



**Kamau v National Housing Corporation & 2 others (Civil Case 783 of 1996)
[2024] KEHC 13971 (KLR) (Commercial and Tax) (11 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 783 OF 1996
JWW MONG'ARE, J
NOVEMBER 11, 2024**

BETWEEN

ANGELA WANJIRU KAMAU PLAINTIFF

AND

NATIONAL HOUSING CORPORATION 1ST DEFENDANT

HOUSING FINANCE COMPANY OF KENYA LTD 2ND DEFENDANT

NAIROBI CITY COUNCIL 3RD DEFENDANT

RULING

1. The 2nd Defendant/ Applicant filed the Notice of Motion application dated 25th August 2021, under Order 45 Rule 1 of the Civil Procedure Rules and Section 80 Of *Civil Procedure Act*, seeking a review of the judgment entered on 17th July, 2020 with regards to costs and that it be exempted from paying costs of the suit.
2. The application is supported by the grounds set out on its face, the annexed affidavit sworn by the Plaintiff's legal manager, Patrick Mwangi on 25th August 2021 and written submissions dated 17th December 2021.
3. The application is opposed by the Plaintiff through a replying affidavit sworn on 18th November 2021 and written submissions dated 14th February 2022.
4. The backdrop to the application is that the Plaintiff filed a suit through a plaint amended on 22nd May 2003 against the Defendants. Judgment was entered on 17th July 2020 by Hon. Lady Justice Olga Sewe. The Court found the 1st Defendant liable and awarded costs to the Plaintiff. The Plaintiff filed a bill of cost dated the 26th February 2021 against the Defendants.



Analysis and Determination

5. I have considered the application, the grounds, the parties' respective affidavits, submissions and authorities. I note that the issue that this court to determine is whether the 2nd Defendant has met the threshold set by law for review of the judgment 17th July, 2020.
6. Section 80 of the *Civil Procedure Act* provides that:-
 - “ 80. 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.”
7. Order 45 Rule 1 of the Civil Procedure Rules limits the grounds for review as follows:-

Application for review of decree or order [Order 45, rule 1.]

 - (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.”
8. From the material placed before this court it is clear that the 2nd Defendant's application is based on the ground that there is an error apparent on the face of the record at the last paragraph of the judgment where the Court in issuing the order as to costs did not specify whether the costs were to be paid severally or jointly and/or which of Defendants were to be condemned to pay the said costs. It asserted that since the 1st Defendant was held liable, it ought to have been condemned to pay the costs and that since the 2nd Defendant/Applicant was not faulted of any wrongdoing, it would be punitive and unjust to condemn them to pay costs.
9. The 2nd Defendant argued that an award for costs is discretionary and that the Court in exercising its discretion ought to have apportioned liability costs to the 1st Defendant and not the 2nd Defendant in view of the circumstances of the case.
10. On the other hand, the Plaintiff asserted that once judgment was entered on 17th July 2020, this Court exercised its discretion pursuant to Section 27 of the *Civil Procedure Act* to order the 2nd Defendant to pay costs of the suit not to penalize it, but rather to compensate her, being the successful party, for the trouble taken in prosecuting the case. She argued that the 2nd Defendant is attempting to lodge a review



application which essentially should be an appeal. She pointed out that in defending the suit, the 2nd Defendant neither disclaimed liability of costs of the suit nor sought to be paid costs as a potentially successful party. She further faulted the 2nd Defendant for bringing the application with inordinate delay.

11. It is clear from the record that the present application was filed on 25th August 2021, one year and 11 days from the judgment issued on 17th July, 2020. I agree that the delay is inordinate. The explanation given for the delay is that that the judgment was delivered in the absence of parties on the 17th July, 2020 at Eldoret. At that time, the Defendant's advocates' offices were closed as a result of the COVID-19 Pandemic. Despite partially opening the offices in August, 2020, they only came to learn of the said judgment far much later in the year. In my view, the delay has not been satisfactorily explained. Regardless, I will consider the substantive arguments for substantive justice.
12. The core issue is whether an error is apparent on record to warrant a review of the judgment. In *National Bank of Kenya Ltd vs Ndungu Njau* [1997] eKLR, cited in the Plaintiff's submissions, the Court of Appeal stated 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.”

13. Although the 2nd Defendant contended that there was an error on the face of the record in the award of costs to the Plaintiff, because of failure to hold the 1st Defendant wholly responsible, it conceded that the award of costs is a matter of the court's discretion. The Plaintiff highlighted that in defending the suit, the 2nd Defendant neither disclaimed liability of costs of the suit nor sought to be paid costs as a potentially successful party. She took the view that there was no error, as the award of costs was meant to compensate her, being the successful party, for the trouble taken in prosecuting the case not to penalize the 2nd Defendant. The Court of Appeal in *Nyamogo & Nyamogo Advocates v Kogo* [2001] EA 173 explained that:-

“An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. 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 or 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”

14. Guided by the above, it is clear that the application for review is based on points where there may conceivably be two opinions. Thus, I am not persuaded that there is an error on the face of the record regarding the order on costs.



15. The 2nd Defendant also advanced that the Court could review the judgment for any other sufficient reason. However, it is my considered view that the grounds that were put forth also do not qualify to be sufficient reasons to warrant a review. In *Sadar Mohamed v Charan Singh and Another* [1959] E.A. 793 the Court held that any other sufficient reason for the purposes of review refers to grounds similar to the other two grounds of discovery of new matter or error on the face of the record.
16. The upshot of the above finding is that the court is satisfied that that the 2nd Defendant's application dated 25th August 2021 is without merit and the same is hereby dismissed with costs to the Respondent. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 11TH DAY OF NOVEMBER 2024

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Ayieko for the 2nd Defendant/Applicant.

Mr. Kimathi holding brief for Mr. Njagi for the Plaintiff/ Respondent.

Amos - Court Assistant

