



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL NO. 16 OF 2017 AS

(CONSOLIDATED WITH HCCA 17 OF 2017 AND HCCA 18 OF 2017)

LNK (a minor suing through CNK as next friend).....1ST APPELLANT/RESPONDENT

BGK (minor suing through CN as next friend).....2ND APPELLANT/RESPONDENT

AWW.....3RD APPELLANT/RESPONDENT

-VERSUS-

SIMON GATUNI NJUKIA.....RESPONDENT/APPLICANT

RULING

1. The Applicant via application dated 16/12/2020 seeks orders that; the judgment delivered on 08/12/2020 be reviewed. The decree thereof be stayed.

2. The same is supported by grounds (a) – (f) on the application:

a) That the Respondents/Applicants being dissatisfied with the judgment/decree and orders delivered in Nyahururu Civil Appeal No. 16 of 2017 as consolidated with HCCA No. 17 of 2017 and HCCA No. 18 of 2017 bring this application for this Honorable Court to review/vary its judgment delivered on 08/12/2020.

b) That the Respondents/Applicants had filed his written submissions on time but the same was not forwarded to the Honorable Judge.

c) That the Honorable Judge in his judgment noted that he made the said awards to the Appellants/Respondents since he noted that submissions were not filed by the Respondent/Applicant.

d) That the Honorable Judge did not consider the submissions by the Respondent/Applicant and had he done so then he would have arrived at a different conclusion altogether.

e) That the Appellants/Respondents may obtain the decree resulting from this judgment and commence execution which will cause irreparable loss to the Respondent.

f) That the right to be heard is a non-derogable right and failure by the court staff to submit the Applicants/Respondents' submissions to the Honorable Judge is an infringement of that right.

3. The Application is supported by affidavit of Simon Gatuni Njukia sworn on 16/02/2020 and a supplementary affidavit by same person sworn on 09/02/2021. The Respondent CNK opposed application via affidavit sworn on 15/01/2021.

4. The parties were directed to canvass application via submission but only Applicant filed same.

APPLICANT'S SUBMISSIONS:

5. It is submitted that in the judgment the court noted that the Respondent/Applicant herein did not oppose the appeals as there were no

submissions tendered before the court during the making of the judgment.

6. The submissions on behalf of the Respondent/Applicant were filed on 05/11/2020 and on 07/11/2020 there was correspondence from e-filing Nyahururu High Court confirming receipt of the written submissions.

7. Receipts generated by the Nyahururu Courts showing payment and printing of our submissions on 11/12/2020. Further, filing of the said submissions was confirmed in court when the appeal came up for mention on 11/11/2020 and judgment set for 09/12/2020.

8. That upon this Honorable Court delivering its judgment on 08/12/2020, it clearly noted and indicated in its judgment that the Respondent/Applicant herein did not oppose the appeals via submissions as the same were not on record.

9. It is clear that the submissions were not submitted and/or forwarded to the Court's attention during making of the judgment and the same amounts to infringement of the Respondent's/Applicant's right to fair hearing and thus it is only in the interest of justice that this Honorable Court review its judgment.

10. The absence of the Respondent's/Applicant's submissions on the appeals, the same amounts to an error apparent on the face of the record and/or judgment as spelt under **Order 45 Rule 1 of the Civil Procedure Rules**. See **Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243**, described an error apparent on the face of the record as follows:

"...In Nyamogo & Nyamogo v 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. 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."

11. Further in **Chandrakhant Joshibhai Patel v Republic [2004] TLR, 218** it was held that an error stated to be apparent on the face of the record:

"....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."

12. It is submitted that, there is clear, open and self-explanatory error apparent on the face of the record, which the court clearly noted and stated in making the judgment. The court in its judgment made note to the Respondent's/Applicant's submissions for not having been on records, by that, this Court indicated in its judgment that the Respondent/Applicant did not file his submissions yet he filed the same.

13. Thus it is submitted that in arriving at its judgment, the Court did not consider the Respondent's/Applicant's case. Further, it is urged that, had this Court considered applicant's submissions in the appeals it would have arrived at a different conclusion altogether.

14. It is submitted that a review and/or vary of the judgment of this court will serve to safeguard the Respondent's/Applicant's right to fair hearing as his case will be heard through consideration of the submissions filed on his behalf. See **Mandeep Chauhan v Kenyatta National Hospital & 2 Others [2013] eKLR**.

ISSUES, ANALYSIS AND DETERMINATION:

15. After going through the record and submissions filed, I find that the issues are whether the application is merited and what is the order as to costs.

16. **Mandeep Chauhan v Kenyatta National Hospital & 2 Others [2013] eKLR** to the effect that:

"it is cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complainant must be give a just and fair hearing."

17. The Court has noted that Applicant submissions were filed on 05/11/2020 and on 07/11/2020 there was correspondence from e-filing Nyahururu High Court confirming receipt of the written submissions.

18. There are also receipts generated by the Nyahururu Courts showing payment and printing of submissions on 11/12/2020. Further, filing of the said submissions was confirmed in court when the appeal came up for mention on 11/11/2020 and judgment set for 09/12/2020.

19. That upon this Court delivering its judgment on 08/12/2020, it clearly noted and indicated in its judgment that the Respondent/Applicant herein did not oppose the appeals via submissions as the same were not on record.

20. It is clear that the submissions were not submitted and/or forwarded to the Court's attention during making of the judgment thus it is only in the interest of justice that this Court accords applicants a hearing.

21. The absence of the Respondent's/Applicant's submissions on the appeals, the same amounts to an error apparent on the face of the record and/or judgment as spelt under Order 45 Rule 1 of the Civil Procedure Rules. Thus the court makes the orders;

i. The judgement herein is reviewed and or set aside and the Appeals Nos. 16, 17 and 18 of 2017 will be heard de-novo expeditiously.

ii. Costs in the appeal.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 7TH DAY OF OCTOBER, 2021.

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CHARLES KARIUKI

JUDGE