



**REPUBLIC OF KENYA**

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

**MISC. APPL. NO. 305 OF 2017**

**NDUGU TRANSPORT COMPANY LTD.....APPLICANT**

**VERSUS**

**CHARLES L. KASAMANI.....RESPONDENT**

**R U L I N G**

The applicant herein has moved this court by way of a notice of motion dated the 22<sup>nd</sup> day of March, 2019 under Article 159 of the Constitution and Sections A, 1B, 3A, 63(e) and 80 of the Civil Procedure Act and Orders 9 Rule (9) 45 Rule 1 of the Civil Procedure Rules and has sought an order for review of the ruling and decree given on the 7<sup>th</sup> day of February, 2019 to adopt as part of the decree, the award of interest as was entered by the Law Society of Kenya Tribunal. He has also sought for the costs of the application.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit sworn by Manjeet Singh Sembi, on the 22<sup>nd</sup> March, 2019.

The basis of the application is that in a ruling delivered on the 7<sup>th</sup> day of February, 2019, the court misdirected itself by disallowing the prayer for interest, yet, it had been granted by the Tribunal in its sentencing. The applicant, through the deponent of that affidavit avers that by failing to make an award on costs, there was an error apparent on the face of the record.

In his response, counsel for the respondent sought to address the court on points of law and thus, he did not have an affidavit on record. He averred that the application cannot stand as the applicant elected to appeal against the ruling of the court.

He submitted that the ruling of the court was clear that no interest was awarded and he prayed for dismissal of the application.

In her rejoinder submissions, counsel for the applicant submitted that she only filed a notice of appeal and there is no substantive appeal on record. She argued that the application is properly before the court and that the court is not functus officio.

Counsel argued that the court can still review its orders under section 80 and 1B of the Civil Procedure Act.

The court has considered the application together with the supporting affidavit. I have also considered the submissions made by the counsels in support of their respective positions. The applicant has sought for a review of the orders made by this court vide its ruling delivered on the 7<sup>th</sup> day of February, 2019.

Review is provided for under order 45 Rule 1 of the Civil Procedure Rules which provides;

***45(i) any person considering himself aggrieved-***

- 1. By a decree or order from which an appeal is allowed but from which no appeal has been preferred; or***
- 2. 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 judgment to the court which passed the decree or made the order without unreasonable delay”***

This provision is based on Section 80 of the Civil Procedure Act which provides;-

*Any person who considers himself aggrieved*

*1. by a decree or order from which an appeal is allowed by this act, but from which no appeal has been preferred; or*

*2. by a decree or order from which no appeal is allowed by this act; may apply for review of the judgment to the court which passed the decree or made the order and the court may make such order thereon as it thinks fit"*

An applicant seeking an order for review needs to satisfy the court the following;

*a. There is 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 or order was made.*

*b. There is some mistake or error apparent on the face of the record.*

*c. Or for any other sufficient reason.*

The applicant herein has sought a review of the orders that were made on the 7<sup>th</sup> day of February, 2019 on the ground that there is an error apparent on the face of the record in that the court failed to award interest. He has asked the court to review the ruling and adopt as part of the decree, the award of interest as was entered by the Law Society of Kenya Tribunal.

An error apparent on the face of the record was discussed in the case of *Antony Gachara Ayub vs. Francis Mahinda Thinwa (2014) eKLR* which quoted with approval the decision in *Draft and Develop Engineers Limited vs. National Water Conservation and Pipeline Corporation, civil case number 11 of 2011* where the court held;

*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 a real distinction between 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 or on points here and 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no grounds for review although it may be for appeal.*

The applicant has argued that the court misdirected itself by disallowing the prayer for interest yet it had been granted by the tribunal in its sentencing. Counsel stated that the finding of interest has at all times been referred to, by the Law Society of Kenya Tribunal in all its reports relating to payments made, and due by the respondent. The applicant has annexed copies of such two reports which are dated 17<sup>th</sup> February, 2014 and 20<sup>th</sup> November, 2018.

The respondent opposed the application on points of law and hence no replying affidavit was filed, his first line of argument being that the application cannot stand as the applicant elected to appeal against the ruling. He contended that by virtue of Order 45 Rule 1 (a) of the Civil Procedure Rules the applicant having preferred an appeal against the ruling can't apply for review. His second line of argument was that the ruling by the Tribunal did not provide for interest. He averred that the applicant is asking the court to look at the statement by the Law Society of Kenya and not the ruling by the tribunal which, according to him, is erroneous on the part of the applicant.

The court has considered the submissions by the parties. I have also perused through the impugned ruling sought to be reviewed. Counsel for the applicant seeks to rely on the reports by the Law Society of Kenya which I have perused and it's true that they mention the issue of interest.

On the other hand, I have looked at the judgment of the Tribunal dated the 12<sup>th</sup> June, 2008 duly signed by the chair person and two members. Annexed to that judgment is an order issued on the 6<sup>th</sup> day of July, 2009, signed by the Secretary/CEO of the Law Society of Kenya. It is noted that both the judgment and the order are silent on interest. The order was extracted after the judgment and according to it, the matter was scheduled to be mentioned on 31<sup>st</sup> August, 2009 to confirm execution process which, therefore, means that it was final on the amount payable after the rectification of the figure was done.

In his application dated 7<sup>th</sup> July, 2017 pursuant to which the impugned ruling was delivered, the applicant in his prayer 2 sought for an order for award of interest at court rates from the date the complaint was filed until payment in full.

In my ruling aforesaid, I addressed the issue of interest sought by the applicant and I made a finding on it. It was on that basis that I declined to grant prayers 2 and 3 of the application dated the 7<sup>th</sup> day July of 2017.

I take note of the payment reports by the Law Society of Kenya annexed to the supporting affidavit. It is my considered view that those reports cannot supersede the judgment of the Tribunal nor can they amend and/or review the same to award interest if the same was not provided for in the judgment. I therefore find that there was no error apparent on the record as submitted by the applicant and I hereby decline to review the orders made on 7<sup>th</sup> February, 2019.

Before I conclude, counsel for the respondent had opposed the application on the basis that the applicant has filed an appeal and therefore the remedy for review is not available to him.

In her response, counsel for the applicant submitted that she filed a notice of appeal and not a substantive appeal and averred that the application is properly before the court.

In answer to that, I refer to the Court of Appeal Rules, 2010 which shed some light on what a notice of appeal is. Rule 2 which deals with interpretation, defines a notice of appeal in a criminal appeal to mean a notice lodged in accordance with rule 59 and, in relation to a civil appeal to mean a notice lodged in accordance with rule 75.

Rule 75(1) States;

***“Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court”***

My understanding of the aforesaid rule is that a notice of appeal is a notice that a party intending to file an appeal to the court of appeal has to give and it is not an equivalent of an appeal.

It is my view that the applicant is rightly before the court but for the reasons that I have set out hereinabove, his application has no merit and it is hereby dismissed.

The Respondent is awarded the costs of the application.

Dated, Signed and Delivered at Nairobi this **18<sup>TH</sup>** Day of **JULY, 2019**.

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

..... For the Appellant

..... For the Respondent