REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION

PETITION NUMBER 22 OF 2016

PAUL OBONYO.....PETITIONER

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT/APPLICANT

ETHICS AND ANTI-CORRUPTION COMMISSION..2ND RESPONDENT

KENYA BUREAU OF STANDARDS.....3RD RESPONDENT

RULING

INTRODUCTION

1. The Petitioner filed this suit vide a petition dated 1st August 2016 and filed on 11th August 2016 seeking a declaration that the Respondent's refusal to allow him to import motor vehicle Chasis No. SALLPAMM3YA – 439233 as a returning citizen from Southern Sudan contravened his rights to freedom to enter and exit Kenya as guaranteed under Article 39 of the Constitution, his right to a fair trial and quick administrative action as enshrined under Articles 50 and 47 of the Constitution.

2. After analyzing the evidence presented by way of Affidavits and Submissions by all parties, Achode J delivered her judgment on 9th April 2018. In awarding reliefs, the Honourable judge singled out the 1st Respondent to bear the damages awarded to the Petitioner and Costs of the suit.

3. Aggrieved by this decision, the 1st Respondent herein the Kenya Revenue Authority filed a Notice of Motion Application dated 28th September 2018 under section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules seeking orders that:

> **1. Spent**
>
> **2. Spent**
>
> **3. The judgment issued by the Honourable Justice L.A. Achode on the 9th of April 2018 and the decree arising therefrom be reviewed and/or varied to the extent that the same ordered payment of costs and damages awarded therein to be borne solely by the 1st Respondent**
>
> **4. Costs be awarded to the 1st Respondent.**

4. The above application was supported by the affidavit of Kenneth J. N Kirugi and grounds on the face of it particularized as follows:

> **1. THAT Judgment was issued in this matter by the Honourable Justice L.A Achode and delivered by the Honourable Justice H. Ongudi on 9th April 2018.**
>
> **2. THAT in the said judgment, the Honourable Court found in favour of the Petitioner and entered judgment against all the Respondents for violation of the Petitioner's rights.**
>
> **3. THAT the court awarded the Petitioner damages for breach of his rights and costs of the suit.**

4. THAT it is not clear why in granting the reliefs, the court ordered that the said damages and costs be borne by the 1st Respondent.

5. THAT nowhere in the ratio decidendi is the 1st Respondent/Applicant singled out and held liable for breach of the Petitioner's rights in isolation to the other Respondents.

6. THAT there is a clear error apparent on the face of the judgment since in the ratio decidendi of the said Judgment, all the Respondents were held liable for the violation of the Petitioner's right.

7. THAT the said relief directing the 1st Respondent to bear the damages and costs of the suit is unfair in the circumstances and to be reviewed or varied.

5. The application was opposed by the 2nd Respondent vide Grounds of opposition dated October 2018 stating that:-

1. The applicant has not met the threshold for grant of review orders.

2. The alleged apparent error or omission referred to by the applicant is not in line that is self-evident.

3. The court was right to the extent that it did not find the 2nd Respondent liable in damages to the Petitioner.

4. The court did not fault the 2nd Respondent for recommending that the suit motor vehicle be detained pending conclusion of the criminal case against Mr. Henry Kosgey the then minister for Industrialization.

5. The court faulted the 1st Respondent for holding the suit motor vehicle after judgment had been delivered in the Criminal Case no. 1 of 2011.

6. The application is also opposed by the 3rd Respondent vide a replying affidavit and grounds of opposition dated 30th October 2018. In the replying affidavit sworn by Emmanuel Nguzo in his capacity as the acting Head of Verification on Conformity for the 3rd Respondent, he averred that the basis upon which compensation was awarded was directly hinged on the detention and failure to release the Petitioner's motor vehicle an act the 1st Respondent in its submission acceded to that they were responsible to the detention of the motor vehicle pending inspection and clearance.

7. According to the 3rd Respondent, the power to award compensation in constitutional violations is discretionary and limited to what is appropriate and just according to the circumstances of a particular case. Furthermore, he contended that the 3rd Respondent was not directly or indirectly a participant in the detention and failure to release the Petitioner's motor vehicle.

He further averred that the Petitioner was duly informed of the fact that the 3rd respondent lacked mandate to release his car that was in custody of the 3rd Respondent hence, the court was justified in exempting the 3rd Respondent while apportioning monetary liability.

8. It was the 3rd Respondent's case that the Application does not disclose any error apparent on the face of the record that warrants a review by this court.

9. Relying on their grounds of opposition, the 3rd Respondent opposed the Application by the 1st Respondent thus stating that:-

1. The 1st Respondent herein preferred a Notice of Appeal on 24th April 2018 thereby effectively deeming the Judgment by Justice L. Achode to have been appealed from.

2. No mistake or error apparent on the face of the record or other sufficient reason has been shown by the 1st Respondent to warrant a review of the Judgment.

3. In any event, there has been an unreasonable and inordinate delay of six months between the time the judgment was delivered on 9th April 2018 and application filed on 3rd October 2018.

4. The Application for review has been improperly filed and/is not merited.

5. Such other or further grounds as may be adduced at the hearing hereof.

SUBMISSIONS

10. M/s Kenneth J.N. Kirugi counsel for the 1st Respondent submitted on the application for review by relying on section 80 of the Civil Procedure Act Cap 21 which states: -

Any party 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.

11. Counsel further relied on Order45 Rule 1 which provides:-

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 a review of the decree of the judgment to the court which passed the decree or made the order without unreasonable delay.

12. It was thus counsel's submission that the 1st Respondent has filed this application for review for reasons that there is an error apparent on the face of the judgment. That the 1st Respondent having filed a Notice of Appeal without a memorandum of appeal to challenge the impugned judgment, is itself not a bar to filing the instant application.

13. To support this proposition, Counsel relied on the case of **Mombasa Court of Appeal Civil Application No. Nai 258 of 1997 Noradhi Kenya Ltd vs Loria Michele** where Justice G.A. Pall held with regard to filing of a notice of Appeal as follows:-

'I agree that the remedy of review is open only when the applicant having a right of review preferred an appeal or when no appeal is allowed by law from the order or decree pronounced by the court. But the short point in question here is : can the lodging of the notice of appeal be tantamount to preferring an appeal itself? The filing of a notice of appeal in my humble view cannot deprive a party of his right under Order 44 r.1 of the Civil Procedure Rules to apply for review and the notice of appeal cannot be tantamount to preferring an appeal.'

14. It was thus counsel's further submission that the filing of a notice of Appeal in this matter does not bar the 1st Respondent from filing the instant Application.

15. On error apparent on the face of the record, counsel submitted by questioning the order and decree of the court on why only the 1st Respondent is the party who ought to bear damages and costs awarded to the Petitioner. To him, this is an error apparent on the face of the record. To bolster this position, Counsel relied on the case of **Independent Medical Legal Unit v Attorney General of the Republic of Kenya Application No. 2 of 2012** where the East African Court of Justice held:-

'for an error apparent' it must be an error which strikes one or mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions. It must be a parent, manifest and self evident error which does not require elaborate discussion of evidence or argument to establish, and a review of a judgment will not be considered except where a glaring omission or a parent mistake or grave error has crept into that judgment through judicial fallibility.'

16. On Damages, counsel submitted by relying on **MBSA H.C, Civil Appeal No. 57 of 2006 Treadsetters Tyres Ltd v Wepukhulu** where Ibrahim J held:-

'The party seeking to recover compensation for damages must make out the party against whom he complains was in the wrong. The burden of proof is clearly upon him and he must show that the loss is to be attributed to the negligence of the opposite party. If at the end he loses the case in even scales and does not satisfy the court that it was occasioned by the negligence or default of the other party, he cannot succeed.'

17. Hence, it was counsel's submission that having found that all the Respondents were in breach of the Petitioner's rights, the order that afforded itself was that all the Respondents would bear damages.

18. M/s Rosslyne Murugi counsel for the 2nd Respondent submitted on the following issues:

a) Whether this court is functus officio to grant the orders sought?

b) Whether the applicant has met the threshold for grant of orders of review?

c) Whether there was unreasonable delay?

19. On whether this court is functus officio to grant the orders sought, counsel submitted that, having filed a Notice of Appeal against the judgment, the same is deemed to be an appeal pursuant to rule 2 of the Court of Appeal Rules 2010 which provides:-

'appeal ' in relation to appeals to the Court, includes an intended appeal, and 'appellant' includes an intended appellant''.

20. Counsel relied on the case of **Jeremiah Muku vs Methodist Church of Kenya Registered Trustees & Another [2009] eKLR** where the court held that:-

'There is however another ground why the application for review should fail. A person who files an appeal and abandons that appeal cannot proceed by way of review as rule 1(1)(d) of Civil Procedure Rules Order XLIV applies to an order from which an appeal is allowed but from which no appeal has been preferred- see the case of Origo v Mungala (supra)'

21. Learned Counsel further relied on the case of **AbdullahI Mohamud vs Mohammud Kahiye [2015] eKLR** that cited the case of **Kwame Kariuki & Another v Mohamed Hassan Ali & 4 Others [2014] eKLR** in which case the court observed:-

'It is evident that the relief of review is only available where an appeal has not been preferred as against an order. Once an appeal is preferred then the door is closed on review and for good reason, as the appellant is then seeking a re-examination of the affected order on its merits, and the Court whose order is appealed from cannot review or further interfere with the said order as such action is likely to affect the outcome of the appeal.'

22. It was counsel's submission that the application by the 1st Respondent ought to fail on this ground alone; That by filing a notice of appeal against the court's decision, the applicant is locked out from filing for review of the same decision.

23. On whether the 1st Respondent has met the threshold for grant of orders of review, counsel submitted that for review orders to be granted the Applicant must meet the requisite criterior set out in order 45 of the Civil procedure rules.

24. Counsel thus submitted that an error apparent on the face of the record must be self evident and should not require an elaborate argument to be established. Counsel relied on the case of **Mwihoko Housing Co. Ltd v Equity Building Society (2007) in which the court stated:-**

''It is trite law and we reiterate , that 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 of 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. See NAIROBI CITY COUNCIL V THABITI ENTERPRISES LTD [1995-98]2EA 251 (CAK) where it was held:-

'' In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not review.''

25. Counsel further relied on **National Bank of Kenya Limited v Ndungu Njau [1997]eKLR** where it was held:-

''Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.'

The court went further to state:

"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".

26. Hence, it was counsel's submission that no apparent error can be deduced from the judgment and as such this is a case for dismissal, with costs to the Commission.

27. On whether there was unreasonable delay, counsel submitted that judgment was delivered on 9th April 2018 and the Appellant moved this court seeking review of the same on 3rd October 2018 hence, there was a delay of 6 months which has not been explained by the 1st Respondent. Thus it was counsel's submission that this ground alone is sufficient for the instant application to be dismissed with costs.

28. M/S Otieno & Amisi Co. Advocates representing the 3rd Respondents submitted that by filing a notice of appeal, the impugned judgment is deemed to have been appealed against hence review application is not applicable; that there is no error on the face of the record nor mistake and lastly; that there is inordinate delay in filing the review application.

29. It was counsel's submission that section 80 gives the power to review and Order 45 sets out the rules which restrict the grounds for review. Counsel further submitted by quoting rule 2 of the Court of Appeal Rules 2010 which state:-

'appeal ' in relation to appeals to the Court, includes an intended appeal, and 'appellant' includes an intended appeal.

To further express his view, Counsel relied on the case of **Equity Bank Limited v West Link Limited [2013] eKLR** which held that once a notice of appeal is filed, an appeal is deemed to be in existence as rule 2 defines an appeal as including an intended appeal. Thus it was counsel's submission that by dint of the Notice of Appeal lodged on 25th April2018, the 1st Respondent effectively and by law lost the right to apply for review.

30. On whether there was a mistake or error apparent on the face of the record Counsel submitted that an error apparent on the face of the record must be self-evident and should not require an elaborate argument. To support this submission, counsel relied on the case of **Muyodi v Industrial and Commercial Development Corporation & Another [2006]1EA 243**, where the Court of Appeal 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. There is 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 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 certainly is no ground for review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.**

31. Counsel also relied on the case of **Chandrakhani Joshibhai Patel v R [2004] TLR, 218** where the court held that an error apparent on the face of the record:-

> **'' ….must be such as can be seen by one who 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."**

32. Hence, it was counsel's submission that there was no error apparent on the face of record and that the award of compensation in the decision was directly hinged on the detention and failure to release the Petitioner's motor vehicle.

33. On whether there has been unreasonable and inordinate delay in filing the present application by the 1st Respondent, counsel submitted that six months have already lapsed since judgment was delivered in the instant matter i.e 9th April, 2018. That the 1st Respondent had not given sufficient reason for or even attempted to explain the delay. Counsel submitted that on this ground alone, this court should not entertain the Application.

DETERMINATION

34. After considering the affidavit in support, the replying affidavits and grounds of opposition by the 2nd and 3rd Respondents plus written submissions by their respective counsel, the issues that present themselves for determination are:-

a) Whether the filing of the Notice of Appeal deems the judgment by Justice L. Achode to have been appealed from?

b) Whether there was a mistake or an error apparent on the face of the record?

c) Whether there has been unreasonable and inordinate delay in filing the Application dated 3rd October 2018?

35. On whether the filing of the Notice of Appeal deems the judgment by Justice L. Achode to have been appealed from, it is an undisputed fact that the 1st Respondent filed the present application for review and a Notice of Appeal but no memorandum of appeal has been filed. The 2nd and 3rd Respondents have submitted in their submissions that the action by the 1st Respondent of filing a review application and also filing a notice of appeal by dint of Rule 2 of the Court of Appeal Rules 2010 which defines appeals to include an intended appeal and appellant to include an intended appellant meant that the 1st Respondent lost the right to apply for review.

36. However, in my humble view, I am persuaded by the reasoning of Justice G.A Pall in the case of **Noradhco Kenya Ltd v Loria Michele (supra)** where the Hon. Judge held that by filing a notice of appeal to the court of appeal, a party does not lose the right to file an application for review.

37. In this case, the applicant does not deny filing a notice of appeal which has not been acted upon by filing a memorandum of Appeal. Ideally, time to lodge an appeal has lapsed unless an extension is sought. It then follows that the appellant was at liberty to file this application. It is my finding that filing a notice of appeal is not a bar to instituting an application for review. It is my holding that the application is properly before the court hence should be determined on merit.

38. While addressing similar question in the case of **Haryanto v Ed & F Man (Sugar) Ltd Civil Appeal No. 122 of 1992,** the Court of Appeal comprising of Judges of Appeal Gicheru, Kwach and Cockar held thus:-

> **1) There was jurisdiction to entertain an application for review, notwithstanding the filing of a notice of appeal under the court of Appeal Rules and**

2) For an appeal to be deemed to have been preferred for the purpose of review, there must be an appeal instituted in compliance with rule 81(1) of the Court of Appeal Rules.

39. On whether there was a mistake or an error apparent on the face of the record, it is the 1st Respondents submission that by questioning the order and decree of the court on why only the 1st Respondent is the party who ought to bear damages and costs awarded to the Petitioner, is itself an apparent error on the face of the record. In contrast, the 2nd and 3rd Respondents have submitted that an error apparent on the face of the record must be self-evident and should not require an elaborate argument.

40. It is trite law that one of the tests in granting an order for review is proof of an error apparent on the face of the record or mistake. The question this court seeks to answer is whether the trial judge's action of directing the 1st Respondent to pay the Petitioner an award of compensation and costs was in reality 'an error on the face of the record.'

41. In my humble view, having read through the entire judgment of the trial judge, the decision by the trial judge ordering only the 1st Respondent to bear the award of compensation and costs is something which is established by a long drawn process of reading on points and is not something which is an obvious and patent mistake (See **Chandrakhani Joshibhai Patel v R [supra).** In any case, It is plain from her judgment that she made a conscious decision on the matters in controversy and correctly exercised her discretion in favour of the 2nd and 3rd Respondents. If she had reached a wrong conclusion of law, it could be a good ground for appeal but not review.''

42. Although the learned judge did fault or blame the three respondents for frustrating the petitioner and contributing towards the damage of the motor vehicle and breach of their public duty by failure to exercise fair administrative action, she categorically singled out the 1st Respondent as the entity to bear full responsibility in paying damages and costs. This is not an error curable under Order 45 of the Civil Procedure rules governing review applications. In the circumstances of this case an appeal would suffice.

43. On whether there has been unreasonable or inordinate delay in filing the Application by the 1st Respondent for review, it is an undisputed fact that six months have lapsed since judgment was delivered by the trial judge. The 1st Respondent has not given any reason nor even tried to explain what prompted the delay in filing the instant application for review. In the circumstances, it is my finding that a delay of six months without any justifiable reason is unreasonable thus bordering on indecisiveness and indolence tainted with latches on the part of the 1st Respondent. As to the existence of any other reasonable cause none was cited.

44. Having held as above, it is my finding that the application herein is not merited and the same is hereby dismissed with costs awarded to the 2nd ad 3rd Respondents.

DELIVERED, SIGNED AND DATED THIS 13TH DAY OF MARCH 2019, IN OPEN COURT AT NAIROBI.

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J. ONYIEGO

JUDGE