



JJ Chesaro and Company Advocates v Walegwa & 157 others (Environment and Land Miscellaneous Application 40 of 2017) [2024] KEELC 5430 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5430 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 40 OF 2017
NA MATHEKA, J
JULY 25, 2024

BETWEEN

JJ CHESARO AND COMPANY ADVOCATES APPLICANT

AND

MARGARET WALEGWA 1ST RESPONDENT

BENSON LUSWETY WANYONYI 2ND RESPONDENT

PAUL KIZUMBI & 155 OTHERS 3RD RESPONDENT

RULING

1. This court has considered the application dated 19th March 2024 brought under Article 159 of the Constitution of Kenya, Section the *Civil Procedure Act* CAP 21 Laws of Kenya, Order 45 and 51 Rule 3, and 15 of the Civil Procedures Rules 2010 seeking the following orders;
 1. That this Application herein be certified as urgent and be heard ex-part in the first instance services of the same be dispensed with.
 2. That this Honourable Court be played to review and or verify its own orders made on 25th January 2024 and allow the applicant dated 15th November 2022 as prayed.
 3. That the order made on 25th of January 2023 by Honourable Lady Justice N. A. Matheka be reviewed, varied, vacated or discharged and or set aside and the Notice of Motion Application dated 15th November 2021 be reinstated and allowed as prayed.
 4. That the cost of this application be provided for.
2. It is based on the grounds that the Notice of motion application dated 15th November 2021 was to convert the taxed cost of Kshs. 21,363,934.56 into judgment. That the Bill of Costs dated 7th October 2017 filed herein was for Advocate and Client and not Party and Party Bill of Costs as stated at ground



number 3 of the Notice of Motion Application dated 15th November 2021 and paragraph 2 of its Supporting Affidavit as the same was a typical error. The Ruling of the Bill of Cost delivered by the Deputy Registrar Hon. Ogwenon on the 1st day of April 2021 was for the Advocate and Client Bill of Costs dated 7th October 2017. The Certificate of taxation dated 1st October 2021 was out of the ruling delivered on 1st April 2021 Advocate and client bill of costs dated April 2021 and Client bill dated 7th October and not party and party bill of costs. That wording party and party was not indicated in the prayers of the Notice of motion Application dated 15th November 2021. It is only indicated at grounds of the Notice of motion application dated 15th November 2021 and at paragraph 2 its Supporting Affidavit and the same was a typical error. That it is only fair, reasonable and in the interest of justice that the order made on 25th January 2023 Honourable Lady Justice N. A. Matheka be vacated or discharged and or set aside and the Notice of Motion Application dated 15th November 2021 be reinstated and allowed as prayed. That unless the orders sought herein are granted the Applicant will suffer irreparable loss and damages. That the review of the orders herein as sought will cause no prejudice whosoever to the Respondents.

3. This court has carefully considered the application and relied on the supporting affidavit. The respondents were served but failed to attend court and the matter was undefended. In the case of Mwihoko Housing Company Limited vs Equity Building Society (2007) 2 KLR 171 is relevant. It was held, that;

A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that;

“An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made...”

4. Order 45, Rule 1(b) is clear that for the court to review its decision, certain requirements should be met. This section provides as follows:
 - (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.

- (2) 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.”
5. The aforesaid rule is based on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which states 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.”

6. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such orders as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. In *Court of Appeal, Civil Appeal No. 211 of 1996, National Bank of Kenya vs Ndungu Njau*, the Court of Appeal 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. The error or omission must be self evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law”.

7. From the above provisions of the law, authorities cited and facts of this case the applicant states that it was a typographical error to term the bill of costs a party to party bill of costs when it was an Advocate clients bill of costs. I have perused the court record and find that the Certificate of Taxation dated 1st October 2021 was out of the ruling dated 1st October 2021 Advocate and Client bill of costs dated 7th October 2021 and not party and party bill of costs. I therefore find this application is merited and grant it as prayed with no orders as to costs as it was undefended.
8. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

