Singh t/a Trilok Construction v Sucham Investment Limited (Civil Appeal E070 of 2021) [2024] KECA 568 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 568 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E070 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

SANTOKH SINGH T/A TRILOK CONSTRUCTION ..... APPLICANT

AND

SUCHAM INVESTMENT LIMITED ..... RESPONDENT

(Being an Appeal from part of the Ruling and Order of the High Court of Kenya at Mombasa (D. O. Chepkwony, J.) delivered on 29th March 2021 in High Court Civil Appeal No. 153 of 2019)

JUDGMENT

1. The genesis of this appeal was a suit filed by the appellant against the respondent before the Chief Magistrate's Court at Mombasa in CMCC No. 1524 of 2017. The cause of action was an alleged breach of agreement entered into between the parties, which agreement was said to have been partly oral and partly in writing. According to the appellant, it was engaged by the respondent to the reconstruction and refurbishment of a hotel known as Amani Tiwi Beach Resort situated on LR 13442 in Tiwi, Kwale County; that it was an agreed term that the appellant would at various intervals submit to the Project Quantity Surveyor an application for payment, giving details of the work done and the materials on site; that an interim valuation of the work done and of the materials on site would be prepared by the consulting quantity surveyors and the project manager, Messrs. Precise Cost Engineering International Company Ltd; that a report would then be forwarded to the architect, who would in turn issue an interim payment certificate in favour of the appellant; and that payment would be made within 14 days of presentation of the certificates to the respondent.

2. According to the appellant, as at 30th September 2013, he had undertaken the construction and refurbishment work at the respondent's premises aforesaid at a cost of Kshs 81,236,406.61, but the Respondent only paid Kshs 64,721,598.50 leaving a balance of Kshs 16,514,808.11, which was the basis of the appellant's claim.

3. In response, the respondent filed its statement of defence on 24th October 2017 denying the claim and counterclaimed against the appellant for Kshs 24,932,857. It averred that the final certificate by the consulting quantity surveyor dated 3rd July 2013 only recommended that the appellant be paid the sum of Kshs 7,947,089.07 and not Kshs 16,514,808.11 as the appellant alleged. The respondent's counterclaim for Kshs 24,932,857 was on the basis of substandard work done by the appellant, including Kshs 12,170,000/=, which was stated to be an outstanding cost for accommodation and meals for the appellant's labour force. According to the respondent, the amount owing to the appellant in the sum of Kshs 7,947,089.07 ought to have been set off to leave a balance of Kshs 16,985,768/=, and the respondent sought judgment against the appellant in that sum.

4. After considering the evidence and the submissions made on behalf of the parties, the learned trial Magistrate, Hon. E.K. Makori, CM (as he then was) delivered his judgment on 27th June 2019 in which he dismissed both the appellant's claim and the respondent's counterclaim on ground that the terms of the contract were not clear for the court to ascertain liability.

5. Aggrieved by that decision, the appellant challenged the said decision in High Court Civil Appeal No 153 of 2019 based on the grounds that the learned trial magistrate erred in law in holding that he was not able to ascertain the terms of the contract between the appellant and the respondent; that the learned trial magistrate erred in law and in fact in failing to evaluate the evidence on record before arriving at the decision to dismiss the appellant's suit; that the learned trial magistrate totally failed to take into consideration the submissions by the appellant and critically evaluate the evidence on record or background of the claim and, in so doing, arrived at a wrong decision; and that the decision by the learned trial magistrate was contrary to law for having failed to determine whether there was indeed a contract between the appellant and the respondent, the terms thereof and alleged breaches.

6. In her judgement delivered on 2nd June 2020, the learned Judge found that, since the document relied upon by the appellant as constituting the contract between the parties was not signed by both parties, it could not constitute a contract between them; and that the parties could only rely on an oral agreement and their conduct as an implication of the intention to enter into a legal relationship.

7. According to the learned Judge, the terms of the oral agreement were that the appellant was to reconstruct and refurbish the respondent's hotel known as Amani Tiwi Beach resort in Kwale County; that the respondent engaged the services of an architect, Messrs. T. Gaal & Associates, and a consulting quantity surveyor, M/s Precise Cost Engineering International Co. Ltd, to examine the quality of works undertaken by the appellant; that it was agreed that payments would be made to the appellant at various intervals for which the appellant would submit an application for payment detailing the work done and materials on the site to the Quantity Surveyor; that the quantity surveyor would then prepare an interim valuation of the work done and materials used and forward it to the architect, who would in turn issue an interim payment certificate on the basis of which the respondent would then make payment; and that the parties had intended to be bound by those terms to constitute a legal relationship.

8. It was the learned Judge's finding that, although the respondent's counterclaim was based on the allegations that there was breach on part of the appellant through defective works and failure to account for certain bags of cement delivered to the appellant, no sufficient evidence was tendered to prove the alleged defective works which necessitated any remedial or rectification work; that there was no evidence to buttress the claim for meals and accommodation alleged to have been offered to the appellant's workers; that no proof was tendered to show that the bags of cement were supplied to the appellant; and that, as such, the counterclaim ought to have failed.

9. As regards the appellant's claim, the learned Judge found that there were two valuation reports by prepared by the quantity surveyor (Precise Cost Engineering Co. Ltd); that, since the valuation certificate relied upon by the appellant was unsigned, the appellant ought to have called the quantity surveyor's Executive Manager who prepared the valuation report as a witness; that in the circumstances, it was difficult for the court to ascertain the truth regarding valuation report No. 9 dated 17th May 2013; that the appellant failed to prove to the required standard on the balance of probabilities his claim for Kshs 16,514,808.11; that, since the respondent admitted owing the amount of Kshs 7,947,089.07 specified in the final valuation report dated 3rd July, 2013, and the court having dismissed the respondent's counterclaim for want of proof, judgment would be entered in favour of the appellant in the sum of Kshs 7,947,089.08.

10. Accordingly, the learned Judge set aside the lower court's decision dismissing the appellant's claim and substituted it for judgment against the respondent for the admitted sum of Kshs 7,947,089.08. She declined to award any costs to either party.

11. By an application dated 26th August 2020 filed by the respondent on 28th August 2020, it was, in substance, prayed that the respondent be granted leave to introduce additional documentary evidence, and that such evidence be deemed to have been on the court record from the date of filing the record of appeal; that the court reviews its judgment dated 2nd June 2020 and varies the decretal sum from Kshs 7,947,089.08 to Kshs 5,416,141.07; that the respondent be allowed to pay the decretal sum by 20 monthly instalments from the date of the court order sought; and that the costs of the application be provided for.

12. The application was based on the grounds that the judgment in favour of the appellant for the sum of Kshs 7,947,089.07 based on the final certificate issued by the project's consulting quantity surveyor on 3rd July 2013; that, on the face of the said certificate, were various deductions, including the sum of Kshs 2,530,948/= being the sum of 3,626 bags of cement supplied to the appellant; that it was only recently that the respondent was able, after extensive archival search, to find the documents showing that it had ordered for the bags of cements; that the said documents would help the court in reaching a fair decision for both parties; that it was in the interest of justice that the deduction of Kshs 2,530,948/= be considered; that although the local purchase orders and invoices were in the name of Hayer Bishan Singh & Sons Ltd, a sister company to the respondent by virtue of their common directorship, and the hotel industry having suffered a huge loss as a result of Covid-19 pandemic and the respondent not being an exception to those "transgressions" sought that it be allowed to repay the debt in 20 monthly instalments.

13. That application was opposed vide the grounds of opposition dated 9th September 2020 in which it was contended that the court became functus officio after delivering the judgement on the appeal; that the application, being an omnibus application seeking several reliefs, was defective and incapable of proper adjudication by the court and should be struck out; and that there was no new material evidence presented before the court to show that the documents sought to be introduced were not within the reach of the respondent after the exercise of due diligence.

14. In her ruling delivered on 29th March 2021, the learned Judge agreed, on the authority of the case of Pyaralal Mhand Bheru Rajput v Barclays Bank and Others Civil Case No. 38 of 2004, that the application was an omnibus one seeking orders governed by different rules and whose determination were subject to different judicial principles, a practice that has been deprecated; that the court would nevertheless lean towards serving substantive justice by acting blind to the technicalities, especially those which do not affect the substance of the application as mandated by Article 159 of *the*

Constitution; and that the failure to attach a decree and/or the orders sought to be reviewed was not fatal to an application for review.

15. Regarding the prayer for leave to adduce further evidence, the learned Judge cited this Court's decision in *Dorothy Nelima Wafula v Hellen Nekesa Nielsen & Paul Fredrick Nelson* [2017] eKLR; and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR, in which the conditions necessary for granting leave to adduce further evidence on appeal were considered. The learned Judge held that the respondent would have had to prove the allegation that the payments were made by Hayer Bishan Singh & Sons on its behalf; that, even if the payment receipts and requisition notes sought to be introduced were to be accepted as having been filed as at the time of appeal, the documents would have remained as mere allegations, and would have had no substantial influence or impact on the result of the appeal; that additional evidence should not be admitted to enable a party to make out a fresh case in an appeal; and that admission of new evidence on appeal should be exercised very sparingly, and with great caution since it is likely to make it impossible for the other party to respond effectively.

16. In view of the learned Judge having found that the documents sought to be introduced were prepared in the name of a different company other than the respondent, if admitted, the documents would introduce more vagueness and only meant to bolster or fill in gaps in the respondent's case; and that the documents, if admitted, would lead to the obvious evidentiary implications in terms of authenticity, veracity and admissibility, which would call to question whether the directors of Hayer Bishan Singh & Sons Ltd were amenable to cross-examination at the post-judgment stage. In the end, the learned Judge found that the additional evidence in documents sought to be introduced did not meet the criteria and guidelines as laid out by the Supreme Court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others* (*supra*) and dismissed that prayer.

17. On the issue as to whether the court was functus officio, the learned Judge relied on the Supreme Court's holding in the case of *Menginya Salim Murgani v Kenya Revenue Authority* [2014] eKLR where it was held that the general principle is that, after passing a judgment, the court becomes functus officio and cannot revisit the judgment on merits, or purport to exercise judicial power over the same matter, save as provided for by law. However, the learned Judge was of the view that the rule of functus officio has exceptions, such as section 99 of the *Civil Procedure Act*, which deals with the slip rule and allows for the correction of a judgment, but not its merits. In this regard, the learned Judge relied on the Canadian case of *Chandler v Alberta Association Of Architects* [1989] 2 S.C.R. 848 as cited by this Court's in the case of *Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR, where it was held in part that the rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: where there had been a slip in drawing it up and where there is an error in expressing the manifest intention of the court. The learned Judge therefore held that the doctrine of *functus officio* was not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on, but bars a merit-based decisional re- engagement with the case once final judgment has been entered and a decree thereon issued.

18. According to the learned Judge, in as much as the court found that the appellant deserved to be compensated for the works and services it rendered to the respondent, the appellant had to account for expenses which were subject to deduction; that, having been brought to the court's attention that the final certificate indicated that there were some deductions to be made before payment was to be effected, it was an oversight on the court's part in failing to take into account the said deductions; and that the final certificate showed that the deduction which were to be made included Kshs 2,530,948.

19. Accordingly, the learned Judge reviewed her judgment delivered on 2nd June 2020 by adjusting the amount admitted to Kshs 5,416,141.07 after taking into account the deductions captured on the face of the final certificate dated 3rd July 2013.

20. Regarding leave to pay the decretal sum by instalments, the learned Judge found that the proper test to apply in granting orders for payment of a decretal amount by way of instalments lies on the judgment debtor in showing his bona fides by arranging for fair payment of the proportion of the debt. Taking notice of the fact that the hotel industry had been largely shaken by grievances brought about by the Covid-19 pandemic, the learned Judge appreciated that, in as much as the appellant is entitled to payment of the decretal amount, which he should receive promptly to reap the fruits of the judgment, the respondent might genuinely be in a difficult position in paying the decretal amount at once given the declined business in the hotel industry.

21. In the end, the learned Judge varied the decretal amount of Kshs 7,947,089.08 to Kshs 5,416,141.07 and granted leave to the respondent to liquidate the decretal sum in monthly instalments of Kshs 400,000/= on or before the 5th day of every succeeding month, beginning with the month of April 2021. She directed each party to bear their own costs.

22. This decision aggrieved the appellant and provoked this appeal, which is brought on the grounds that the learned Judge erred in law in varying the decretal sum despite dismissing the respondent's prayer seeking introduction of additional documents meant to buttress the argument that the final certificate had on its face various deductions including Kshs 2,530,948/=, which were to be made; that the learned Judge erred in law in varying the decretal sum by relying on the deductions on the face of the final certificate without any supporting evidence; and that the learned Judge failed to consider the submissions by the appellant and critically evaluate the evidence on record or background of the claim and, in so doing, arrived at a wrong decision.

23. It was prayed that the appeal be allowed, the ruling dated 29th March 2021 be set aside in part and the judgement delivered on 2nd June 2020 be reinstated. The appellant also sought costs of the appeal.

24. We heard this appeal virtually on the Court's GoTo platform on 6th February 2024 when learned counsel, Mr. Mingo, appeared for the appellant while Ms Kitoo appeared for the respondent. Both counsel relied entirely on their written submissions.

25. The appellant's submissions dated 29th January 2024 filed by Conrad Law Advocates LLP were not supported by any authority save for the provisions of the *Evidence Act*. In the submissions, whose relevance to the appeal we are unable to discern, it was the appellant's case that the learned Judge, in varying the decretal sum, based her decision on an assumption without any evidence before the Court thereby occasioning a miscarriage of justice; that section 70 of the *Evidence Act* requires proof of any handwriting or signature on a document and, if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting must be proved to be in his handwriting; that no such evidence was tendered before the learned Judge to enable the court arrive at a merited decision; that, whereas p[roof of handwriting] by expert is provided for in section 48(1) of the Act, the court did not seek the assistance of the experts; that, although section 50(1) of the Act permits opinion of any person [acquainted] with the handwriting, no witness was called by the respondent; that the handwritten deductions, which were not proved, were not even pleaded by the respondent; and that the Court ought to grant the orders sought in the appeal.

26. On its part, the respondent relied on the submissions dated 2nd February 2024 filed by Kitoo & Associates Advocates. Before dealing with the merits of the appeal, it was submitted that the appeal was incompetent on the grounds that the memorandum and record of appeal were filed and served outside

the 60 days period prescribed by rule 82(1) of the Rules of this Court; that, contrary to rule 90 of the Rules, the said documents were not served within seven (7) days from the date they were lodged; and that the Notice of Appeal in itself is undated and unsigned. It was prayed that the appeal be struck out.

27. On merits, it was submitted that this being a second appeal, the right of appeal is confined to questions of law only, and that the Court is enjoined to accept the findings of fact of the courts below; that the court should also not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law. The case of *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR was cited in support of this submission. As to the distinction between matters of law and matters of fact, the respondent relied on Black's Law Dictionary and this Court's decision in *Bashir Haji Abdullahi v Adan Mohammed Nooru & 3 others* [2014] eKLR in which the decision of Denning J. in the English case of *Bracegirdle v Oxley* (2) [1947] 1 ALL E.R. 126 at p 130 was cited as stating that where the question whether a determination by a tribunal is a determination in point of fact or in point of law, a distinction must always be made between primary facts and conclusions from those fact; and, while the determination of primary facts is always a question of fact, the conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law.

28. According to the respondent, perusal of the grounds of appeal, shows that the issue for determination is whether the learned judge erred in reviewing the sum awarded to the appellant from Kshs 7,947,089.08 to Kshs 5,416,141.07; that, since the learned judge's decision on this issue followed an examination of the evidence before her, her decision is a conclusion from primary facts; and that this court can only interfere with her decision if the conclusion cannot reasonably be drawn from the primary facts.

29. The respondent contended that the learned Judge had good reason to arrive at that decision because the agreement between the parties was that expenses were to be deducted from any payment to be made; and that it was therefore not unreasonable for the court to consider that cement bags had been spent, and that their cost needed to be accounted for; that this was indicated on the final valuation certificate, which formed part of the evidence and which the appellant did not challenge.

30. The respondent's position was that it was not unreasonable for the learned judge to review her judgment because section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 clothes her with jurisdiction to do so; that some of the grounds for review are where there is some mistake or error apparent on the face of the record, or for any other sufficient reason; and that the learned judge exercised this jurisdiction after she noted an oversight on her part in failing to consider the deductions.

31. We were urged to dismiss the appeal with costs.

32. We have considered the submissions made before us by the parties herein as well as the material on record. The issue of the competency of the appeal is one that ought to be dealt with in limine. The respondent contends that the appeal is incompetent for having been filed and served outside the prescribed period.

33. The reason why the objection to the appeal based on the alleged incompetency should fail is that, pursuant to rule 44 of the Rules, save as otherwise provided thereunder, all applications are to be made by Notice of Motion supported by affidavit. This is meant to advance the rules of natural justice. When such a serious application as for striking out an appeal is made casually in the submissions as the respondent did in this case, it deprives the other side of the opportunity to be heard on the issue. On that ground we are similarly of the view that the objections raised by the respondent cannot be sustained.

34. On the merits, this appeal substantially arises from a decision made on an application for review. The respondent cited section 80 of the *Civil Procedure Act* which provides that:

> 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

35. The section is given effect by Order 45 of the *Civil Procedure Rules* and in rule 1(1) of the said Order, which the respondent did not cite, it is provided that:

> 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,
>
> c. 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.

36. Although the grounds of the application were not specific on the grounds upon which the application for review was brought, it is clear that, the court having disallowed the contention that new evidence was recovered, determined the application on the basis of the error apparent on the face of the record. That is our understanding of the finding by the learned Judge that:

> " Now, it has been brought to the attention of the court that the final certificate indicated that there were some deductions to be made before the payment was to be effected. It must have been an oversight on part of the court in failing to take into account the said deductions. The final certificate is contained at page 53 of the Record of Appeal which shows that the deduction which were to be made included Kshs 2,530,948/=."

37. We wish to remind the parties when making applications for review to be specific in the body of the application the ground(s) upon which the application is based. This was emphasised by this Court in the case of National Bank of Kenya v Ndungu Njau [1995-98] 2 EA 249, where the Court held that:

> " In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought."

38. The general position in matters of review was laid down by this Court in the case of Mahinda v Kenya Power & Lighting Co. Ltd [2005] 2 KLR 418 in which the Court expressed itself as follows:

> " The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

39. We associate ourselves with the view expressed in *The Code of Civil Procedure*, Volume III Pages 3652-3653 by Sir Dinshaw Fardunji Mulla that:

> " The power of review can be exercised for correction of a mistake and not to substitute a view. Such powers should be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not ground for review. The review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47, rule 1, Code of Civil Procedure...The review court cannot sit as an Appellate Court. Mere possibility of two views is not a ground of review. Thus, re-assessing evidence and pointing out defects in the order of the court is not proper."

40. Where the ground for seeking review is that of an error apparent on the face of the record, this Court in case of *Anthony Gachara Ayub v Francis Mahinda Thinwa* [2014] eKLR reiterated 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 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 even though another view was also possible."

41. This Court in *Mumby's Food Products Limited & 2 Others v Co-Operative Merchant Bank Limited* Civil Appeal No. 270 of 2002, held that 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; that the error or omission must however be self-evident and should not require an elaborate argument to be established; that it will not be a sufficient ground for review that another Judge could have taken a different view of the matter, nor can it a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion; and that misconstruing a statute or other provisions of the law cannot be a ground for review.

42. In *National Bank of Kenya v Ndungu Njau* [1995-98] 2 EA 249, this Court reiterated the principle that:

> " 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 and the error or omission must be

self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law... Misconstruing a statute or other provision of the law is not a ground for review."

43. The Indian Supreme Court in the case of *Aribam Tuleshwar Sharma v Aribam Pishak Sharmal* (SC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047 clarified that:

> " an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions."

44. In this case, the learned Judge explained the reasons for reviewing the judgement, stating in her own words that:

> " In as much as this Court found that the Plaintiff/Applicant deserved to be compensated for the works and services it rendered to the Defendant, this Court must also emphasise that the Plaintiff had to account for expenses which were subject to deduction. That was the intention of the court in the said Judgment.
>
> Now, it has been brought to the attention of the court that the final certificate indicated that there were some deductions to be made before the payment was to be effected. It must have been an oversight on part of the court in failing to take into account the said deductions. The final certificate is contained at page 53 of the Record of Appeal which shows that the deduction which were to be made included Kshs 2,530,948/=."

45. As the authorities cited above clearly indicate, an error apparent on the face of the record for the purposes of review must be an error that stares one in the face. It does not require any explanation or scrutiny of the record. It is one that a bystander, if asked whether there was an error, would quickly look at the record and say "of course there was". It is an error that can be corrected by anyone by merely looking at the record without more. That is the reason Order 45 rule 2(1) of the *Civil Procedure Rules* provides that:

> An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

46. In our view, the issue as to the intention of the parties, the need to account for the expenses by the appellant and deductions to be made before the payment was to be effected cannot be termed as issues apparent on the face of the record. To the contrary, they were issues that required "long-drawn process of reasoning on points where there may conceivably be two opinions". In fact, they are issues that may well have required further evidence, which the learned Judge found inadmissible at that stage. Those are issues that cannot be the basis for review on the ground of error apparent on the face of the record. It would seem that, the learned Judge having found that by admitting further evidence it was likely to make it impossible for the appellant to respond effectively proceeded to do the very same thing that she had earlier on avoided when she reviewed the judgement.

47. We therefore find that the learned Judge erred when she decided to review her earlier judgement. As the second order of payment by instalment does not form the basis of this appeal, we say nothing of it.

48. Accordingly, we allow the appeal, set aside the ruling of the High Court dated 29th March 2021 and hereby reinstate the judgement delivered on 2nd June 2020.

49. We hereby award the costs of the appeal to the appellant.

50. Orders Accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR