Waweru & another v Ibrahim & 2 others (Civil Case 540 of 2007)
[2025] KEHC 11345 (KLR) (Civ) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11345 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 540 OF 2007

JN MULWA, J

JULY 31, 2025

BETWEEN

JACKSON WAWERU ..... 1ST PLAINTIFF

STOJANOVIC MILAN ..... 2ND PLAINTIFF

AND

HAYAT AKASHA IBRAHIM ..... 1ST DEFENDANT

ATTORNEY GENERAL ..... 2ND DEFENDANT

NURI AKASHA ..... 3RD DEFENDANT

RULING

1. Before the Court for determination is the motion filed by Nuri Akasha (hereafter the 2nd Defendant/ Applicant) dated 30/10/2023 as against Stojananovic Milan & Jackson Waweru (hereafter the 1st and 2nd Plaintiff), Hayat Akasha Ibrahim (hereafter the 1st Defendant) and Attorney General (hereafter the 3rd Defendant) seeking inter alia -:

    a. Spent.

    b. That the ruling delivered on 12/10/2023 be reviewed to the extent that the Court ruled that the 2nd Defendant advocate was not properly on record.

    c. Costs of the application be in the cause.

2. The motion is brought among others pursuant to Section 1A, 3, 3A & 80 of the *Civil Procedure Act* (CPA), Order 45 of Civil Procedure Rules (CPR) and on grounds on the face thereof amplified in the support affidavit of even date sworn by James Nyanyi Ong'amo. The gist of his deposition is that judgment was yet to be delivered in the matter, whereas this Court in its ruling dated 12/10/2023

pointed out that a law firm was required to comply with Order 9 Rule 5 of the CPR only after judgment had been rendered, and that the firm of Bryant's & Associates came on record after filing a Notice of Change of Advocates on 08/03/2022.

3. Further the Applicant goes on to depose that the said firm of advocates proceeded with the conduct of the matter upon coming on record however the said firm morphed into a new Law firm known as Bryant's Law LLP and on 25/01/2023 filed a Notice of Change of Advocates, and lastly that the Court's omission to deliberate on the issue in its ruling is an apparent error on the face of the ruling that warrants review. He concludes that it is in the interest of justice that the motion is allowed.

4. The 1st Plaintiff opposes the motion by way of a replying affidavit dated 29/11/2023 deposed by Alfred Njeru Ndambiri. He states that the firm of Wandugi & Co. Advocates filed and served the Plaintiffs with a memorandum of appearance dated 06/08/2007 as advocates for the 2nd and 3rd Defendants. That on 09/10/2017 the firm of Harun Ndubi Advocates filed and served a notice of appointment of advocates of even date to act for the 1st and 2nd Defendants whereas the said firm failed to file a Notice of Change of advocates to signify coming on record in place of Wandugi & Co. Advocates as required by law.

5. Therefore, the 1st Plaintiff states that the Notice of Appointment of advocates by Harun Ndubi Advocates was irregular, incompetent and defective whereas the firm of Wandugi & Co. Advocates continues to be legally on record as advocates for the 1st and 2nd Defendant.

6. Further, the 1st Plaintiff goes on to depose that the firm of Bryant's Law LLP prepared, filed and served a notice of change of Advocates dated 25/01/2023 indicating that they had conduct of the suit in place of Byrant & Associates Advocates adding that the notice is equally incompetent and irregular as Wandugi & Co. Advocates is still on record for the 2nd Defendant, as found by the Court through its ruling delivered on 12/10/2023 as the firm of Bryant's Law LLP failed to follow due procedure.

7. In conclusion, it is deposed that the motion is inherently flawed and ought to be dismissed with costs.

8. Jackson Waweru (hereafter the 2nd Plaintiff) on his part opposes the motion by way of grounds of opposition dated 18/01/2023. He assails the application on grounds that-; motion does not meet the threshold under Order 45 of the CPR to warrant a review of this Honourable Court's Ruling delivered on 12/10/2023; that there is no discovery of new and important matters or evidence or an error apparent on the face of the record to warrant a review; that the application does not raise grounds to warrant this Court to alter its Ruling delivered on 12/10/2023; that allowing the application would be tantamount to this Honourable Court sitting on appeal of its own decision; and that the application is brought in bad faith and is an abuse of the Court process that will only further delay the hearing of the main suit.

9. The motion was orally disposed of. Having considered the rival material and oral argument by respective counsel, the Court postulates that the issues for determination concern-:

    a. Whether the Court ought to review its ruling delivered on 12/10/2023?

    b. Who ought to bear the costs of the motion?

Whether the Court ought to review its ruling delivered on 12/10/2023?

10. The 2nd Defendant's motion invokes inter alia the provisions of Section 3A of the CPA as well as Order 45 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. Courts

inherent powers was judiciously addressed by the Court of Appeal in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR and require no restatement.

11. By dint of Order 45 Rule 1 of the CPR as read with Section 80 of the CPA this Court is empowered to review its orders or judgments and make such orders as it may think fit, on conditions thereto being: -(a)Discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) For any other sufficient reason and (d) that the Application has to be made without unreasonable delay.

12. The purport of Rule 1 of Order 45 has been the subject of numerous decisions within our jurisdiction meanwhile it has since been settled that the provision involves exercise of judicial discretion as observed in Jason Ondabu t/a Ondabu & Company Advocates & 2 Others v Shop One Hundred Limited [2020] eKLR.

13. That said, by the grounds amplified in support of the motion, the 2nd Defendant seeks to invoke this Court's discretion to review its ruling rendered on 12/10/2023 on the premise of mistake or error apparent on the face of the record. An application for review specifically premised on Order 45(1)(b) of the CPR must demonstrate an error or omission self-evident and ought not require an elaborate argument to be established as addressed by the Court of Appeal in National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR and Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR.

14. The impugned ruling of this Court sought to be reviewed was delivered on 12/10/2023 whereafter the Applicant moved this Court vide the instant motion on or about 30/10/2023. It can be reasonably concluded that the 2nd Defendant moved with speed to have the decision of this Court reviewed. That said, as to whether the 2nd Defendant has sensibly demonstrated mistake or error apparent on the face of the record, the Court must revisit the relevant facets of the impugned ruling, to which review has since been sought. This Court at Paragraph *3*, *4*, *5* & *6* of the impugned ruling addressed itself as follows-:

> " 3. From the record, the court notes that the firm of Bryant Law LLP filed their Notice of change of Advocates on 25th January 2023, a year later after they had filed the application dated 15th July 2022.This is a clear indication that indeed they were not properly on record and ought to have filed their notice of change of advocates before filing the said application in order to be properly on record.
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> 4. Order 9 Rule 5 of the Civil Procedure Rules states as follows:.....Order 9 Rule 9 of the Civil Procedure Rules states that .....
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> 5. In the present Application, it is clear that the firm of Bryant Law LLP came on record after they had already filed this application on 25th January 2023 and by then the firm of Wandugi & Co. Advocates were still on record for the 2rd Defendant/Applicant.
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> 6. It is evident that the said law firm did not comply with the provisions of Order 9 Rule 9 of the Civil Procedure Rules by either filing a consent between themselves and the firm of Wandungi & Co. Advocates or they could as well have sought leave to come on record from this court. This court therefore finds that the firm of Bryant Advocates LLP was not properly on record as it did not follow the right procedure as required by law. Based on the above, the Application dated 15th of July 2022 is hereby dismissed with costs."

15. In National Bank of Kenya (supra), the Court of Appeal had this to say regarding a review arising from a mistake or error apparent on the face of the record-:

> "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 sufficient grounds 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." (Emphasis added)

16. In Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E.A. 173 the Court of Appeal further explained an error apparent on the face of the record as follows-:

> "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."

17. From the above captioned ruling, what was presented for determination were two (2) applications, one filed by the 2nd Defendant dated 15/07/2022 and another dated 25/01/2023. Notably, in determining the said applications, particularly the 2nd Defendant's motion, this Court noted that the same was opposed by way of the 1st Plaintiff's preliminary objection wherein issues surrounding whether the firm of Bryant's & Associates and Bryant's Law LLP were properly on record were canvassed.

18. Noticiably, the 2nd Defendant offered no response on the issues by either filing a supplementary affidavit to the procedural questions raised by the 1st Plaintiff. Consequently, as at date of rendering the determination on 12/10/2023, the same was premised on the rival material presented by the parties. Thus, had the 2nd Defendant anticipated a different outcome on whether it was properly on record, the onus was on it to advance tangible material towards persuading this Court that it has duly complied with procedural requirements of Order 9 Rule 5 of the CPR.

19. To the foregoing end, the Court conclusive addressed itself on the procedural propriety of the firm of Bryant's Law LLP being on record whereas the 2nd Defendant having failed to tender any evidence on the questions raised therein it cannot be purported at this juncture that this Court rendered its decision on account of some error or mistake apparent on the face of the record.

20. By the instant motion, the 2nd Defendant appears to be re-litigating the issue already determined by this Court whereas by evincing the respective notices of change (Annexure JO-1 & JO-2) at this stage would be late in the day. The forestated annexures would have been pertinent or relevant, prior to the determination of this Court on 12/10/2023, hence the 2nd Plaintiff's reservations that this motion

would be tantamount to this Honourable Court sitting on appeal of its own decision, would appear plausible.

21. Notwithstanding, the chain of events leading to Bryant's Law LLP coming on record, as canvassed in the 1st Plaintiff's affidavit, the appropriate forum of the same would have been prior to this Court's ruling on 12/10/2023, and not after the delivery of the ruling.

22. While the 2nd Defendant appears to be aggrieved by this Court's reasoning on the issue of its representation, it would be improper to approach the Court to seek review of the order under the main ground of error apparent on the face of the record. Indeed, I agree with the Plaintiffs that no such error has been demonstrated here.

23. In the Court's considered view, what the 2nd Defendant is pressing for as supposedly an error on the face of the record is essentially an error of law and/or fact in the Court's exercise of its discretion, which comprises a ground of appeal rather than a ground for review.

24. In the case of Abasi Belinda v Frederick Kagwamu and Another [1963] EA p.557, cited with approval by the Court of Appeal in Solacher v Romantic Hotels Limited & another (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR) it was held that; -

> " A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal."

25. The 2nd Defendant having disregarded its right of appeal the ruling of this Court cannot be allowed to invoke the review jurisdiction of the same court under the guise of an error apparent on the face of the record. The Court declines the 2nd Defendant invitation to sit on appeal over its own decision.

26. Here, it must be added that the question of the 2nd Defendant's representation is a procedural question. It can be easily remedied prior to hearing of the main suit. This Court's finding in the earlier ruling of 12/10/2023 and the resultant decision herein cannot be considered to be fatal to the 2nd Defendant's choice of representation. The 2nd Defendant can proceed to regularize the same as required by Order 9 Rule 5 of the CPR.

27. The upshot is that the 2nd Defendant's motion lacks merit and is dismissed with attendant costs in favour of the Plaintiffs.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

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JANET MULWA.

JUDGE