REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

(CORAM: A.K. NDUNG'U J.)

CIVIL CASE NO. 12 OF 2017

RACHEL NJOKI KIHARA.....PLAINTIFF/ APPLICANT

VERSUS

GIDEON MIGORO NYAMBATI.....DEFENDANT/ RESPONDENT

RULING

1. On 19th February, 2020this court delivered a ruling sustaining an objection to the production of a Certificate for production of exhibits for failing to adhere to the provisions of the Evidence Act. Aggrieved by that decision, the applicant moved this court in the present application dated 14th September 2020 seeking the following orders:

a. Spent.

b. Spent.

c. That this Honorable Court do review and or set aside the orders dated 19th February, 2020.

d. That in the alternative, this honourable court be pleased to grant the Plaintiff herein leave to file a more detailed certificate under section 65 (8) as read with Part VII, Section 106 and 106B of the Evidence Act or allow her carry all the gadgets used in productions of WhatsUp messages which includes laptop, mobile phone make Sony Xperia 7-2 and a printer.

e. That the Court do make any other or further orders in the interest of justice.

f. That the costs of this application be provided for.

2. The application was expressed to be brought under ***Order 9, Order 51 Rules 1,3 and 10, Order 22 Rule 45*** and ***49*** of the ***Civil Procedure Rules*** and ***Section 3A*** and ***Section 63 (e)*** of the***Civil Procedure Act.*** It was based on the grounds set out at the foot thereof and an affidavit sworn by the applicant on 14th September 2020.

3. The applicant claimed that there was an apparent error on the face of the record with respect to the ruling dated 19th February 2020 as the Certificate together with the screen shots of the WhatsApp messages had already been produced as PEX 6 (a) and (b) during the hearing on 23rd September, 2019. She asserted that all legal requirements were met before the exhibits were produced and after the court had dismissed a preliminary objection raised by the respondent's advocate in a ruling delivered on 23rd September 2019.

4. The applicant further deposed that the ruling dated 19th February 2020 contradicted the court's earlier ruling dated 23rd September 2019 and would have adverse effects on her case if implemented. She urged the court to grant her leave to prepare a more detailed Certificate in line with the provisions of the Evidence Act or she be allowed to carry all the gadgets used in production of WhatsApp messages.

5. The application was opposed by the respondent in an affidavit sworn on 5th October 2020. He lauded the impugned ruling as being well reasoned and stated that it could only be overturned through an appeal. He was also of the view that the application was based on a phishing expedition of evidence since the court had already held that the applicant was not able to place before it the source of the screenshot message and a detailed Certificate as required under the Evidence Act. That in any case, this court was *functus officio* in respect of the decision of 19th February 2020 and allowing the application would amount to it sitting on appeal of its own decision.

6. The respondent also averred that during examination in chief, the applicant had testified that the Gadget Sony Xperia Z2 was broken down and she had not demonstrated that she was capable of servicing those gadgets. He also averred that the alleged printer belonged to the

judiciary at Keroka Law courts which were normally under lease. According to the respondent, carrying the gadgets would not add any value since the applicant had already been accorded an opportunity to be heard but failed to discharge her legal obligations.

7. The applicant was perturbed by the respondent's assertions on the ownership of printers at Keroka Law Courts since he had never been employed by the judiciary. She also clarified, in her supplementary affidavit, that she had not said that the Gadget Xperia Z2, was broken down but that it had become slow to use and she had bought a new one as a result. She maintained that the phone and all other gadgets were available and could be produced and the respondent given an opportunity to cross examine her.

8. The parties took directions to canvass the application by way of written submissions. In his submissions, the applicant's counsel urged that an objection had already been raised against the production of the Certificate and copies of screen shots of WhatsApp messages and overruled in a ruling dated 23rd September, 2019. The ruling delivered on 19th February 2020 was therefore contradictory to the earlier ruling allowing the production of the documents and this was an error apparent that ought to be rectified through review.

9. The other error pinpointed by counsel was the court's reference to a non-existent provision of the law. Counsel submitted that the court had upheld the objection for the applicant's failure to comply with Section 65(a)(1) of the Evidence Act yet there was no such provision. He contended that this was a pertinent mistake that warranted the jurisdiction of the Court to review and/or vary its orders.

10. It was also submitted that this court had an inherent jurisdiction to grant such orders as would meet the ends of justice. Counsel contended that Exhibits 6 (a) and (b) were very crucial to the applicant's case and if they were rejected, the Plaintiff would be condemned unheard and her case would substantially collapse. He therefore urged the court to grant the orders sought in the alternative.

11. For his part, the respondent's counsel submitted that the application did not meet the threshold under **Section 80** of the **Civil Procedure Act** and **Order45** of the **Civil Procedure Rules**. He argued that if the applicant was not satisfied with the provisions of law cited by the court, then she ought to have appealed against the decision and not seek a review.

12. Counsel referred to the cases of ***Nyamongo and Nyamongo -vs- Kogo (2001) EA 174***, ***Muyodi -vs- Industrial Commercial Development Corporation Another (2006)1 EA 243, National Bank of Kenya Ltd- vs- NdunguNjau Civil Appeal No. 211 of 1996 (Unreported), Abasi Belinda -vs- Fredrick Kangwamu Another (1963) EA 557*** and ***Francis Origo Another -vs- Jacob Kumali Mungala (C.A Civil Appeal No. 149 of 2001 (Unreported)***in support of his submissions.

ISSUES, ANALYSIS AND DETERMINATION

13. Having had regard to the application, the rival depositions of both parties and their written submissions, I deduce the following two main issues for determination:

a. Whether there was an error apparent on the face of the record capable of being reviewed; and

b. Whether the court should allow the applicant to file a more detailed certificate under Section 65 (8) as read with Part VII, Section 106 and 106B of the Evidence Act.

14. Although the application for review is based on the wrong provisions of the law this court will overlook the irregularity as it was procedural technicality curable under Article 159(2) (d) of the Constitution of Kenya.

15. The applicable provisions for applications for review are **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**.

16. Section 80 of the **Civil Procedure Act** provides:

> *80. 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.*

17. Order 45 Rule 1 provides the scope of the court's powers of review thus:

> *45(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 noappeal 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.*

18. The present application has been brought on account of an error apparent on the face of the record. Both parties referred to the case of ***Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*** which is good law on what constitutes an error apparent on the face of the record. In that case the Court of Appeal held:

> *"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 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. This laid down principle of law is indeed applicable in the matter before us."*

19. The proceedings before this court were instituted by the applicant against the respondent seeking damages for defamation. The applicant began testifying on 23rd September 2019. In the course of the trial, she intimated to the court that she intended to produce a printout of the offending messages that had been sent to a WhatsApp group.

20. It is at this point that the respondent took to his feet raised his first objection. He argued that he had not been served with a certified copy of the WhatsApp message to confirm that it was a true copy of the original. His objection was premised on **Section 78 A** of the **Evidence Act** which governs the admissibility of electronic and digital evidence as read with **Section 106 B (2)** of the **Evidence Act** which deals with the admissibility of electronic records.

21. This court considered and overruled the respondent's objection in its ruling dated 23rdSeptember 2019. It further held that, *"The authenticity of the document will have to be based on the meeting by the plaintiff of the requirements of Section 78 of the evidence Act as read with S106 B(2) of the Evidence Act."*

22. With that hurdle behind her, the applicant proceeded to produce copies of screenshots of WhatsApp messages that had been sent to her mobile phone make Sony Xperia Z2 via WhatsApp as PEXH 6 (a) and (b). She testified that she had saved the messages on her laptop which had been issued to her by the Judiciary and printed the messages from her computer using a printer in their office. Before the applicant could produce a Certificate identifying the documentary evidence and describing the manner in which it was produced pursuant to the Evidence Act, the respondent raised an objection to the production of the Certificate.

23. This court sustained the objection in the impugned ruling dated 19th February 2020. The court juxtaposed the Certificate against provisions of Sections 65 (5) (c), (6),(8) and 106 B of the Evidence Act which had been laid out in *extenso* in the ruling and found it to be non-compliant with the provisions of the law. The court referred to various cases including the case of ***John Lokitare Lodinyo -vs- I.E.B.C and 2 Others [2018] eKLR*** and ***Richard Nyagaka Tong'i v Independent Electoral & Boundaries Commission & 2 others Election Petition No. 5 of 2013 [2013] eKLR*** in reaching its decision.

24. This court further held:

> *"20. The defendant further contends that there were no details of phone number used to transmit the screenshot to the handset Sony Xperior Z 2. The plaintiff in the certificate stated that computer printout relates to WhatsApp records of phone number 0724xxxx49 received on her phone on 3rd May 2017. The plaintiff filed a supplementary further list of documents and the first document listed thereunder was a 'Certified Copies of the WhatsApp messages sent via +2547xxxxxx45'. It is clear that the screenshots were taken by some other person other than the plaintiff and later sent to the plaintiff whereupon she downloaded and saved the image. Through her device she was able to download, save the contents of the WhatsApp message on her computer and print out the document. It was thus necessary to file a certificate pertaining to the person who took the screenshot of the WhatsApp messages describing the particulars of any device involved in the production of the image."*

25. The two decisions of this court which the applicant claims are contradictory related to two distinct objections. The respondent's initial objection was based on the certification of the applicant's printouts while his subsequent objection was based on the conformity of the applicant's Certificate to the provisions of the Evidence Act.

26. The earlier decision of this court dismissing the respondent's first objection was qualified to the extent that the authenticity of the documents to be produced by the applicant would have to be based on the meeting by the applicant of the requirements of the Evidence Act. In the latter decision, the court found that the requirements of the Evidence Act had not been adhered to in the preparation of the Certificate required under the Evidence Act.

27. By maintaining that all legal requirements had been met before she produced copies of the screen shots, the appellant was effectively claiming that this court proceeded on an erroneous exposition of the law when it made its decision and in effect asking this court to sit on appeal of its own decision.The ruling dated 19th February 2020, was a conscious decision made by this court on considering and weighing the facts before it against the law. The court will eschew attempts to invoke its discretion to review its orders on points of law which are good ground for appeal.

28. The Court of Appeal in the case of ***Swai v Kenya Breweries Limited CIVIL APPEAL NO. 275 OF 2010 [2014] eKLR*** cautioned against such attempts thus:

> *"It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly*

faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are functus officio and have no appellate jurisdiction."

29. Although the applicant is right in her argument that the reference to Section 65 (a) 1 was erroneous, this court set out at length the provisions of the law upon which it allowed the respondent's objection in the ruling dated 19th February 2020. This infraction was minor and curable by reference to the law extensively set out by the court in the ruling.

30. As to whether this court can grant the applicant leave to file a more detailed Certificate under the provisions of the Evidence Act, I find that this court has already expressed itself on the subject which is now *res judicata*. Allowing the applicant to shore up her case after the court has made its decisions pointing out its flaws would be prejudicial to the respondent. It would also compromise the integrity of the process provided under the Evidence Act which is meant to guarantee the authenticity of the evidence sought to be produced. (See ***County Assembly of Kisumu & 2 others versus Kisumu County Service Board & 6 others [2015] eKLR***)

31. For these reasons, the application dated 14th September 2020 is found to be lacking in merit. It is hereby dismissed with costs to the respondent.

Dated, signed and **delivered** at **Kisii** this **14th** day of **April 2020.**

A. K. NDUNG'U

JUDGE