



**Dawoodia v Wills & 2 others; Vogt & another (Interested Party) (Commercial Suit 386 of 2017) [2021] KEHC 320 (KLR) (Commercial and Tax) (3 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 320 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL SUIT 386 OF 2017  
DAS MAJANJA, J  
DECEMBER 3, 2021**

**BETWEEN**

**FEMINA DAWOODIA ..... PLAINTIFF**

**AND**

**KLARISSA WILLS ..... 1<sup>ST</sup> DEFENDANT**

**LIUBOV MAKCHINA ..... 2<sup>ND</sup> DEFENDANT**

**MUTHAIGA TRAVEL LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JOY WANJIKU VOGT ..... INTERESTED PARTY**

**MIRA HEMAL BID SHAH ..... INTERESTED PARTY**

**RULING**

1. In the Notice of Motion dated 28<sup>th</sup> September 2021, the Defendants and Interested Parties seek to strike out the suit. In the alternative, they seek to review the ruling dated 11<sup>th</sup> December 2020 and pray that it be varied and or set aside and that the Defendant's application dated 12<sup>th</sup> July 2021 be allowed as prayed.
2. The application is supported by the affidavit of Klarissa Wills sworn on 28<sup>th</sup> September 2021. The Defendants state that the suit is a nullity ab initio and is incurably defective. That the court does not have jurisdiction to entertain a suit that is a nullity or that does not exist in law and that it is the interest of justice that the ruling dated 11<sup>th</sup> December 2020 and the consequent order be reviewed on account of mistakes or errors apparent on the face of the record and that these errors are self-evident and there can be no two opinions on them.



3. The Plaintiff opposes the application through her deposition sworn on 2<sup>nd</sup> November 2021. She states that the intention of the application is to delay the matter. That the application does not meet the threshold for review and that in substance, the Defendants seek to appeal against the ruling dated 11<sup>th</sup> December 2020.
4. Since the application seeks to review the order arising from the ruling dated 11<sup>th</sup> December 2020, it is important to recap the substance of the decision. By the Notice of Motion dated 12<sup>th</sup> July 2019, the Defendants and Interested Parties, as applicants, sought to dismiss the suit with costs on the ground that on 11<sup>th</sup> July 2017, it was established that the Plaintiff had not paid filing fees at the time of filing suit and since the cause of action arose on 16<sup>th</sup> June 2013 and expired on 16<sup>th</sup> June 2019 and that by the time the Plaintiff paid court filing fees on 16<sup>th</sup> October 2019, the claim was statute barred.
5. According to the court record, the Deputy Registrar, by a letter dated 8<sup>th</sup> March 2019, notified the Plaintiff's advocate that the receipt issued to it, Serial No. 8561057 for Kshs. 73,120/- dated 19<sup>th</sup> September 2017, 'was a fake receipt and no monies were paid into the Judiciary account'. The Plaintiff was given an opportunity to regularize the position. In due course, the court fees were re-assessed and the Plaintiff paid the correct court fees on 16<sup>th</sup> October 2019.
6. I considered the arguments and in my decision, I cited section 96 of the [Civil Procedure Act](#) which states that:
  96. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of the fee; and upon such payment the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance.
7. I therefore held that the aforesaid provision is permissive and the court has discretion to excuse the failure to pay fees where there are reasons given for such failure and in that case condone the consequences of the default. I dismissed the application and held that the suit was properly on record once the Plaintiff has paid the requisite fee. I concluded that:

In this case the court filing receipt was found to be fraudulent. There is no evidence that the plaintiff was involved in the fraud. If it was the act or mistake of her counsel's office or clerk or that of court staff, then she should not be punished such acts. Further, when the matter was brought to her counsel's attention, he did regularize the position by paying the assessed court filing fee. I do not think the defendants and interested parties have suffered any prejudice having participated fully in the proceedings for the last two years.
8. The application before the court is for review of the ruling under section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#). The principles governing the exercise of discretion to review a decree or order are now commonplace and the parties have cited several decisions to support their respective positions. An applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter or for any other sufficient reason for the court to review. The Court of Appeal in *National Bank of Kenya Limited v*



*Ndungu Njau* [1996] KLR 469 explained what constitutes an error of law apparent on the face of the record and the scope of review:

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 ground for review. {Emphasis mine}

9. The Defendants point out that the Plaint was stamped on 19<sup>th</sup> September 2017 but the court filing fees assessed and paid on 16<sup>th</sup> October 2019, two years after stamping. In its view, the limitation period for commencing legal action based on 6 years expired on 16<sup>th</sup> June 2019. The Defendants submit that by dismissing its application, the court extended the time for limitation without regard to the provisions of the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya). The Defendants submit that the court does not have jurisdiction under section 96 of the *Civil Procedure Act* to extend the limitation period. The Defendants contend that the purported extension of the limitation period by deeming the Plaint as duly filed constitutes a self-evident error on the face of the record.
10. The Plaintiff reiterates that the arguments made by the Defendants are in essence and appeal against the ruling of the court. It urges the court to dismiss the claim.
11. In my view, what the Defendants now seek is to rehash the arguments made in support of its earlier application. I hold that the law of limitation of actions, that is the *Limitation of Actions Act*, deals with the period when the cause of action accrues and when the suit is filed. The manner of filing is dealt with in the *Civil Procedure Act* and it is this issue the court dealt with by deeming the suit as duly filed under section 96 of the *Civil Procedure Act*. This is the issue I considered and dealt with and therefore, in my view, there is no error apparent on the face of the record. What that Defendants seek to show is that the court proceeded on an incorrect, erroneous and mistaken conclusion of law or misconstrued the *Civil Procedure Act* vis-a-vis the *Limitation of Actions Act*. In the *Ndungu Njau Case* (Supra), the Court of Appeal was clear that the such reason cannot constitute grounds for review. The Defendants ought to have appealed against the decision.
12. For reasons I have set out, the Defendants' and Interested Parties' application dated 28<sup>th</sup> September 2021 is dismissed with costs to the Plaintiff.

**DATED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER 2021.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Ms Akello instructed by Shapley Barret and Company Advocates for the Defendants and Interested Parties.

Mr Washika instructed by Wafula, Washika and Associates Advocates for the Plaintiff.

