Shah v Shah (Miscellaneous Application E250 of 2024)
[2025] KEHC 15979 (KLR) (Family) (7 November 2025) (Ruling)

Neutral citation: [2025] KEHC 15979 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

MISCELLANEOUS APPLICATION E250 OF 2024

H NAMISI, J

NOVEMBER 7, 2025

BETWEEN

BHARTI PRASHIT SHAH ..... APPLICANT

AND

PRASHIT JAYANTILAL SHAH ..... RESPONDENT

RULING

1. On 14 October 2024, the Applicant filed Notice of Motion seeking two main prayers; leave to appeal out of time and that the annexed Memorandum of Appeal be deemed as duly filed. The Application was heard and allowed by this Court on 24 March 2025.

2. Soon thereafter, the Respondent filed the present application dated 3 April 2025 seeking review of the Ruling dated 24 March 2025 and that the orders issued be set aside. The Application is premised on grounds that there is an error apparent on the face of the record since this Court failed to consider the Ruling by Hon. Musyoki, J in Family Appeal Case No. E012 of 2023. Further, that the Respondent was granted leave to appeal out of time without there being an appeal on record.

3. In the Supporting Affidavit, the Respondent avers that since the Hon. Justice B. Musyoki had struck out the appeal since the same was filed out of time and without leave of Court, then this Court erred in allowing the Application dated 14 October 2024. The Respondent argues that this Court made orders admitting a non-existent Memorandum of Appeal despite there being no competent Memorandum of Appeal on record since the same was struck out in Divorce Appeal HCFA 12 of 2023. The Respondent contends that there must be an appeal on record before a party seeking to file an appeal out of time can be granted the leave to do so.

4. The Application, which was opposed by the Applicant herein, was canvassed by way of written submissions.

5. I have keenly read the rival submissions. Looking the issues herein, I run the risk repeating my Ruling of 24 March 2025 verbatim, in which I had carefully considered these issues at the time of rendering the same.

6. The Application is brought under Order 45 Rule 1(2) of the Civil Procedure Rules, which provides:

> A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

7. In my view, this provision cannot be read alone and certainly is not sufficient enough to sustain the current application. I find it useful to examine the provisions of Rule 1(1), which states:

> Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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 judgment to the court which passed the decree or made the order without unreasonable delay.

8. It is common ground that the High Court has a power of review, but such power must be exercised within the framework of Section 80 of *Civil Procedure Act*, which provides as follows:-

> Any person who considers himself aggrieved-
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> (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.

9. In Nyamogo & Nyamogo v Kogo [2001] EA 170, while discussing what constitutes an error on the face of the record, the Court rendered itself as follows:-

> " 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

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."

10. Review is impermissible without a glaring omission, evident mistake or similar ominous error. 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order of review.

11. It is my finding that this is not a proper case for the court to grant the review sought. Accordingly, the Application is dismissed. Costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 7 DAY OF NOVEMBER 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

For Applicant: Mr. Mbatha

For Respondent: N/A

Libertine Achieng.....Court Assistant