

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
MISCELLANEOUS CIVIL APPLICATION NO. E31 OF 2022

ETHICS & ANTI CORRUPTION COMMISSION.....APPLICANT

VERSUS

AMAIO INVESTMENT COMPANY LTD.....1ST RESPONDENT

EQUITY BANK KENYA LIMITED.....2ND RESPONDENT

RULING

1. The background to this matter is that on 7/09/2021, the Applicant, suspecting the 1st Respondent to have engaged in corrupt practices in its dealings with the Turkana County Government, filed **Eldoret High Court Miscellaneous Civil Application No. E148 of 2021** seeking orders preserving the 1st Respondent's specified bank account held at the 2nd Respondent bank. That Application was allowed by **O. Sewe J** on 8/09/2021 who issued orders "**freezing**" the said bank account for a period of 6 months to give the Applicant time to complete investigations. Upon expiry of the 6 months, the Applicant, on 4/03/2022, filed this fresh action, namely, **Eldoret High Court Miscellaneous Civil Application No. E31 of 2022**, seeking extension of the preservation orders, which Application was, again, allowed by **R. Nyakundi J** on the same date, and the orders extended for another period of 6 months.
2. This matter then came up in Court on 21/07/2022 during which the Applicant's Counsel, **Ms. Ashitiva**, informed the Court that the Applicant had since filed a recovery suit in Nairobi, which action rendered this matter no longer necessary. The matter was however not terminated on that date since, although Counsel for the 2nd Respondent, **Ms. Chesoo**, was also present in Court, Counsel for the 1st Respondent was absent. The matter came up again on 28/2/2022 on which date Counsels for all the parties were present. When Counsel for the Applicant, **Ms. Kavita**, holding brief for **Ms. Ashitiva**, applied to withdraw the matter, Counsel for the 1st Respondent, **Mr. Songok** sought an award of costs. **Ms. Kimeli**, holding brief for **Ms. Chesoo**, on her part, stated that she had no instructions on the issue of costs. **Ms. Kavita**, in her response, submitted that the Applicant should not be condemned to pay costs as it had only filed the action "**as a matter of necessity**". Not persuaded with **Ms. Kavita's** argument, I then awarded costs to the 1st Respondent as prayed.
3. Before the Court is now the Notice of Motion dated 24/05/2023 in which the Applicant prays that this Court reviews its said earlier order awarding costs to the 1st Respondent as a consequence of withdrawal of the matter.

4. The Application is supported by the Supporting Affidavit sworn by **David Mutua**, who described herself as a Forensic Investigator with the Applicant and the Investigating Officer assigned to investigate allegations of corruption and economic crimes as pertains to **Tender No. TCG/ESSP/094/2019-2020** awarded to the 1st Respondent by the County Government of Turkana. He deponed that both the Applicant's earlier Applications, namely, first, for preservation of the funds, and subsequently, for extension of the preservation orders referred to above were successful as both were granted, and it is upon completion of the investigations that the Applicant filed the recovery suit in Nairobi. He thus contended that the Applications had served their purpose as the funds had been preserved pending conclusion of investigations, and the action had therefore been simply overtaken by events once the substantive recovery suit was filed. He deponed further that the Application was never "*withdrawn*" but was simply "*overtaken of events*", it is unfair for the Applicant to be condemned to costs for carrying out its statutory functions, and that the Court made the award because it had not been properly appraised. He averred further that the Applicant has filed a Bill of Costs seeking a sum of Kshs 2,702,329/- yet it has not prosecuted its own pending Application. He also faulted the Bill of Coasts for being based on wrong principles thus excessive, and urged that the order on costs was made without a full understanding of the history of the matter, and without an appreciation of the intent of **Section 56** of the **Anti-Corruption and Economic Crimes Act 2003 (ACECA)**.
5. The 1st Respondent, in opposing the Application, relied on the Replying Affidavit sworn by **Ekorot Peter Endapal**, who described himself as a director thereof. He deponed that, contrary to the Applicant's contention that the Court made the award for costs on 28/02/2023 because it was not properly appraised, Counsel for all the parties were present in Court and all consented to the order. He deponed further that the 1st Respondent's Counsel had filed all his pleadings in response to the action, and was ready to proceed when the Applicant withdrew the same. He further contended that the orders awarding costs has since been overtaken by events and there is thus nothing to review, that the Applicant did not appeal or apply for review in good time, and that the 1st Respondent established its entitlement to costs to the satisfaction of the Court. He contended further that he works in Turkana and only sought a week off to address the case, and he will thus be prejudiced should the matter be re-opened.
6. Considering the straight-forwardness of the matters in issue, the parties, with concurrence of the Court, did not file written Submissions.

Determination

7. The issue that arises for determination in this matter is “**whether this Court should review the orders made herein on 28/02/2023 awarding costs to the 1st Applicant as a consequence of withdrawal of this action by the Applicant.**”

8. The relief of Review is governed by **Section 80** of the **Civil Procedure Act**, which provides as follows:

“**Any person 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 thereon as it thinks fit.

9. **Order 45(1)** of the **Civil Procedure Rules** then provides that:

“**1. (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.”

10. **Order 45** therefore recognizes 3 circumstances under which an order for review can be made. The first is where there has been “***discovery of new and important matter or evidence***”, the second is where there has been “***a mistake or error apparent on the face of the record***”, and the third is “***for any other sufficient reason***”. The Applicant has not specified the ground under which it has approached the Court, but the matters raised clearly

fit within the ground of “*mistake or error apparent on the face of the record*” or “*for any other sufficient reason*”.

11. The question therefore is whether the 1st Respondent has successfully brought itself within those grounds.

12. The phrase “*an error apparent on the face of the record*”, was described by the Court of Appeal, in the case of **Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, in the following terms:

“... 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 is certainly no ground for a review although it may be for an appeal ...”

13. The phrase was also described in the Tanzanian case of **Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218** as one that:

“..... must be such as can be seen by one who runs and 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.’

14. There is also the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, where the Court of Appeal had the following to say:

“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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He 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.”

15. It is therefore clear that “*an error apparent on the face of record*” must be one that is obvious to the eye, and self-evident. It must be one which when considered, would not yield two results, and does not require to be established by way of elaborate arguments.

16. In this case, there is no dispute that the order awarding costs was not made *ex parte*. On the contrary, Counsel for all the parties were present in Court and each addressed the Court on the issue of costs after Counsel for the 1st Respondent sought the award. I captured the Applicant’s Counsel, **Ms. Kavita**, to have responded as follows:

“We only filed this matter as a necessity. We should not be penalised to pay costs”.

17. The Applicant has however referred the Court to **Section 56** of **ACECA**, and urged that in filing this action, it simply invoked the above provision in pursuance of its statutory duties to investigate corrupt dealings, and that the Application was in fact successful, and that the action was not really “*withdrawn*” but was “*overtaken by events*”. It is on this basis therefore that the Applicant argues that it is unfair to condemn it to pay costs.

18. **Section 56(1), ((2) and (3)** provide as follows:

“56. Order preserving suspect property, etc.

(1) On an *ex parte* application by the Commission, the High Court may make an order prohibiting the transfer or disposal of or other dealing with property if it is satisfied that there are reasonable grounds to suspect that the property was acquired as a result of corrupt conduct.

(2) An order under this section may be made against a person who was involved in the corrupt conduct or against a person who subsequently acquired the property.

(3) An order under this section shall have effect for six months and may be extended by the court on the application of the Commission.

19. Looking at the above provisions, I am persuaded by the Applicant's arguments. Section 56 of ACECA grants the High Court the power to issue an order preserving suspect property where there is or are reasonable grounds to believe it was acquired through corruption. In this case therefore, the logic was to freeze the 1st Respondent's bank account so as to prevent withdrawal or transfer of the funds held therein pending completion of investigations on legality of how the funds were obtained. It is not in dispute that both Applications filed by the Applicant pursuant to **Section 56** were successful. These were the initial Application commenced by way of **Eldoret High Court Miscellaneous Civil Application No. E148 of 2021** whereof the 6 months freezing order was issued, and upon its expiry, the second Application filed in this instant matter, namely, **Eldoret High Court Miscellaneous Civil Application No. E031 of 2022**, whereof the "*freeze order*" was extended for another 6 months. It is also not in dispute that upon completion of investigations, the Applicant, as contemplated, did file the main recovery suit against the 1st Respondent, namely **Nairobi ACEC E025 of 2022**. The Applicant is therefore right in asserting that although, in terminating this action, the Applicant's Counsel used the term "*withdrawal*", the correct position is that the action was simply "*overtaken by events*" as it had fully served its purpose.

20. For the foregoing reasons, and also considering the great public interest element served by the Applicant in furthering its statutory mandate, the order awarding costs against the Applicant was clearly issued in error. The action was not withdrawn because of any irregularity, or the action being futile, or any omission on the part of the 1st Applicant, but because it had, as contemplated under statute, fully served its intended purpose. I thus agree that the Court was not properly apprised of the chronology of events and history of this matter when it dealt with the issue of costs on 28/02/2023. This might have arisen because **Ms. Kavita**, who held brief for **Ms. Ashitiva** who had all along handled the matter, may not have been fully briefed and did not therefore bring out these matters when responding to the prayer for costs. Although failure to fully instruct Counsel holding brief is generally not an excuse, in the peculiar circumstances of this case, I will treat it as excusable. I also consider

that the Application for review was filed less than 3 months after the order was issued, thus relatively, timeously.

Final Orders

21. In view of the above, the Notice of Motion dated 24/06/2023 succeeds, with the result that the portion of the order made on 28/02/2023 awarding costs of this (now withdrawn) action to the 1st Respondent is hereby reviewed, set aside and vacated, and substituted with an order that each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 13TH DAY OF FEBRUARY 2026

.....
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Ms. Baithalu for the Applicant

Ms. Kesei for the 2nd Respondent

N/A for the 1st Respondent

Court Assistant: Brian Kimathi