



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NO 695 OF 2015**

**STEPHEN KIMANI MUTHONI .....CLAIMANT**

VERSUS

**THIKA COFFEE LIMITED.....RESPONDENT**

**RULING**

1. On 20.9.2019, I delivered judgment herein in which I allowed both the claimant's claim and the respondent's counterclaim but only awarded costs for suit to the claimant. The respondent was aggrieved and brought the notice motion dated 6.3.2020 seeking the following orders: -

- a. Review of the Judgment dated 20.9.2019 by awarding the Applicant costs for the Counterclaim against the claim for having been successful in the counterclaim.
- b. Costs of the application.

2. The application is premised on the grounds set out in the body of the motion and supporting affidavit sworn by the defence counsel sworn on 6.3.2020. In brief, the affiant deposed that the failure to award the respondent costs of the counterclaim is an error and/or mistake apparent on the face of the record, which arose from an accidental slip by the Honourable Court. In his view therefore, the said error is sufficient reason warranting review of the judgment.

3. The claimant opposed the application by his Replying Affidavit sworn on 22.7.2020. In brief, the claimant contended that the failure by the court to award costs for the counterclaim was deliberate and it meant that each party was to bear their own costs for the counterclaim. He further contended that in Employment and Labour Relations Court costs don't follow the events but are subject to the discretion of the court as per section 12(4) of the ELRC Act. According to him, the application does not raise any error on the face of the court's record or any other ground required for grant of the review sought. He further contended that the application is a delaying tactic meant to delay execution and enjoyment of the impugned judgment.

4. The parties agreed not to make any submissions on the applications and asked the court to make its ruling based on their affidavits.

5. I have carefully considered the rival affidavits and the court record and the only issue for determination is whether the application has met the legal threshold for granting the review order sought.

6. The jurisdiction and the threshold for granting review by this court is set out by the following rule

**“33. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—**

- a. If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**
- b. on account of some mistake or error apparent on the face of the record;**
- c. if the judgment or ruling requires clarification; or**

**d. for any other sufficient reason.”**

7. The first hurdle that an applicant for review must jump over is to satisfy the court that the application was made within a reasonable time. In this case the impugned judgment was delivered on 20.9.2019 and the instant application was made on 6.3.2020. It follows that the time taken before making the application was almost six months after the delivery of the judgment. The applicant has not explained the said delay and I must hold that the delay of over five months without any justifiable explanation is unreasonable delay and the application ought to fail.

8. According to the court record, the applicant raised the issue of the costs for the counterclaim on 11.11.2019 when the matter went before the Deputy Registrar for taxation of the Claimant’s bill of costs and sought adjournment to enable it file application for clarification of the issue of costs for the counterclaim. However, for no good cause the applicant never filed the application until 6.3.2020. I agree with the claimant that the application is a tactic to delay execution and enjoyment of the impugned judgment.

9. As regards the merits of the application, the applicant contended that there is error or mistake apparent on the face of the record. It argued that the failure by the court to award costs for the counterclaim after it succeeded was an error or mistake on the face of the record.

10. The Court of Appeal, in **Nyamogo and Nyamogo Advocates v Kogo [2001] EA 173** discussed the meaning of an error apparent on the face of the record and held 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 an 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. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”**

11. In this case the court deliberately denied the applicant costs for the counterclaim after considering that it is the one who caused the claimant to file the suit after his demand letter was ignored. I also considered that the overall winner in the proceedings was the claimant. The said decision may have been erroneous in the applicant’s view, but as per the above precedent, an error of judgment or a wrong determination of an issue by the court does not constitute a ground for review but it may be a ground for appeal. Consequently, the court finds and holds that the applicant has not established any error or mistake apparent of the face of the record or any other sufficient ground upon which the court’s discretion can be exercised to review the impugned judgment.

12. Having found that the application herein was not brought within reasonable time and that the applicant has not established that there is an error or mistake apparent on the face of the record or any other sufficient cause upon which the court can review the impugned judgment, I must, as I now do, dismiss the application dated 6.3.2020 with no costs.

**Dated, signed and delivered this 22<sup>nd</sup> day of January, 2021.**

**ONESMUS O. MAKAU**

**JUDGE**

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**ONESMUS N. MAKAU**

**JUDGE**