



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISC. CIVIL CASE NUMBER 450 OF 2015

MARTHA WAMBUI PLAINTIFF

VERSUS

IRENE WANJIRU MWANGI 1ST RESPONDENT

THE REGISTERED TRUSTEES THE MATER HOSPITAL...2ND RESPONDENT

RULING

By a Notice of Motion dated the 4th May 2016, the applicant seeks the following orders;

(1) Spent

(2) That this court be pleased to extend time by a further 60 days to deposit into court shs.1,000,000.00 or any lesser amount as to be determined by court after the hearing and determination of this application and or in the alternative allow the Applicant to deposit property in the form of an asset and or the already deposited amounts of Kshs.300,000.00 be continued to be held by court as Security.

(3) That this honourable court be pleased to review its ruling delivered on 12/4/2016.

(4) That cost of this application be in the cause.

The application is brought under order 45, order 51 Rule 1 and sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law. It is supported by the affidavit of Martha Wambui (the applicant) sworn on the 4th day of May 2016. In addition to the supporting affidavit, the applicant filed a further supporting affidavit on the 8th day of July 2016.

The grounds on which the application is premised are enumerated on the face of the application as well as in the two affidavits referred to hereinabove. In the said affidavits, the applicant avers that there is an error apparent on the face of the record as to arithmetic computation of the amounts that included other costs other than the morgue charges. That the first Respondent lied on oath to court as to wrongly influence the court's discretion in her favour as regards the morgue charges in respect of the deceased John Mwangi Kariuki at Mater Hospital, which costs were unduly inflated to include legal fees that had not been presented to court for taxation, postmortem, and hospital costs/bills.

She further averred that the first respondent together with her advocate lied on oath as to when she was served with the memorandum of appeal as shown on copy of memorandum of appeal received by her advocate and stamped as received on the 4th November 2015 which contradicts her sworn supplementary affidavit.

That the amount used to pay the costs had been collected by the first Respondent from friends, colleagues and well wishers of the deceased, the late John Mwangi Kariuki and therefore were not personal funds subject to reimbursement. That after the demise of her husband, she has been faced with many financial challenges due to high cost of living in terms of family daily upkeep, school fees for the children and that she left formal employment after the death of the deceased. In addition, she had to raise money for the lawyer's fees and court fees on filing the case. She also had to repay outstanding loans that they had taken with the deceased for various projects and developments, that had not taken off at the time of his demise.

She avers that she is not a person of means as portrayed by the 1st Respondent, to the court. That financially, she is overwhelmed and she has continued to receive handouts from her siblings and borrowing so that she can be able to meet her financial obligations.

The application is opposed vide two replying affidavits sworn by Cyrus Gitonga Kariuki and Irene Wanjiru Mwangi. The said Cyrus Kariuki who describes himself as a butler to the deceased denies having been involved in any fundraising to raise money for the deceased as alleged by the applicant and avers that, he is aware, that the first respondent borrowed money from family and friends and well wishers to offset the outstanding amount at Mater Hospital.

On her part, the first Respondent deposed that there is no error apparent on the face of the record to warrant a review of the court orders given on 12th April 2016. That the lower court order was very specific and after the judgment was pronounced, she raised money and paid the hospital bill so that the body of the deceased could be released to her for burial. She further avers that the issues raised about the bill can be raised and determined by the court during the hearing of the appeal. She denied that she conducted a harambee to raise money for settling the medical bills and further denied the averments by the applicant to the effect that she has tried to enrich herself using the court process. That it's a cardinal principal of law that the costs follow the event and that the applicant has not satisfied the requirements to merit the award of the orders sought in the application herein.

In her submissions, the applicant urged the court to grant orders 2 and 3 of the application as she is not a person of means and that the first Respondent raised funds to pay the hospital bills but she refused to do so and mis-used the money instead. She relied on case number 248/2006 **Mohammed Bashir Vs Shavkat Farqq Sheikh** and asked the court to review the orders. She further urged the court to admit her further supporting affidavit which was filed out of time and invoked the provisions of Article 159 (2) of the constitution in support of her application.

In his submissions, counsel for the first Respondent relied on the two replying affidavits. He urged the court to strike out the applicant's further supporting affidavit filed on 8th July 2016 as it was filed without the leave of the court. He further told the court that it was not clear upon which grounds the applicant had sought the order of review and cited the cases of **National Bank of Kenya Vs. Ndungu Njau** and that of **Moses Wachira Vs Bool & 2 others (both unreported)**. He submitted that there are no new material facts as the same bills were relied on during the hearing of the application that gave rise to the orders that the applicant is seeking to review and that she did not question those bills during the hearing.

He further submitted that, the Judge when giving the orders sought to be reviewed considered all the facts and made a ruling.

That the money the applicant was ordered to deposit is security for costs and after the appeal is heard, the court will make an order for the refund, if need be. That in her ruling, the Hon. Judge observed that the applicant owns a land Rover discovery which she did not disclose to the court and to that extent, it is evident that she is a woman of means.

In her reply, the applicant submitted that she is relying on the ground that “*there is an error on the face of the record*” in that there are additional items which have been included in the bill and which ought not to be there. About the car, she submitted that it was imported by her siblings but it was registered in her name to enable her take a loan as she was in financial problems. She maintained that she is not in any formal employment and that she stopped working after her late husband started ailing. She urged the court to reduce the amount.

This court has considered the material before it together with the submissions by the parties to the application herein. I will start with the submission by the counsel for the first respondent that the further supporting affidavit by the applicant be struck out as it was filed without the leave of the court. In her response, the applicant urged the court to have it admitted out of time and invoked the provisions of Article 159 (2) (d) of the Constitution. In this regard, I am persuaded by the submission by the applicant and I do admit the same out of time.

Turning on to the substance of the application, it is clear that the applicant has sought orders for review as the main order and that of extension of time to deposit into court the sum of Ksh.1,000,000 ordered by the court or any lesser amount to be determined by the court after hearing the application. The second limb of this prayer would amount to review and therefore, I will not consider it separately.

Review is provided for under order 45 Rule 1 of the Civil Procedure Rules, which provision is based on section 80 of the Civil Procedure Act.

Under that rule, an applicant seeking an order for review needs to satisfy the court the following that;

- (a) There is a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced 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 review on the basis that there was an error apparent on the record. In the case of Antony **Gachara Ayub Vs. Francis Mahinda Thinwa (2014) eKLR** which quoted with approval the decision of the court in the case of **Draft and Develop Engineers Ltd Vs National Water Conservation and Pipeline Corporation**, Civil Case No.11 of 2011, it was 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 the 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 on 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 the long drawn process of reasoning or on the points here 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 ground for review although it may be, for appeal.

Having carefully considered the affidavits by the applicant and her submissions, I am not satisfied that there is an error apparent on the face of the record. The errors that she refers to, in the hospital bill by way of additional items that have been included that ought not to be there are not a ground on the basis of which this court can review the orders made by Justice Aburili in her ruling delivered on the 12th day of April 2016. However, in the interest of justice, this court finds that she has made a case for extension of time within which to deposit the money which Aburili J, had ordered.

The upshot of it all, is that the application dated 4th May 2016 partly succeeds and the following orders are made;

(a) The applicant is hereby granted an extension of time within which to deposit a sum of Ksh.1,000,000/=. The said amount to be deposited within a period of 60 days from the date of this ruling.

(b) Prayer 2 of the application is disallowed.

(c) The costs of the application shall be in the cause.

Dated, signed and delivered at Nairobi this 2nd day of February, 2017.

.....

LUCY NJUGUNA

JUDGE

In the Presence of

..... for the Appellant

..... for the Respondent