



**Ngasi v Gor Construction & Hardware Ltd (Environment and Land
Appeal 22 of 2019) [2024] KEELC 4821 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 4821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 22 OF 2019
SO OKONG'O, J
APRIL 11, 2024**

BETWEEN

RACHILO ENOKA NGASI APPELLANT

AND

GOR CONSTRUCTION & HARDWARE LTD RESPONDENT

RULING

Background

1. The Respondent filed a suit against the Appellant at the Chief Magistrate's Court at Kisumu, Kisumu CMCC No. 85 of 2018 (the lower court) seeking among others, specific performance of an agreement of sale of all that parcel of land known as Title No. Kisumu/Kapuonja/1004 (the suit property) which it entered into with the Appellant on 14th May 2014. The Respondent averred that according to the said agreement, the Appellant who was the proprietor of the suit property sold the suit property to it at a consideration of Kshs. 200,000/-. The Respondent averred that the Appellant had refused and/or neglected to transfer the suit property to the Respondent despite receipt of the full purchase price.
2. The Appellant filed a defence in the lower court against the Respondent's claim in which the Appellant denied that he entered into an agreement of sale of the suit property with the Respondent or that the Respondent paid to him a sum of Kshs. 200,000/- as the purchase price for the suit property. In a judgment delivered by the lower court on 25th June 2019, the lower court found that the Respondent had proved its case against the Appellant and entered judgment in its favour against the Appellant as prayed in the plaint.
3. The Appellant was dissatisfied with the said judgment of the lower court and brought the present appeal on 23rd July 2019. The Appellant challenged the said decision of the lower court on several grounds. The appeal was heard by Ombwayo J. In a judgment delivered on 22nd September 2022. The court found that as at the time the Appellant purported to sell the suit property to the Respondent, the



suit property was not registered in the name of the Appellant. The property was registered in the name of one, Enoka Ngasi Achola, deceased. The court found that since the suit property was not registered in the name of the Appellant, there was no way in which an order of specific performance could be enforced against the Appellant. The court found merit in the appeal, set aside the orders of the lower court and substituted them with an order dismissing the Respondent's suit in the lower court. In his analysis of the proceedings and judgment of the lower court, Ombwayo J. stated that "The appellant equally relied on his statement in testimony and agreed that he had received money but wanted to pay back the money."

The application before the court

4. What is now before me is a Notice of Motion application dated 7th November 2022. In the application brought under Sections 3A and 80 of the *Civil Procedure Act*, Order 45 Rules 1 and 2, Order 12 Rule 7, Order 22 Rule 22 of the *Civil Procedure Rules* and all other provisions of the law, the Respondent sought the following orders;
 1. That the judgment delivered by Ombwayo J. on 22nd September 2022 allowing the Appellant's appeal be reviewed, varied and/or set aside.
 2. That the court be pleased to award the Respondent a sum of Kshs. 200,000/- together with interest at court rates from 14th May 2014 until payment in full.
 3. That the costs of the application be provided for.
5. The application was brought on the ground that in allowing the appeal, the court returned the ownership of the suit property which the Respondent had purchased from the Appellant at a consideration of Kshs. 200,000/- to the Appellant. The Respondent averred that in the judgment, the court found that there was irrefutable evidence that the Respondent had paid the said sum of Kshs. 200,000/- to the Appellant. The Respondent averred that having found that the Respondent had paid the sum of Kshs. 200,000/- to the Appellant and that the sale transaction was void for want of capacity on the part of the Appellant to sell the property, failure by the court to award the Respondent the said sum of Kshs. 200,000/- was an innocent mistake, an error or an oversight on the part of the judge. The Respondent averred that it was only fair that the Appellant be compelled to refund the said sum of Kshs. 200,000/- paid to him by the Respondent on the voided agreement.
6. The application was opposed by the Appellant through a replying affidavit sworn on 29th June 2023. The Appellant averred that the money paid to him by the Respondent was a loan and was not on account of the purchase price for the suit property a fact which he admitted before the lower court. The Appellant averred that in its claim in the lower court the Respondent never sought the recovery of the payment that it had made to the Appellant. The Appellant averred that the only recourse available to the Respondent after the judgment delivered herein was either to appeal against the judgment or to file a suit for the recovery of the said sum of Kshs. 200,000/-.

Analysis and determination

7. The application was argued by way of written submissions. The Respondent filed submissions dated 26th October 2023 while the Appellant filed submissions dated 29th January 2024. I have considered the Respondent's application together with the supporting affidavit. I have also considered the replying affidavit filed by the Appellant in opposition to the application and the submissions by the advocates for the parties.



8. The court's power to review its orders and decrees is provided for in Section 80 of the [Civil Procedure Act](#) under which the Respondent's application was brought 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 of the [Civil Procedure Rules](#) also invoked by the Respondent lists specific grounds upon which an application for review can be made as follows;

- a. Discovery of a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed;
- b. Mistake or error apparent on the face of the record; and
- c. Any other sufficient reason.

10. In [Francis Origo & another v Jacob Kumali Mungala](#), Eldoret CA No. 149 of 2001, [2005]eKLR the Court of Appeal stated as follows on review:

“...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”

11. Similarly, in [Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints](#), Nairobi C.A 132 of 2014, [2016] eKLR, the court set the conditions for review as follows:

“To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay.”

“Sufficient reason” was defined in [Attorney General v Law Society of Kenya & another](#) [2017] eKLR as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See [Black's Law Dictionary](#), 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable



and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

12. In John *Kamau Rubangi v Kenya Reinsurance Corporation, Civil Appeal No. 208 of 2006*, [2012]eKLR the court stated as follows:

"It is important to bear in mind that Order 44 Rule 1 of the *Civil Procedure Rules* sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground for review. All these are grounds of appeal."

13. The Respondent's application was brought on the grounds of a mistake or error apparent on the face of the record. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR, the court stated as follows:

"13. The starting point is 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. 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. See, *National Bank of Kenya v Ndungu Njau* [1996]KLR 469(CAK)

14. In *Nyamogo & Nyamogo v Kogo*[2001] eKLR 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."

14. In the same case, the court stated that:

30. The principles which can be culled out from the above-noted authorities are:-

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.



- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

15. I am not satisfied that a case has been made out for the review of the judgment made herein on 22nd September 2022. The Respondent has not persuaded me that there is a mistake or an error apparent on the face of the judgment of the court. As correctly submitted by the Appellant, the Respondent did not seek the refund of Kshs. 200,000/- as an alternative prayer in the lower court. Whether or not the said amount should have been refunded to the Respondent was therefore not considered by the lower court. I have considered the submissions that were made by the parties during the hearing of the appeal herein. The Respondent insisted in its submissions that the lower court was correct in granting it an order of specific performance. Even before this court, the Respondent did not argue in the alternative that if the court found that the lower court had erred in ordering specific performance, the court could consider making an order for the refund of the said sum of Kshs. 200,000/- paid by the Respondent as purchase price. Since the court was not addressed on the issue by any of the parties, the court did



not and needed not to have considered the same. The court did not make a mistake or commit an error in not awarding the Respondent the sum of Kshs. 200,000/- that the Respondent did not seek in the lower court or on appeal. The Respondent's application for review on the ground of a mistake or error apparent on the face of the record has no merit in the circumstances.

Conclusion

16. For the reasons given, the Notice of Motion dated 7th November 2022 is dismissed with costs to the Appellant.

DELIVERED AND DATED AT KISUMU ON THIS 11TH DAY OF APRIL 2024

S.OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Nyanga for the Appellant

Ms. Awuor for the Respondent

Ms. J.Omondi-Court Assistant

