Kerara v Gal Baking Service Limited (Civil Appeal E813 of 2022)
[2025] KEHC 631 (KLR) (Civ) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 631 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E813 OF 2022

LP KASSAN, J

JANUARY 30, 2025

BETWEEN

SHEM OMOKE KERARA ..... APPELLANT

AND

GAL BAKING SERVICE LIMITED ..... RESPONDENT

RULING

1. For determination is the motion dated 11.10.2024 by Gal Banking Services Ltd (hereinafter the Applicant) seeking inter alia that the Court be pleased to review and or set aside the judgment of this Court delivered on 06.06.2024; and that the Court be pleased to reinstate the Nairobi Milimani Small Claims Court Case No. E1815 of 2022 (hereafter lower Court claim) for hearing and determination. The motion is expressed to be brought among others pursuant Section 1A, 1B, 3, 3A & 80 of the *Civil Procedure Act* (CPA), Order 22 Rule 22 and Order 45 Rule 1 & 2 of the Civil Procedure Rules (CPR). And premised on the grounds amplified in the supporting affidavit sworn by Christopher Moranga Makori, counsel on record for the Applicant.

2. The gist of his affidavit is that judgment was to be delivered via email in the instant appeal whereafter he proceeded to file away the matter in his office and inadvertently forgot to diarize a bring up date in order to follow up with the Court assistance should judgment not be sent via mail. That it is only on 09.10.2024 that he learnt that a copy of the judgment was delivered on 06.06.2024 and that the same had been sent on 07.06.2024 but was left unopened in the spam folder of his email. He goes on to depose that, upon perusing the judgment, the Applicant was aggrieved by the same on accord of an apparent error on the face of the record given that the appellate Court did not consider the fact that the Court Fee Receipt issued on 10.07.2022 indicates that the claim was paid for on 08.07.2022. Therefore, the suit as filed before the Small Claims Court in respect of a cause of action which occurred on 09.07.2022 was filed within the limitation period and in line with the provisions of Section 4(2)

of the *Limitation of Actions Act*. Counsel goes on to state that it is in the interest of justice that the motion be allowed to prevent the Applicant from being punished for mistakes of counsel and to enable him prosecute his claim before the Small Claim Court to conclusion. That in any event, Shem Omoke Kerara (hereafter the Respondent) will not suffer any prejudice should the motion be allowed whereas the Applicant is willing and able to pay security for costs should the Court so order therefore the motion ought to be allowed as prayed.

3. The Respondent opposes the motion by way of a replying affidavit dated 28.10.2024. He begins by assailing the motion as being an abuse of the Court process and has not met the threshold for granting of the order so sought. That the Applicant's contestation that the lower claim was paid for on 08.07.2022 is false whereas the record of appeal before this Court equally does not demonstrate the same, to wit, the appellate Court can only pronounce itself on the premise of documents tendered before it. He goes on to state that the lower Court claim having been filed two (2) years ago, filing of the instant motion is an abuse of the Court process and that motion is an appeal disguised as an application for review. That the error or omission alluded to by the Applicant must be self-evident and ought not require an elaborate argument to be established. He further states that there has been inordinate delay in filing the motion meanwhile the motion has been overtaken by events, for reasons that he has since taken requisite legal steps to collect amounts owed to him. That should the motion be allowed, he stands to be greatly prejudiced whereas the mistakes of the Applicant and or its counsel ought not to be visited upon him.

4. The motion was canvassed by way of written submissions, of which this Court has duly considered alongside the record before this Court.

5. The Applicant's motion invokes inter alia the provisions of Section 3A of the CPA as well as Order 45 Rule 1 & 2 of the CPR. The former provision, specifically reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court" of which its purport was reasonably addressed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR and requires not restatement here. That said, the latter provision provides that; -

    (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.

6. The kernel of the Applicant's motion is that there is an error apparent on the face of the record in respect of this Court's decision delivered on 06.06.2024 a consequence of which it seeks to invoke the review jurisdiction of this Court on the same. In Jason Ondabu t/a Ondabu & Company Advocates,

Kullsam Kassam & Zacharia Baraza t/a Siuma Traders v Shop One Hundred Limited [2020] KECA 134 (KLR) the Court of Appeal stated that:

> "An application for review, therefore, involves exercise of judicial discretion. The circumstances in which this Court, as an appellate Court, can interfere with the exercise of judicial discretion are limited".

7. There are a long line of authorities on the principles governing review applications brought under Order 45 (1) of the CPR. In the judgment of Okwengu JA in Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] eKLR the Court of Appeal stated that:

> "It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
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> > "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."
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> > In Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:
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> > > "An error apparent on the face of the record cannot be defined precisely and 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. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

8. Further, in Multi choice (Kenya) Ltd v Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation [2020] KECA 633 (KLR), the Court of Appeal held that: -

> "It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and

does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

> "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record 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 reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

9. Before addressing the crux of the motion, it would be apt to place the same into context. The appeal herein was admitted for determination on 31.07.2023 whereinafter it came up for compliance purpose on filing of submissions on 16.11.2023 before the Deputy Registrar (DR). Counsel appearing for the Applicant sought leave of the Court to file a supplementary record of appeal, to wit, the DR accorded the Applicant fourteen (14) days to do so. On 07.02.2024, the matter came before Mulwa. J. to confirm compliance with filing of the requisite records of appeal and submissions whereafter the matter was slated for judgment on 02.05.2024. However, on 11.03.2024 Meoil, J. (Presiding Judge then) issued directions placing the matter for determination during service week. It is on the premise of the latter order that the appeal was placed before, heard and determined by Musyoka, J. whom delivered judgment on 06.06.2024.

10. At this juncture I find it useful to quote relevant facets of the impugned judgment that has consequently led to the instant motion presently for determination for the benefit of the parties' herein. Upon considering the record(s) of appeal before him, Musyoka, J. proceeded to address himself as hereunder: -

> " 7. The matter is fairly straightforward, for it rests only on one point, as to when was the claim paid for. Was it 10th July 2022, as claimed by the appellant; or on 8th July 2022, as alleged by the respondent. If the payment was made on 10th July 2022, then it was outside the limitation period, and the claim was stale. If it was done on 8th July 2022, then it was made within the limitation period, and the claim was valid.
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> 8. Both sides concede that the auto-generated receipt came out on 10th July 2022, at 6.53 PM, and it expressed that that was when the cause was filed. The respondent, although acknowledging that, submits that there is another record showing that the payment was done on 8th July 2022. It has referred to a supplementary record of appeal. The supplementary record of appeal in the file of papers before me, appears to have been filed by the appellant, and not the respondent. It has no evidence of a payment made on 8th July 2022. The said

supplementary record has 4 pages. Page 1 is the title page. Page 2 is an index, showing that the document filed in the record is a memorandum of appeal. Page 3 is the first page of the memorandum of appeal, filed by the appellant, dated 13th October 2022, while Page 4 is the second page of that memorandum of appeal.

9. In the absence of evidence or proof that a payment was made for the claim on 8th July 2022, I can only go by the record at page 28 of the record of appeal filed by the appellant, which indicates that the cause was filed on 10th July 2022, at 6.53 PM, and, therefore, outside the limitation period. See Agro Irrigation & Pump Services v. Godrick Otieno Nyongesa [2018] eKLR (Njuguna, J)

10. .....

11. I note, from the ruling of the trial court, that the adjudicator stated that he had perused the record, and established that the payment was made on 8th July 2022, at 15.31 Hours. It is not indicated, in that ruling, which document reflected that payment.

12. I have very closely perused the original trial court record, as well as the record of appeal, and I have not come across any evidence or proof of a payment made on 8th July 2022. I have noted from the last page of the statement of claim, that there is a column to be filled by the court, and signed by the registrar, to indicate the date when the claim was filed. However, that space was not filled, and it was not signed by the registrar.

13. In view of everything that I have said above, it is my finding and holding that the appeal herein has merit, and I hereby allow it. The consequence would then be that the order made on 30th September 2022, dismissing the preliminary objection dated 10th August 2022, is vacated or set aside, and it is substituted with an order allowing the said preliminary objection. The statement of claim by the respondent, dated 21st June 2022, was filed outside the limitation period of 3 years, it is time barred, and I hereby strike it out. The appellant shall have the costs of the appeal, as well of at the Small Claims Court. Orders accordingly." (sic)

11. By its submissions before this Court, the Applicant argues that there is an error apparent on the face of the record as the lower Court receipt of 08.07.2022 was filed before the appellate Court vide a further supplementary record of appeal dated 22.11.2023 pursuant to leave of this Court granted on 16.11.2023. Therefore, the appellate Court erred at Paragraph 8 of its judgment by solely referring to the Respondent's supplementary record of appeal dated 04.07.2023 meanwhile failed to consider the further supplementary record of appeal that was filed by the Applicant dated 22.11.2023. Counsel further contended that the Respondent in his submissions before this Court equally referred to the Applicant's further supplementary record of appeal however this Court failed to take due cognizance of the same therefore this Court ought to review its judgment on accord of the documents evinced in the further supplementary record of appeal filed by the Applicant. Counsel called to aid the decisions in Paul Mwaniki v NHIF Board of Management [2020] eKLR, Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR, Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR as quoted in Hosea Nyandika Mosagwe & 2 Others v County

Government of Nyamira [2022] eKLR and Suleiman Murunga v Nilestat Limited & Another [2015] eKLR in support of his submissions.

12. On the part of the Respondent, while placing reliance on the decisions in Kenya Orient Insurance v Zachary Nyambane [2021] eKLR, National Bank of Kenya Ltd (supra), Advocates Disciplinary Tribunal Ex Parte Apollo Mboya (supra) and Odwar & 2 Others v Ministry of Lands & Physical Planning & 2 Others (Environment & Land Case E050 of 2021) [2024] KEELC 1131 (KLR), counsel posited that the error purported by the Applicant requires of its to give a detailed explanation of the same of which is not apparent on the face of the record. That having failed to place the evidence it intended to rely on before the appellate Court, the latter could not proceed to pronounce itself on issues not before it. It was further argued that there was inordinate delay of four (4) months in filing the instant motion which has not been sufficiently explained by the Applicant therefore this Court ought not exercise its discretion by reviewing the impugned judgment as sought by the Applicant. In summation, the Respondent contends that the instant motion is an appeal disguised as an application for review of which this Court ought to frown upon.

13. With the above in reserve, it is palpable that the current review motion is premised on the grounds of error or mistake apparent on the face of the record, based on the detail that the appellate Court did not consider the Court Fee Receipt issued on 10.07.2022 by the lower Court which indicates that the claim was paid for on 08.07.2022. Of which was attached to the Applicant's further supplementary record of appeal dated 22.11.2023. In light of the above, what this Court is called to determine is whether the Applicant by its present motion has demonstrated the asserted error or mistake apparent on the face of the record. Firstly, as earlier noted, the instant appeal was disposed of during service week. As a matter of practice, under the directive of the judiciary leadership, in a bid to clear back log within the judiciary, Courts regularly hold service weeks wherein Judges from other stations visit other station for purposes of disposing of pending matters that constitute backlog. It is on the premise of the forestated and directions by Meoil, J. on 11.03.2024, that the instant appeal ended up being heard and determined by Musyoka, J.

14. Having taken the liberty of perusing impugned decision, the entirety of the record before this Court and Case Tracking System (CTS), the following comes to fore. On 16.11.2023, the Applicant was accorded leave to file a supplementary record of appeal within fourteen days of the said date, of which it proceeded to file on 22.11.2023, obviously within the 14 days window accorded to by the Court. The appeal thereafter came up before Mulwa. J on 07.02.2024 and latter on 11.03.2024 whereinafter it was placed before Musyoka, J. for determination. As rightly, observed by the appellate Court in its judgment, only the supplementary record of appeal filed by the Appellant dated 04.07.2024 appears on the physical record. However, as earlier stated the Applicant had filed a further supplementary record of appeal dated 22.11.2022 on the CTS platform. The latter bore two (2) documents namely: - a receipt issued on 10.07.2022; and the claimants' submission to the notice of preliminary objection dated 10.08.2022. Ex facie, the impugned judgment was delivered by a Judge sitting in Busia, on accord of service week, and it would appear that as at when the physical file was transmitted to the said Judge, the Applicant's further supplementary record of appeal had not been physically placed on file.

15. It would therefore seem that the honorable did not have the benefit of the said receipt dated 10.07.2022, that is at the heart of the instant appeal, as at when he delivered his judgment on 06.06.2024. Consequently, the Court is inclined to agree with the applicant that there was is/was a manifest error apparent on the face of the record as at when the impugned judgment of this Court was delivered. As to delay in filing the instant motion, the Court is rather convinced by the Applicant's explanation given that the judgment prima facie captures that it was delivered by email to the parties. Therefore,

considering the vagaries of technology, it is likely that counsel for the Applicant did not have the benefit to the impugned judgment in time, in order to promptly move this Court without unreasonable delay.

16. Secondly, on whether this Court ought to review the impugned judgment, in light, of the further supplementary record of appeal that the appellate Court did not have the benefit of as at 06.06.2024? The gist of the contestation before the lower Court was the Respondent's Preliminary Objection urging the Court to find that the Applicant's claim before it was statute barred by dint Section 4(2) of the *Limitation of Actions Act*. It is undisputed, that the Applicant's cause of action arose on 09.07.2019 and going by the latter provision the claim ought to have been filed by 09.09.2022 given that the claim was premised on an action founded on tort. The learned Magistrate before the trial Court, in dismissing the Respondent's Preliminary Objection observed in part in his ruling that; -

> "I have perused the record which indicate that the payment for the statement of claim was made on 08.07.2022. A pleading is deemed to be filed once payment in done. As such the statement of claim was duly filed on 08.07.2022 at 1531hrs when payment was done. Consequently, the preliminary objection dated 10.08.2022 is consequently dismissed with no orders as to costs." (sic)

17. It is on the backdrop of the forestated ruling that prompted the Respondent's appeal before this Court on three (3) grounds itemized in the memorandum of appeal dated 13.10.2022. Musyoka, J. in his judgment purposefully crystallized the issue for determination to rest only on one point, "as to when was the claim paid for. Was it 10th July 2022, as claimed by the appellant; or on 8th July 2022, as alleged by the respondent?" Indubitably, he did not have the benefit of the Applicant's further supplementary record of appeal while he rendered his decision, for reasons earlier addressed in this ruling. The first document in the further supplementary record of appeal in a receipt issued on 10.07.2022 which captures therein that the M-pesa transaction date in respect of the claim or the date in which the lower Court claim was paid for, to be 08.07.2022. Therefore, for all intents and purpose the claim was filed within time and as rightly found by the trial Court, was not statute barred. It therefore follows that in the totality of issues, the Court is inclined to review the judgment of this Court on the pretext of this Court earlier finding herein and proceeds to consequently allows the Applicant's motion and consequently dismisses the Respondent's appeal, both with costs to the Applicant.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Mugasia for the Applicant

Orina holding brief for Kibila for Respondent

Guyo - Court Assistant