



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 640 OF 2007**

**WILLIAM PETER MAYAKA ..... PLAINTIFF**

**-VERSUS-**

**KENYA REINSURANCE CORPORATION LTD.....DEFENDANT**

**R U L I N G**

1. This is a ruling on the plaintiff's Motion on Notice dated 25/6/2020 brought under **sections 80, 63 (e) and 3A of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules**.
2. The plaintiff seeks a review of the judgment delivered on 30/4/2020 by **Kasango J** specifically on the order for costs and the grant of access to the suit property for valuation purposes. The grounds for the application are contained in the body of the Motion and the Supporting Affidavit sworn by the plaintiff himself on even date.
3. The grounds are that; there is an error apparent on the face of the judgment dated 30/4/2020; that the said error is based on the fact that in the substantive body of the judgment, the court found that each party shall bear its own costs; that however, the final orders of the judgment stated that the suit is dismissed with costs to the defendants.
4. Further, that the final orders included orders on prayers that were not sought for or pleaded by the defendant, that is, an order granting access of the premises for valuation purposes as found in part 'c' of the court's decision.
5. It is the plaintiff's contention that unless the Court reviews the said judgment in terms of each party bearing its own costs, there will be a miscarriage of justice on his part as the defendant will likely proceed to execute and recover costs against him contrary to the substantive terms of the judgment.
6. The defendant opposed the application vide a replying affidavit of **Jadiah Murungi Mwarania** sworn on 10/8/2020. He contends that; the application is bad in law as a review may be sought only when an appeal has not been preferred; that in the instant case, the applicant had lodged an appeal as against the judgment by filing the Notice of Appeal dated 12/5/2020 which predates this application. That therefore the instant application for review is bad in law and should be dismissed with costs.
7. It is the defendant's contention that the application lacks merit as it is well settled that costs follow the cause. That upon the dismissal of the suit, it followed that the defendant was entitled to the costs of the suit. That the court exercised its discretion in awarding costs and awarded the same to the defendant.
8. That the operative part of the judgment which bears the findings and or orders of the Court forms the basis and contents of the decree upon extraction, excluding all other parts of the judgment. That this section bears no errors whatsoever as the Court's decision and or orders were captured clearly and correctly.
9. On the orders granted by the Court on its own motion, it is contended that the Court is vested with inherent jurisdiction and may make orders *suo moto* where it deems fit. As such, the defendant had raised the issue of the denial of access to the suit property by the plaintiff to prevent the valuation of the suit property. In the premises, it was within the purview and jurisdiction of the Court to make a direction or order thereon.
10. The court has considered the record, depositions and submissions by the parties. This is an application for review. **section 80 of the Civil Procedure Act, Cap 21** provides that any person who is aggrieved by a decree or order from which an appeal has not been preferred or is not allowed, may apply for a review of judgment to the court which passed the decree or order. This section is operationalized in **Order 45, Rule (1) of the Civil Procedure Rules**.

11. Before delving into the merits of the application, it is important to deal with the issue that has been raised by the defendant. The defendant contends that since the plaintiff had already preferred an appeal against the judgment, the application is a non-starter. That no review is allowed where an appeal has been preferred.

12. The answer to that is two-fold; firstly, the record shows that although the plaintiff had filed a Notice of Appeal dated 12/4/2020, he nevertheless withdrew the same via a Notice of Withdrawal dated 24/7/2020. That cures the anomaly.

13. Secondly, even if the plaintiff had not withdrawn the said Notice of Appeal, still he would have been entitled to lodge the present application as a Notice of Appeal is not an appeal so properly called.

14. It should be recalled that a Notice of Appeal is only a notification which is filed in this Court signifying an intention to appeal to the Court of Appeal. An appeal is only deemed filed once a Record of Appeal with a Memorandum of Appeal is lodged in the Court of Appeal in accordance with the rules of that Court.

15. Accordingly, the objection that the application does not lie has no basis and is overruled. The Court can now deal with the merits of the Motion.

16. The basis of the present Motion is that there is an error apparent on the face of the record. This is on the issue of costs. Paragraph 13 of the judgment states that each party shall bear own costs while paragraph 15 states that the suit is dismissed with costs to the defendants.

17. Paragraph 13 states:-

***“I am of the view that the plaintiff has failed to prove his case on the balance of probability and the case therefore fails. On costs I will order each party to pay their own costs.”***

While paragraph 15 (a) states:

***“The plaintiff's suit is dismissed with costs to the defendants.”***

18. There is a clear contradiction between the two paragraphs. Although the defendants contend that the operative part of the judgment should be upheld, that part must follow the findings made in the body of the judgment. The operative part is but an end result from what is discussed in the body of the judgment. It must find its basis and foundation from the judgment itself.

19. In the body of the judgment, the Court found that the 1<sup>st</sup> defendant had not explained its demand for Kshs. 8,310,250/75. The Court was of the view that the statutory demand that triggered the suit had been issued improperly. That is why, even after dismissing the suit, the Court directed the 1<sup>st</sup> defendant to re-issue the demand afresh in accordance with the law.

20. In **Chandrakant Joshibhai Patel -v- R [2004] TLR 218**, it was considered an error apparent on the face of the record thus: -

***“...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long-drawn process of reading on points on which may be conceivably be two opinions”.***

21. In this regard, I find that the operative part of the judgment was made in error. Although costs are in the discretion of the Court, the Court had expressed itself in paragraph 13 of the judgment that each party shall bear own costs. The suit had been triggered by the wrongful acts on the part of the defendants. Accordingly, the prayer for review on costs succeeds.

22. As regards the order made in part ‘c’ of the judgment, to the effect that the plaintiff gives access to the suit premises, the Court does not see any error thereon. The Court always retains inherent power to make orders that are efficacious for the ends of justice. The defendants may not have prayed for the order of access, but the Court in its view found it necessary to issue that order so that justice is not denied but met by the Court’s judgment.

23. Accordingly, I allow the Motion to the extent that the judgment delivered on 30/4/2020 is reviewed to the extent that the plaintiff’s suit is dismissed. Each party to bear own costs. As regards part ‘c’ of the judgment, that part remains.

24. Since the Motion is partially successful, I will order that each party bears own costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**