Kerai v Mudaliar & another (Commercial Case E184 of 2022)
[2024] KEHC 15748 (KLR) (Commercial and Tax) (6 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E184 OF 2022

A MABEYA, J

DECEMBER 6, 2024

BETWEEN

SURESH KURJI KERAI ..... PLAINTIFF

AND

ARUL SELVARAJ MUDALIAR ..... 1ST DEFENDANT

YUVI CONSTRUCTION LIMITED ..... 2ND DEFENDANT

RULING

1. Before Court is the application dated 4/12/2023 brought under order 22 rule 22, order 10 rule 11, order 45 rule 1(a) & (b) and rule 2, order 51 rule 1 of the *Civil Procedure Rules 2010*, sections 80, 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* Chapter 21 Laws of Kenya.

2. The application sought the setting aside of the ruling delivered on 30/11/2023 and that the same be substituted with an order setting aside the default judgment made on 21/9/2022. That the applicants statement of defence on record be deemed to be properly filed.

3. The application was supported by the grounds set out on the face of the Motion and the supporting affidavit of Arul Selvaraj Mudaliar dated 4/12/2023. It was contended that on 30/11/2023, the Court dismissed the applicants' application dated 3/7/2023 which sought to set aside the default judgment.

4. It was contended by the applicants that the applicants' advocates had failed to serve the statement of defence within the time prescribed and thereupon instructed another firm who filed the defence after 59 days without leave of Court. That as a result, the applicants were highly prejudiced as the Court entered a default judgment on 21/09/2022.

5. It was the applicant's case that, the inadvertent delay in filing the statement of defence was caused by the mistake of the its advocate. Additionally, that its application dated 3/7/2023 was dismissed for erroneously making reference to a non-existent judgment.

6. It was contended that the plaintiff had commenced execution and if it was not halted by the Court, the defendant would be subjected to illegal and irregular execution process. That the application was made without undue delay and no prejudice would be occasioned to the plaintiff if the orders sought are granted.

7. The application was opposed by the plaintiff vide a replying affidavit dated of Suresh Kurji Kerai sworn on 2/2/20224. That the Court dismissed the application dated 3/7/2023 after considering it on merit. That the applicants had failed to meet the threshold for review set out under section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. It was deposed that the application was against the doctrine of functus officio as the Court had exercised its mind on that application. That the application had not set out any ground for review and that the plaintiff continues to be highly prejudiced.

8. The application was argued by way of written submissions which I have considered. The applicants submitted that there was an error in the impugned ruling specifically at paragraph *11* which stated that the defence did not have triable issues. That the applicants' draft defence raised a sole issue with respect to computation of interest upon the principal loan amount.

9. The respondent submitted that the application by the applicants did not state the grounds for review. That the applicants were inviting the Court to carry out a fresh issue on interest which the Court could not determine without elaborate and detailed arguments. That the application offended the doctrine of functus officio as the issues raised herein ought to be raised in an appeal.

10. I have considered the parties' contestations and the submissions on record. The main issue for determination is whether the applicants' have met the threshold for review of the orders made on 30/11/2023. The Court's jurisdiction for review of the ruling is founded on section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*. Order 45, rule 1 provides: -

> " 1
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> (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.

(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 applicants 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 application is for the setting aside of the order of dismissal and to allow the applicants to file their defence. A brief chronology of the events is that the applicants did not file a defence within the prescribed timelines and a default judgment was entered against the. They applied vide the application dated 3/7/2023 seeking to set aside the interlocutory judgment of 16/6/2023. The same was dismissed on the ground that there was no judgment that was entered on 16/6/2023. The Court further held that the draft defence did not raise any triable issues and as result the application was dismissed with costs.

12. The impugned ruling is the basis of the application before Court. The applicant did not, however set out the grounds for the review of the said orders. They only raised the grounds of review at the submission stage. It is trite that parties are bound by their pleadings and any issues or evidence raised at submission stage that was not in the pleadings is immaterial.

13. In the submissions, the applicants raised the ground that the ruling had an error apparent on the face of record for stating that the defence raised no triable issues. In considering what constitutes an error apparent on the face of record, the Court of appeal in the case of *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, stated that: -

> " In Nyamogo & Nyamogo vs Kogo (2001) EA 174, this Court said that an error apparent on the face of the record cannot be defined precisely or 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 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 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 or wrong view is certainly no ground for a review although it may be for an appeal."

14. Further, in the case of *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR, 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."

15. It has been established that an error apparent on the face of record is a clear and obvious which can be ascertained without the need for additional arguments. The applicants contended that the Court erred by stating that the defence raised no triable issues. The applicants, in this instance, is attempting to challenge the court's assessment of the merits of the defense, which is a matter that can only be addressed through the appeal process, not by way of review.

16. Moreover, the application for setting aside the interlocutory judgment had already been determined by the Court. This means that the matter was already concluded, and the Court cannot revisit or reopen the issue through a review application. A review cannot be used to re-argue or reconsider the merits of a case that has already been decided.

17. I find that the applicants have failed to establish the conditions necessary to warrant a review. The application lacks merit and is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE