Republic v Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party); Kingángá (Exparte) (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated)) [2021] KEHC 298 (KLR) (Judicial Review) (16 November 2021) (Ruling)

Neutral citation: [2021] KEHC 298 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

MISCELLANEOUS CIVIL APPLICATION 59 & 63 OF 2019 (CONSOLIDATED)

JM MATIVO, J

NOVEMBER 16, 2021

BETWEEN

REPUBLIC .... APPLICANT

AND

MEDICAL PRACTITIONERS & DENTISTS BOARD & ANOTHER .... 1ST RESPONDENT

PROFESSIONAL CONDUCT COMMITTEE & ANOTHER .. 2ND RESPONDENT

AND

MIO1 ON BEHALF OF MIO2 (A MINOR) & ANOTHER . INTERESTED PARTY

AND

GEOFFREY MUIRURI KINGÁNGÁ .... EXPARTE

RULING

1. Vide an application dated 30th November 2020 expressed under the provisions of sections 1A, 1B, 31, 80 and 99 of the *Civil Procedure Act*[1](the act), Order 45 Rules 1 and 2 of the *Civil Procedure Rules*, 2010, Articles 47(1), 50 (1) and (2) of the *Constitution* and all other enabling provisions of the law, Dr. Sunil Vinayak and Dr. Sunil Vinayak trading as "Smile Africa Dental Clinic" (the applicants) moved this court seeking orders that this court reviews its judgment rendered on 22nd July 2020). They also pray that upon review this court sets aside the decree thereto and substitute it with an appropriate

[1] Cap 21, Laws of Kenya.

decree that conforms with the said review. They also pray that this court makes such further orders as it may deem fit and just in the circumstances of the case. Lastly, they pray that the costs of the application be provided.

2. The nub of their grievance is that in rendering the judgment, the judge made reference to and relied on the provisions of the *Medical Practitioners and Dentists Act*[2] as amended in 2019 vide the Health Laws (Amendment) Act, 2019-KenyA Gazette Supplement No. 60 (No. 5 of 2019) which came into effect on 17th May 2019. They state that the act relied upon was not in force either at the time the applicants were charged or when the PCC entertained the disciplinary proceedings or when the PCC ruling was made nor does it have a retrospective effect.

3. Additionally, they state that prior to 17th May 2019, the applicable law was the *Medical Practitioners and Dentists Act* as amended by the Statute Law (Miscellaneous Amendments) Act (Act No 12 of 2012). They stated that the amending act introduced fundamental amendments to the old act key among them being: -

    i. It did disbanded the Medical Practitioners and Dentists Board by deleting sections 3 and 20 of the old act;

    ii. The establishment of the Kenya Medical and Dentists Council;

    iii. The setting out of the function of the council which includes regulating the conduct of registered medical and dental practitioners and taking such disciplinary measures for any form of professional misconduct and regulating health institutions and taking disciplinary action for any form of misconduct by a health institution through the introduction of section 4 and 20;

    iv. The establishment of various committees of the council to regulate including one mandated to regulate professional conduct -the Professional Conduct Committee (the PCC) introduced by sections 4 and 20 of the old act.

4. The applicants contend that that under the old act, only the Board was mandated to inquire or adjudicate on allegations of professional misconduct and not the PCC. They state that the functions of the PCC to inter alia conduct inquiries, impose punishments (including suspensions) and levy costs as introduced through gazette notices No. LN No. 21 of 2012 and LN no. 223 of 2013 are in conflict with the provisions of section 20 of the old act.

5. They state that their case before this court was that the PCC in conducting the inquiry acted without jurisdiction and ultra vires the confines of sections 20 of the old act but this court in adjudicating the judicial review application erroneously relied on the provisions of the new act instead of old act. They state that all the parties in their affidavits and submissions relied on the old act and not the new act and since inquiry/adjudication by the PCC took place before the coming into force of the amendment introduced by the new act, this court had no basis to rely on the new act. They state that the said error is apparent, manifest and does not need elaborate argument to be established and by relying on an in applicable statute, this court proceeded on the wrong premise and failed to appreciate that under the applicable act, the Board was the only body mandated to carry inquire into the allegations.

6. They state that the said error qualifies to be corrected under this courts power to review its own decision on the basis of a clear error on the face of the record and existence of sufficient reason to review. Also, they state that it will be in consonance with the provisions of Articles 47, 48 and 50 of the Constitution and a denial of the right to access to justice if the orders sought are not granted. Further, they state that

[2] Cap 253, Laws of Kenya.

the application has been brought in good faith and without delay and no party will suffer prejudice if the application is allowed.

7. The grounds in support of the application are replicated in the supporting affidavit of Dr. Sunil Vinayak, the 1st applicant, dated 2nd December 2020. It will add no utilitarian value to rehash them here. Suffice to mention that he made reference to several paragraphs in the judgment, namely paragraphs 88, 89, 90, 93, 108 in support of his averments that the court relied on the new act as opposed to the old act in arriving at its decision, and, that this court was misled in making its findings in the judgment by the provisions of the new act.

The 1st and 2nd Respondent's Replying affidavit

8. Michael R. Onyango, the Respondent's Corporation Secretary swore the Replying affidavit dated 15th February 202 in opposition to the application. The Respondent's case is that the applicant has not shown an error apparent on the face of the judgment; that the alleged error can only be drawn by process of reasoning where there may conceivably be two or divergent opinions; and that the grounds cited are grounds of appeal.

9. Further, the Respondents state that the applicant filed a Notice of Appeal dated 28th July, 2020 against the said Judgment and applied for typed proceedings, and they cannot pursue both review and appeal at the same time; that the application is vexatious and an abuse of the court process and it amounts to forum shopping and are guilty of material nondisclosure for failing to disclose that they filed a Notice of Appeal against the same judgment they seek to review. Also, that there is no clerical or arithmetical mistake in the judgment or errors arising to warrant review under Section 99 of the *Civil Procedure Act*.[3]

10. They state that the application was filed after undue delay of more than 4 months from date of delivery of the judgment which has not been satisfactorily explained. Additionally, they state that the court delivered a well-reasoned decision which considered all the Parties' arguments, so there are no valid reasons to warrant review of the judgement. Lastly, they contend the argument that the PCC acted without jurisdiction and that the judge and relied on the new act instead of the old acts are grounds of appeal, nor review.

Applicant's supplementary affidavit

11. Mr. Samir Inamdar, advocate and a partner in the firm of Daly & Inamdar advocates swore the supplementary affidavit dated 8th March 2021 in response to the Respondent's Replying affidavit. Briefly, he averred that this court mistakenly relied on a statute that was not in force when either the incident complained of occurred or when the PCC ruling was delivered. Further, that the fact that the court relied on the wrong act is patently obvious from a cursory reading of the decision, and, that this is not a matter which the court misconstrued the provisions of a statute but it relied on a statute that did not exist at the material time, hence, the court is bound to remedy the error as a matter of justice.

12. He averred that mere filing of a Notice of Appeal does not amount to preferring an appeal under Order 45 of the Civil Procedure Rules. Further, that, the 4 months delay in filing the application is attributed to the disruption in his law firm because some staff members contracted COVID 19 and also the applicant who lives in Scotland faced similar challenges.

The applicant's advocates submissions

13. The applicants' counsel submitted that in determining the judicial review application, the court mistakenly relied on the provisions of a statute that did exist at the material times relevant to the impugned decision. He argued that the applicable Act was the 2012 Edition which was substantively

[3] Cap 21, Laws of Kenya.

amended by the Health Laws (Amendment) Act, 2019 which came into effect on 17th May 2019. Counsel submitted that none of the parties relied on the amended act, but all parties relied and submitted solely on the provisions of the old act. He submitted that the applicant's argument in the proceedings ought to have been up held on the sole ground that the old act requires that a disciplinary inquiry be held by the Board. He submitted that is something which does not need elaborate reasoning because it is patently obvious from a cursory reading of the judgement.

14. Counsel submitted that as a result of the error of relying on an inapplicable statute, this court proceeded on the wrong premise in so far as interrogating the applicant's main argument on the judicial review application. Citing section 20 of the amended Act which he argued is different from the amended act, he argued that the court cannot add words into a statute and relied on *Apollo Mboya v Attorney General & ors.*[4]

15. Specifically, counsel also took issue with paragraph 92 of the judgment arguing that it states that Section 23 of the new act provides the necessary "statutory underpinning" enabling the council to conduct disciplinary inquiries into professional misconduct through the PCC and argued that section 23(b) of the old act when juxtaposed with the provisions of Section 20 of the old act leaves no room for interpreting any such legislative intendment. He submitted that the power given to the Board to regulate procedure in an Inquiry is solely confined to such an inquiry being held by the Board and by no other body.

16. Additionally, counsel argued that reference of the PCC as a Committee of the Council at paragraphs 90 and 93 of the judgement refers to the new act. He submitted that the establishment of the PCC under the old act was by way of subsidiary legislation which has no "statutory underpinning" at all under the old act because subsidiary legislation cannot override express statutory provisions. He cited section 31 (b) of the *Interpretation and General Provisions Act*[5] and *Mwalagaya v Bandali,*[6] *Kidero & Ors v Waititu & Ors,*[7] *Hotel Balaji v State of Andhra Pradesh* [8]and *R v Medical Practitioners & Dentists Board & 2 others Ex-p Majid Twahir & anor*[9] all of which elucidated the above position. Further, counsel submitted that the act is not retrospective and cited section 23(3) of the *Interpretation and General Provisions Act*. To fortify this point, he cited several decisions among them *Commissioner of Income Tax v Pan African Paper Mills (EA) Limited.*[10]

17. Further, counsel argued that section 80 *Civil Procedure Act*[11] as read with Order 45 Civil Procedure Rules, 2010 gives the court jurisdiction to review a judgment or order on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within a person's knowledge or could not be produced by him at the time the decree was passed or the order made or on

4 {2018} e KLR.

5 Cap 2, Laws of Kenya.

6 *{1980} e KLR.*

7 {2014} e KLR.

8 AIR 1993 SC 10484

9 {2016} e KLR.

10 {2018}e KLR.

11 Cap 21, Laws of Kenya.

account of some mistake or error. He cited *National Bank of Kenya Limited v Ndungu Njau*,[12] *Richard Francis Malelu v Odhiambu Asher & another*[13] cited in *Nyamogo and Nyamogo Advocates v Moses Kipkolum Kogo*[14] both of which defined what constitutes an error on the face of the record to be self-evident and should not require an elaborate argument.

18. He submitted that the error in this case is not about misconstruing a statute but an erroneously application of the wrong statute which is clearly apparent from a reading of the judgement which "stares one in the face" and requires no elaborate argument to establish and there can be no two contrary views about it. He submitted that this case falls under any other sufficient reason and cited P*ancras T. Swai v Kenya Breweries Ltd*.[15]

19. Additionally, counsel submitted that this court has an inherent power, free from the shackles of Section 80 and Order 45, to make such orders as are necessary to correct errors made by the court itself through no fault of any party appearing before it. (Citing *S. Nagaraj v_State of Karnataks*[16] which held that justice is a virtue which transcends all barriers). He submitted that the reason the jurisdiction has to be exercised without any fetter, statutory or otherwise, is explained by the well-recognized maxim of equity, that an act of the court shall prejudice no man. (Citing *Jang Singh v Brijlal and others*[17] and *Lily Thomas v Union of India & Others & others*[18]). He submitted that technicalities cannot be used to deny a party justice.

20. Responding to the argument that the applicants cannot "appeal" and "review" the same decision, he submitted that the issue was resolved by the Court of Appeal in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 others*[19] which held that filing a Notice of Appeal signifies an intention to appeal, but an appeal comes into existence when a party lodges a Record of Appeal against the decision.

21. Regarding the question whether the application was filed without delay, he submitted that the 4-month delay was sufficiently explained. (Citing *Zablon Mokua v Solomon M. Choti & 3 others*).[20] He submitted that the delay is a matter of fact to be determined on the circumstances of each case (Citing *Agip (Kenya) Ltd v Highlands Tyres Ltd*.[21]). He argued that the facts of this case transcend the statutory strictures.

The 1st and 2nd Respondent's advocates submissions

22. The nub of the Respondent's counsels' submissions is that the application does not meet the grounds for review; that a party cannot review and appeal at the same time; there is no error or mistake apparent

12 {1997] e KLR.

13 {2020} e KLR.

14 {2001} 1 E. A. 173.

15 {2014} e KLR.

16 {1993} (4) SCC 595.

17 1966 AIR 163.

18 {2000} 6 SCC 224.

19 {2020} e KLR.

20 e KLR.

21 e KLR.

on the face of the record or discovery of new evidence; and no sufficient reasons have been presented to merit a review.

23. Counsel relied on *National Bank of Kenya Limited v Ndungu Njau*[22] which held that the error or omission must be self-evident and should not require an elaborate argument to be established; that it will not be a sufficient ground for review that another judge could have taken a different view of the matter, and that misconstruing a statute or other provision of the law cannot be a ground for review; or the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Counsel also cited *Richard Francis Malelu v Odhiambo Asher & Another*[23]cited in *Nyamogo & Nyamogo Advocates v Moses Kipkolum Kogo*[24]which held that an error which has to be established by a 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 neither can a view which is adopted by the court in the original record, if a possible one, be an error apparent on the face of the record even though another view is also possible: mere error or wrong or an erroneous view of evidence or of law is certainly no ground for a review although it may be a ground for appeal.

24. Counsel cited *Francis Origo and Another v Jacob Kumah Mungala*[25] which held that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal. Also cited is *Republic v Registrar of Companies Interested Party Githunguri Ranching co*[26] cited in *Pancras T. Swal v Kenya Breweries Ltd*[27]and *Francis Origo and Another v Jacob Kumah Mungala*[28] both of which expounded the same position.

25. Buttressed by the above authorities, counsel submitted that the applicants' contention that the judge misconstrued the statute is a ground for appeal but not a ground for review. She submitted that the applicant's argument that the PCC acted without jurisdiction and therefore ultra vires in rendering the decision, and that the judge made reference to and relied on the new act does not suffice because the manner in which the court interpreted the law and its application in the circumstances can only be addressed through an appeal and not through an application for review. She submitted that there is no error apparent on the face of the record and there is no clerical or arithmetical mistake in the judgment or errors arising therefrom to warrant review.

26. Counsel submitted that the applicants filed the Notice of Appeal and also applied for a copy of the judgment and the proceedings, yet section 80 of the *Civil Procedure Act* provides that a person who is aggrieved by a decree or order from which an appeal is allowed by the Act but from which no appeal has been preferred or by a decree from which no appeal is allowed may apply for review of a judgment. She submitted that an appeal is said to have been preferred once a Notice of Appeal is filed and cited *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited*.[29] To buttress her argument,

22 {1997} e KLR.

23 {2020} e KLR.

24 {2001] 1 EA 173.

25 CA 149/2001.

26 {2016} e KLR.

27 {2014} e KLR.

28 CA 149 of 2001.

29 {2020} e KLR.

she cited Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others[30]which held (J.A Gatembu) where a party has filed a notice of appeal but subsequently applies to the court from which the appeal came to review the decision, that party must in the first place, withdraw the notice of appeal.

27. She submitted that the applicant has not withdrawn the Notice of Appeal and cited *Kisya Investments Ltd v Attorney General & Another*[31]cited in Republic v Registrar of Companies Interested Party Githunguri Ranching Co. Ltd[32] in which the court held that a party who has filed a Notice of Appeal cannot apply for review but if an application for review is filed first, the party is not prevented from filing an appeal subsequently even if a review is pending. Further, she cited *In the Estate of Allan Ngugi Muchai (deceased),*[33]*Gerald KithU Muchanje v Catherine Muthoni Ngare & another*[34] and Gerald KithU Muchanje v Catherine Muthoni Ngare & another[35] in support of the proposition that one has to choose one remedy, either to appeal or review.

28. Lastly, counsel submitted that the application was filed after an unexplained inordinate delay of 4 months and cited *Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers*.[36]

The applicant's advocates submissions in reply

29. Responding to the submission that the application does not meet the requirements for review, the applicants' counsel submitted that the application is not grounded just on sections 80 and 99 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010, but the applicants also invoke the court's Inherent jurisdiction under Section 3A as explained in R v AG & Anr Exp Mike Maina Kamau.[37] Further, counsel argued that the issue at hand is not mis-interpreting or misapplying the law but mistakenly applying the wrong statute which did not exist when the proceedings before this court or the PCC were heard. He cited Nasibwa Wakenya Moses v University of Nairobi & Anor[38] which held that a mistake or error apparent on the face of record refers to an evident error which does not require extraneous matter to show its incorrectness, an error so manifest and clear that no court would permit such an error to remain on the record.

30. On the question of filing Notice of appeal and the instant application, he distinguished the authorities cited by Respondent's counsel citing the Court of Appeal in Multichoice{{^}} (supra) which held that filing a notice of appeal merely indicates an intention to appeal, and an appeal is formally lodged when the record of appeal is lodged.

31. On the question of delay, he echoed his earlier argument that the court is not shackled by statutory or procedural obligations, but its duty bound to correct mistakes under its inherent jurisdiction. He cited Article 259 (8) of the Constitution and submitted that there is no statutory definition of unreasonable

30 {2020} e KLR.

31 CA 31/95.

32 {2016} e KLR.

33 {2006} e KLR.

34 {2020} e KLR.

35 {2020} e KLR

36 {201 6} e KLR.

37 {2020} e KLR.

38 {2019} e KLR.

delay but courts look at the facts of each case to see whether there has been unreasonable delay and the explanation for the delay (Citing Jaber Mohsen Ali & anor v Priscillah Boit & anor[39] and Vijay Kumar Davalji Kanji Gohil v Suresh Mohanlal Fatania & others[40]).

Determination

32. The court's jurisdiction to review its own judgment, as is well known, is limited. The court, indisputably, has a power of review, but it must be exercised within the framework of Section 80 of the *Civil Procedure Act* as read with Order 45 Rule 1 of the Civil Procedure Rules, 2010. Section 80 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

33. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides : -

    45 Rule 1 (1) Any person considering himself aggrieved-

    (a) By a decree or order from which an appeal is allowed, but from which no appeal 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

34. Two lessons can be gathered from the above provisions. One, it is manifest that section 80 gives the power of review while Order 45 sets out the rules. Two, the rules restrict the grounds for review by essentially laying down the jurisdiction and scope of review by limiting review to the following grounds: -

    a) Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

    b) On account of some mistake or error apparent on the face of the record, or

    c) For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

35. To appreciate the scope of a review, section 80 has to be read, but this section does not even outline the ambit of interference expected of the court since it merely states that it "may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order

[39] {2014} e KLR.

[40] [2013] eKLR.

thereon as it thinks fit." The parameters are prescribed in Order 45 Rule 1 which permit an applicant to press for a review "on account of some mistake or error apparent on the face of the records or for any other sufficient reason."

36. Paragraph (a) part of the rule deals with a situation attributable to the applicant, while paragraph (b) deals to an action attributed to the court which is manifestly incorrect or on which two conclusions are not possible. However, neither of them postulates a rehearing of the dispute. The fact that the decision on a question of law on which the judgment of the court is based has been reversed or modified by the subsequent decision of a superior court in any other case is not a ground for the review of such judgment. Where the order in question is appealable the aggrieved party has adequate and efficacious remedy so the court should exercise the power to review its order with the greatest circumspection.

37. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error, where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.

38. 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. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.[41]

39. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. As was held in Nyamogo & Nyamogo v Kogo:-[42]

> " An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 a long-drawn process of reasoning 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

41 See *National Bank of Kenya Ltd vs Ndungu Njau,* {1996} KLR 469 (CAK) at Page 381.

42 {2001} EA 170.

apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

40. As the Indian Supreme Court[43] stated it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. The rationale behind this reasoning is that there is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.[44]

41. The applicants' argument is that: - (i) the PCC acted without jurisdiction and therefore ultra vires. (ii) that this court mistakenly applied the wrong statute and as a consequence of the said mistake it proceeded on the wrong premise, fell in error and arrived at the wrong decision. (iii) Its case was that the PCC acted contrary to section 20 of the old act but court relied on the new act instead of the old act despite the fact that all the parties relied on the old act. (iv) That in relying on an inapplicable statute, this court proceeded on the wrong premise. (v) The court was misled in making its findings by relying on the new act. (vi) That the applicants' submissions ought to have been upheld. (vii) The applicants' counsel identified several paragraphs from the judgement to buttress the applicant's argument that this court fell into error and relied on inapplicable law.

42. Sincerely, all the above grounds are a direct attack to the judgment. They are simply grounds of appeal. Review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law amounts to exercise of appellate jurisdiction, which is not permissible.[45]

43. A mistake or an error apparent on the face of the record means a mistake or an error which is prima-facie visible and does not require an elaborate argument or more than one opinion. First, the arguments propounded by the applicants are detailed and elaborate. This discounts their own argument that the ground cited do not require a detailed examination. The elaborate submissions and authorities tendered by the applicant's counsel betray their argument that the grounds cited do not require an elaborate argument. On the other hand, the diametrically opposed position taken by the Respondent describing the impugned judgment as well reasoned clearly suggests the possibility of two or more opinions. An error contemplated under Order 45 Rule 1(b) must be such which is apparent on the face of the record and not an error which has to be fished out and searched. In other words, it must be an error of inadvertence. It is not clear why the applicants take the view that the court inadvertently relied on the wrong statute which amounts to reading words into the finding. Under the guise of review, the parties are not entitled to rehearing of the same issue but the issue can be decided just by a perusal of the records and if it is manifest can be set right by reviewing the order. If I were to agree with the applicant's argument, it will amount to rehearing the case, analyzing the law and making conclusions which is outside the scope of review.

44. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. Here the applicants are inviting this court to study the

[43] In the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047.

[44] see *Thungabhadra Industries Ltd. v. Govt. of A.P.1*

[45] *See Meera Bhanja v. Nirmala Kumari Choudhury,* (1995) 1 SCC 170.

cited paragraphs and correct the error. They are inviting the court to go back and study the old act and find that it was wrong to refer to the new act and then replace its findings in accordance with the "applicable law." If the view accepted by the court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record.

45. A review of a judgment is a serious step and it can only be resorted where a glaring omission or patent mistake or like grave error has crept in the judgment or order by judicial fallibility but not where the judge has misapplied, misinterpreted or misconstrued the law or facts. The power of review can be exercised for correction of a mistake but not to substitute a view. Put differently, the grounds cited are attacks on the judgment and good grounds of appeal. They cannot and do not qualify to be grounds for review. It is a clear invitation to this court to exercise appellate jurisdiction on its own judgment. I decline the invitation to do so. On this ground, the applicants' application collapses.

46. The applicants' counsel submitted that other than section 80 and Order 45, the applicants were also invoking the inherent powers of this court under sections 1A, 1B, 3A and 99 of the *Civil Procedure Act*. First, section 99 deals with amendment of judgments, decrees or orders. It has no relevancy in the instant application. Second, the applicants are inviting this court to exercise its inherent powers and grant the orders sought. The courts' power stems from the Constitution and the statutes that regulate them. However, the jurisdiction of each hierarchy of the courts is limited within the boundaries of the written law apart from the High Court which is sometimes said to have inherent jurisdiction to do things not specifically provided for. In addition to the powers enjoyed in terms of statute, the High Court has always had additional powers to regulate its own process in the interests of justice commonly described as an exercise of its inherent jurisdiction defined by Freedman C J M in Current Legal Problems'[46] as the: -

> "... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them..."

47. Jerold Taitz, in his book, The Inherent Jurisdiction of the Supreme Court[47] pithily describes the inherent jurisdiction of the high court as: -

> ". . .This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court."

48. Even though the inherent jurisdiction of the high court has long been acknowledged and applied by courts, [48] a court's inherent power to regulate its own process is not unlimited. It does not extend to

[46] *Montreal Trust Co v Churchill Forrest Industries (Manitoba) Ltd* 1972 21 DLR (3d) 75 at 81 quoting I H Jacob, Current Legal Problems (1970) p 51, citing I H Jacob.

[47] Jerold Taitz, University of Cape Town, Juta, 1985.

[48] *Ritchie v Andrews* (1881-1882) 2 EDL 254; Conolly v Ferguson 1909 TS 195.

the assumption of jurisdiction which the court does not otherwise have. In National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd[49] it was aptly stated: -

> "While it is true that this Court's inherent power to protect and regulate its own process is not unlimited – it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute. . ."

49. It must be mentioned at the outset that the inherent powers of the court are not an open license for the court's exercise of unlimited discretion. It is invoked to effect procedural fairness between the parties where a statute falls short of doing so or where there is a gap in the law. The inherent power claimed is not merely one derived from the need to make the court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation.[50] As stated earlier, section 80 and Order 45 Rule 1 provides in clear terms the court's jurisdiction, scope and considerations for entertaining applications for review. The attempt to invoke this courts inherent jurisdiction on the face of such clear provisions of the law is misguided. The jurisdiction and boundaries for review are clearly set and it would be a gross misdirection and a ground for appeal if this court were to allow a review application on grounds other than those set out in the above provisions under the guise of exercising inherent jurisdiction.

50. The Respondent's counsel took issue with the fact that the applicants filed a Notice of Appeal which has not been withdrawn and also filed the instant application. The Respondents' counsel argued that the applicants cannot properly file the instant application having filed a Notice of Appeal. This argument is anchored on the nomenclature deployed in section 80 of the act and Order 45 Rule 1 (1) ...but from which no appeal has been preferred." However, the Court of Appeal in the majority judgment expounded the said provisions in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others (supra) thereby settling the law by clarifying that the mere filing of a Notice of Appeal signifies the intention to appeal, and that the appeal comes into existence upon filing the Record of Appeal.

51. I must add that the *Civil Procedure Act* and the Rules do not contemplate the simultaneous proceedings of review and appeal. Also, the said provisions do not specifically provide that a review application would become incompetent after the filing of the appeal nor does a review application become incompetent merely on account of an appeal being filed subsequently. However, when an appeal is filed subsequently to the filing of a review application, the hearing of the appeal should be stayed till the disposal of the review application. This is because the decision of the appeal or the granting of the review application will make the hearing of the other incompetent in view of the fact that the decree under appeal or the decree sought to be reviewed as the result of the review of judgment, as the case may be, would have been substituted by another decree.

52. The last ground of attack mounted by the Respondent's counsel is that the application was filed after an inordinate delay of 4 months. The law as I know is that delay, even if its for one day must be accounted. This ground largely stands or falls on whether the delay has been explained. Even an inordinate delay can be explained to the satisfaction of the court. In the instant case, the applicants' counsel attributed the delay to COVID 19 pandemic which affected some members of staff in their law firms both in Nairobi and Mombasa leading to closure of their offices and self-isolations. Similarly,

[49] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

[50] Se Ex parte *Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) at p 585F-G Vieyra J and *Union Government and Fisher v West* 1918 AD 556.

it was said the client who lives abroad faced the same challenges. To me, the delay has been sufficiently explained.

Conclusion

53. In summary, in a civil proceeding, an application for review is entertained only on a ground mentioned in Order 45 Rule 1. A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. An error apparent on the face of the record exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the court in the original judgment is a possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record. Review of the earlier order cannot be done unless the court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. An error which is not self-evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review.

54. Flowing from my findings on the issues discussed herein above, it is my conclusion that the applicants' application is unmerited. I therefore dismiss the application dated 30th November 2020 with costs to the Respondents.

Right of appeal.

SIGNED, DATED AND DELIVERED AT NAIROBI VIA E-MAIL THIS 16 THDAY OF NOVEMBER 2021.

JOHN M. MATIVO

JUDGE