



**Wanjiru v Munga (Civil Appeal E759 of 2021)
[2024] KEHC 14259 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E759 OF 2021**

**JN MULWA, J
NOVEMBER 14, 2024**

BETWEEN

SIDI WANJIRU APPELLANT

AND

ANN MUNGA RESPONDENT

RULING

1. Judgment in this Appeal was delivered on 29/07/2024 by the Hon. Kizito Magare J in which the lower court judgment in CMCC No. 1079 of 2018 delivered on 5/11/2021 was set aside and substituted with an order dismissing the suit with costs. The court further awarded costs of the appeal to the appellant assessed at Kshs. 55,000/=.
2. By the instant Application dated 29/08/2024, Ann Munga the Respondent sought an order for stay of execution of the decree as well as an order to review and/or set aside the said judgment delivered on 29/07/2024 and the resultant decree thereof, basing the same on Section 80 of the *Civil Procedure Act*, and Order 45 of the Civil Procedure Rules as well as Sections 1A, 1B and 3A of the Act.
3. The grounds set forth for the application are stated at paragraph 20 of the judgment, wherein the judge indicated that the Respondent/Applicant did not file its submissions which is a misstatement of facts in that it filed its submissions on the appeal dated 25/03/2024 and uploaded on the e-filing portal.
4. By the above, the Applicant avers that the judgment is highly prejudicial to herself as while making the judgment the court failed to consider her submissions despite being properly on record and therefore the said failure constitutes an error apparent on the face of the record and therefore that error is sufficient for the said judgment to be subject to review. The application is further supported by an affidavit sworn on an even date by the Applicant.



5. The Respondent in the application Sidi Wanjiru objected to the application by a replying affidavit she swore on 13/09/2024. It is her averments that the applicant did not file her submissions on time or at all and urges this court to deny the orders of review sought by the Applicant and order payment of the costs of the appeal and those of the trial court to her.
6. Both parties were directed by this court to file short submission. The applicant's submissions are dated 24/09/2024 and the Respondents are dated 23/09/2024.

Analysis and Determination

7. The court has considered the parties averments in their affidavits and the court's judgment delivered on 27/07/2024 as well as the submissions filed by both parties in respect of the Appeal and the motion before the court.
8. The impugned judgment was delivered on 29/07/2024. At paragraph 19, the court considered the Appellant's submissions dated 7/03/2024 and at paragraph 20 the judge stated -"The Respondent does not appear to have filed submissions" and proceeded to analyze the issue it flagged for determination.
9. The Respondent who is the Applicant in the motion relied on paragraph 20 in the judgment as well as her averments at her Replying Affidavit dated 13/09/2024 stating that she had filed her submissions to the appeal dated 25/03/2024 at the CTS portal.
10. I have taken the liberty to peruse the CTS to find out if indeed the submissions were filed and if so, when, and if within the timelines given by the court. I have also perused the court proceeding that show that on 9/04/2024 the matter was listed before the judge, Kizito Magari J, and that the Respondent was represented by Ms. Omuga Advocate while the Appellant's advocates were absent; that Ms. Omunga stated that she had filed submissions. Nothing was stated for the appellant. The court then gave a judgment date.
11. From perusal of the CTS, it is evident that the Applicant through her Advocates Musyoka Murambi & Associates had filed submissions dated 25/03/2024 on 28/03/2024 at 3.15pm.

It is therefore clear to this court that there were submissions filed and uploaded in the CTS by the Applicant which the court failed to consider in the determination of the appeal.

12. An order for review of a judgment decree or order is premised on Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the [Civil Procedure Act](#). It is available to a party who is not appealing against the judgment.
13. Order 45(1) provides as follows:-
Any person considering himself aggrieved-
 - a. by a decree or order from which owed , but from which no appeal has been preferred ; or
 - b. by a decree or order from which no appeal is allowed, and w ho from the discovery of new and important matter or evidence which after 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.
14. In a myriad of Superior courts decisions, the courts have held that where an error apparent on the face of the record is explicit and demonstrable, the court will review its judgment, decree or order. See the



Court of Appeal decisions in the cases of Sanitam services (EA) Limited vs. Rentokil (K) Limited & Another [2019]eKLR, Francis Njoroge v. Stephen Maina Kamore[2018]eKLR, Republic V. Public Procurement Administrative Review Board & 2 others [2018]eKLR.

15. In the case of Evans Bwire v. Andrew Aginda Civil Appeal No. 147 of 2006, cited in the case of Stephen Githua v. Nancy Wanjira Waeuingi t/A providence Auctioneers [2016]eKLR the court of Appeal held as follows:-

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh.....”

16. From the above analysis, it is evident that the judge (Kizito Magari J) while analyzing the appeal before him failed to consider the Respondent’s/applicant’s submissions when they were duly filed long before the 9/04/2024 when he proceeded to give a judgment date for the appeal, yet counsel Ms. Muga for the Respondent stated to the court that she had filed her submissions.

17. This court having satisfied itself that the submissions had been filed on 25/03/2024 and uploaded into the CTS, the court’s failure to consider the applicants submissions in my view is an error on the face of the record.

18. For the foregoing, I am sufficiently persuaded to allow the application dated 29/07/2024 and consequently make the following orders:-

- a. That the judgment dated 29/07/2024 is hereby set aside and the resultant decree thereof.
- b. That the appeal herein shall be heard afresh upon re-assignment to a judge in the civil division other than this court (J. N. Mulwa J).
- c. In the meantime, an order of stay of execution of the decree flowing from the judgment of the court dated 29/07/2024 is hereby-stayed pending hearing and determination of the appeal as stated at (b) above.
- d. Circumstances in the appeal and application dictate that each party bears its own costs on the application.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024.

JANET MULWA

JUDGE

