China Jiangxi Int (K) Limited v Otieno (Civil Appeal 14 of 2018) [2026] KEHC 327 (KLR) (22 January 2026) (Ruling)

Neutral citation: [2026] KEHC 327 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL 14 OF 2018

OA SEWE, J

JANUARY 22, 2026

BETWEEN

CHINA JIANGXI INT (K) LIMITED .... APPELLANT

AND

MOSES ADERO OTIENO .... RESPONDENT

RULING

1. The Notice of Motion dated 8th January 2024 was filed by the appellant pursuant to Sections 1A, 1B, 3, 3A, 63(e) and 80 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya,Order 45(a) and (b) and Rule 51(1) of the Civil Procedure Rules, 2010, for the following orders:

   (a) Spent

   (b) That the Court be pleased to review and/or set aside its order dismissing the appellant's application dated 21st June 2021 for want of prosecution/non-attendance;

   (c) That the Court be pleased to reinstate the application.

   (e) That the costs of the application be provided for.

2. The application was premised on the grounds that the appeal came up for mention on 3rd October 2023 when the same was dismissed for want of prosecution/non-attendance. The applicant contended that its counsel, Mr. Anyumba, attended court virtually but his call dropped before the matter was called out. The application was therefore dismissed yet it was only for mention for the purposes of confirming the filing of written submissions. The applicant also pointed out that its submissions had already been filed by the time of the dismissal; and that the parties ought to have been given a ruling date in the circumstances.

3. The application was supported by the affidavit of Mr. George O. Anyumba, Advocate, sworn on 8th January 2024. He reiterated the grounds aforementioned and added that there is an error apparent on

the face of the record, considering that the respondent had filed a response to the application dated 25th June 2021 stating that he was not opposed to the orders sought therein being granted. Counsel further averred that the absence of counsel in court was not intentional and that it is in the interest of justice that the instant application be allowed.

4. The respondent opposed the application. He relied on the Replying Affidavit sworn on 1st April 2025 by his counsel, Mr. Samuel Odhiambo Eliakim, Advocate. He complained that he was not served in good time with the instant application; and that the application has been brought after an inordinate delay of more than one year from the date of the dismissal order. Counsel further blamed the applicant's counsel for lack of diligence in that he made no attempt to address the court as soon possible to give credence to his claim that his call dropped. Thus, the respondent prayed for the dismissal of the application.

5. The parties were given an opportunity to file their written submissions in respect of the application; and while the applicant complied, the respondent opted to place reliance on his Replying Affidavit. The applicant reiterated its averments in the Supporting Affidavit and prayed that its application be allowed.

6. I have carefully considered the application and the grounds upon which it was based. I note that the appellant relied on Section 80 of the *Civil Procedure Act* as well as Order 45 of the Civil Procedure Rules, contending that there is an error on the face of the record. For purposes of Section 80, Order 45 Rule 1(1) of the Civil Procedure Rules states:

   (1) 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 judgment to the court which passed the decree or made the order without unreasonable delay.

7. It was therefore incumbent upon the respondent to satisfy the Court that it had filed its application without unreasonable delay; and that:

   (a) there has been discovery of new and important matter or evidence which after due diligence, was not within the applicant's knowledge or could not be produced at the material time; or

   (b) there is some mistake or error apparent on the face of the record; or

   (c) that there is any other sufficient reason for review.

8. This is a fairly old appeal, having been filed in 2018. It has been heard and concluded by way of judgment. The judgment is dated 9th April 2019. An application for stay of execution was thereafter disposed of and determined on 16th October 2019. The Deputy Registrar thereafter had occasion to tax the appellant's Bill of Costs. By the application dated 25th June 2021, the appellant sought judgment in terms of the Certificate of Taxation issued in respect of the appellant's Advocate's Costs. The application was fixed for hearing on various dates. Ultimately it was fixed for mention on 16th March 2023 to confirm the filing of submissions. There is no indication as to what transpired on that date, but the record shows that on the 2nd August 2023, the matter was fixed for Notice to Show

Cause on 3rd October 2023. The Registry was to issue and serve the Notice. The appeal was therefore dismissed on 3rd October 2023 for non-attendance.

9. The applicant's complaint is that the learned judge erred in dismissing the appeal on a mention date yet the parties had already filed submissions. The applicant posited that in the circumstances, the learned judge ought to have reserved the matter for ruling instead of dismissing the appeal. Clearly, the applicant is out to challenge the exercise of the learned judge's discretion and therefore impugned the merit of the decision. Where this is the case, the best option would be an appeal. Indeed, in Nyamogo & Nyamogo Advocates v Kago [2001] 1 EA 173 the Court of Appeal made this point thus:

> " ... 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 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 apparent on the face of the record, though another view was also possible. Mere error or wrong view is certainly no ground for review although it may be for an appeal..."

10. Similarly, in National Bank of Kenya Limited v Ndungu Njau [1997] eKLR, the Court of Appeal had the following to say in connection with an application for review:

> " ... 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."

11. The Court of Appeal further stated that:

> " ...the learned Judge ... made a conscious decision on the matters in controversy and 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 for review. 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."

12. In the more recent case of Pancras T. Swai v Kenya Breweries Limited [2014] eKLR, the Court of Appeal restated its viewpoint thus:

> " It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus [sic] officio and have no appellate jurisdiction...The power to review decisions on appeal is vested in appellate courts..."

13. That notwithstanding, the ex parte dismissal order made on the 3rd October 2023 is amenable to setting aside under Order 42 rule 21 of the Civil Procedure Rules. The provision states:

> Where an appeal is dismissed under rule 20, the appellant may apply to the court to which such appeal is preferred for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing, the court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

14. Therefore, the issue for my determination is whether sufficient cause has been shown for the exercise of the Court's discretionary powers to set aside the dismissal order.

15. As pointed out in the case of Mbogo v Shah [1968] EA 93 the discretion is intended to be exercised "...to avoid injustice or hardship resulting from inadvertence or excusable mistake or error," but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

16. The defendant has explained the applicant's non-attendance on the 3rd October 2023. It basically contended that the mistake of counsel ought not to be visited on it. Whereas that is not always a plausible explanation, the application that was dismissed was simply part of the post judgment proceedings and therefore no prejudice is likely to befall the respondent.

17. In the premises, it cannot be said that the intention of the applicant is simply to obstruct or delay the course of justice. Indeed, in Philip Chemwolo & Another v Augustine Kubende [1982-88] KAR 103, Apaloo JA took the following view:

> " ...I think the charge that the appellants were negligent is one that can be questioned. But counsel seems to think the defendants are deserving of punishment and must be shut out for their negligence.
>
> I think a distinguished equity judge has said:
>
> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

18. Moreover, in CMC Holdings Limited v Nzioki [2004] 1 KLR 173 it was held that:

> " In law, the discretion that a Court of law has, in deciding whether or not to set aside an ex-parte order...was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would...not be proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error..."

19. In the premises, I find merit in the application dated 8th January 2025. The same is hereby allowed and orders granted as follows:

    (a) That the dismissal order dated 3rd October 2023 be and is hereby set aside;

(b) That the application dated 21st June 2021 be and is hereby reinstated for hearing and determination on the merits;

(c) That the costs of the application be borne by the applicant in any event.

It is so ordered.

DATED, SIGNED AND DELIVERED AT HOMA BAY THIS 22ND DAY OF JANUARY 2026

OLGA SEWE

JUDGE