court be pleased to review its judgement delivered on 23rd September, 2021 by giving Orders as to Costs of the Appeal in the final Order; and
 - b. That costs of this application be borne by the Respondent
2. The Application was premised on the grounds on its face and the Supporting Affidavit of the Applicant sworn on even date. It was the Applicant case that in the final orders of its judgement on 23rd September, 2021, the Court did not give directions on the costs of the Appeal and believed that the error might have been inadvertent.
3. The Respondent on the other hand in opposing the Application filed Replying Affidavit sworn on 1st February, 2024 by Lawrence Njuguna, Counsel for the Respondent. He deposed that the Application is misconceived as the Applicant did not satisfy the grounds for seeking review. Counsel highlighted the law on review as contained in Section 80 of the Civil Procedure Act and summarized the grounds for seeking review.



4. It was his argument that the Applicant has not introduced any new matter or evidence that was not in their knowledge or established an error on the face of the record or an error on substantial points of law. Counsel also highlighted and attached the case of Republic v Advocates Disciplinary Tribunal Ex-Parte Apollo Mboya [2019] eKLR.
5. He deposed further that an error established by long reasoning cannot be grounds for review but for appeal. Counsel added that the award of costs is discretionary and the Applicant is attempting to find fault in the Court and seeking a greater award from the Court.

Applicants Submissions

6. In the submission dated 29th June, 2024, the Applicant submitted that under Section 27 of the [Civil Procedure Act](#) the general rule is that costs do follow the event and relied on the decisions in Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR and Domitilah Mueni Muli vs Pan Africa Chemicals Ltd Civil Appeal No 236 of 2018 (unreported) to submit that being the successful party on Appeal, the Court ought to have awarded him costs.
7. The Applicant further placed reliance in Joseph Oduor Anode v Kenya Red Cross Society [2012] eKLR to submit that there exists no reason for deviating from that well-established principle.

Analysis and Determination

8. Having carefully considered the grounds in support of and against the Application the submissions, the relevant law together with the authorities cited. The following is the sole issue manifest for determination:-

- a. Whether the application is merited to warrant grant of orders for review.

9. According to, Section 80 of the [Civil Procedure Act](#):-

Review

“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.”

10. Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

Application for review of decree or order.

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.

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

11. The Rules limit the ground for review to be: -
 - 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,
 - c. 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.
12. The Appellant/ Applicant seeks a review of the judgment dated 23rd September, 2021 where this Court found his appeal merited and allowed it. The Applicant was however given costs of the Trial Court but the Court did not give directions on costs of the Appeal and according to Applicant he ought to have been awarded the costs being the successful party.
13. The Application was primarily premised on the ground of error. The Applicant’s application was quite vague on the grounds seeking a review but it was deposed in the supporting affidavit that failure to give directions might have been an error and which was in advertent.
14. The Applicant has submitted extensively on Section 27 of the *Civil Procedure Act* and why he ought to have been awarded the costs. While the general rule is that costs follow the event, and a successful party generally, ought to be awarded costs, the award of costs is also a discretionary one. Despite the Applicant’s success in the appeal, the Court in the exercise of its discretion departed from that rule and did not set out reasons why costs would not follow the event.
15. Be that as it may the request herein entails re-analyzing the Courts decision to award the Applicant costs of the Trial Court and not on appeal and further why the Court departed from the general rule. That in my considered view is beyond the scope of review.
16. In the case of Republic versus Cabinet Secretary for Interior and Co-ordination of National Government Ex parte Abulahi Said Salad [2019] eKLR the Court cited National Bank of Kenya Ltd vs Ndungu Njau, {1996} KLR 469 (CAK) at Page 381 wherein it was held as follows:

“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.”

17. Similarly, in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR the Court of Appeal held that:

“It bears emphasizing that the phrase “mistake or error apparent” by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition Pg 2335-36...”

18. The Appellant believes he is entitled to costs and the failure to award costs was an error. The Applicant has nevertheless failed to demonstrate that error within the confines of Order 45 Rule 1 of the Civil Procedure Rules.
19. Courts are generally expected to comply with the general rule on costs but it can also exercise its discretion and depart from it with grounds to justify the departure. The choice of the Court to depart from the general rule is an error of law and is therefore a ground of appeal and not for review.
20. There is also the matter of delay in filing this Application. The decision was delivered on 23rd September, 2021 the Application was filed on 9th October, 2023. The Applicant took almost two (2) years to file the instant application but has nevertheless in his Supporting Affidavit and submissions failed and ignored to address the delay. That period of delay of two (2) years is in my considered view a lengthy and significant duration of time, and no plausible reason has been given for the delay. The lengthier the delay the more the Applicant shall be expected to justify the delay. The issue of costs being raised now belatedly is purely an afterthought and inordinate. In my opinion the delay was unreasonable.
21. The upshot of the foregoing is that the Application dated 9th October, 2023 is without merit as it fell short of the requisite threshold to warrant grant of orders for review and is hereby dismissed with costs.

It is so ordered.

RULING SIGNED, DATED AND DELIVERED ON THIS 17TH DAY OF OCTOBER, 2024

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MOHOCHI SM
JUDGE

