Terra Craft Limited v Waliubah & another (Civil Appeal 126 of 2015) [2024] KEHC 872 (KLR) (Civ) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 872 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 126 OF 2015

CW MEOLI, J

JANUARY 31, 2024

BETWEEN

TERRA CRAFT LIMITED .... APPLICANT

AND

BEN MUSUNDI WALIUBAH .... 1ST RESPONDENT

BENSON IFEZA ANYUMBA .... 2ND RESPONDENT

RULING

1. Following the judgment of this court delivered on 04.11.2022, Terra Craft Limited (hereafter the Applicant) filed a motion dated 22.02.2023 seeking inter alia that there be an order awarding costs to Applicant, rather than the Respondents. The motion is expressed to be brought pursuant Section 80 of the *Civil Procedure Act* (CPA), Order 45 Rule 1, 2 & 3, and Order 51 Rule 1 of the Civil Procedure Rules (CPR), and premised on the grounds on its face, as amplified in the supporting affidavit sworn by Moses Gicharu Kimotho, described as a director of the Applicant.

2. The gist of the affidavit is that by its judgment delivered on 04.11.2022, the court allowed the Applicant's appeal arising from Nairobi Milimani CMCC No. 4223 of 2011 (hereafter lower court suit). That there is an error apparent on the face of the record as the court awarded costs to Benson Musundi Waliubah (hereafter 1st Respondent) instead of the Applicant, which error is easily discernible and ought to be corrected. He further asserts that it would meet the ends of justice to grant the motion to cushion the Applicant from loss. Especially because, upon a plain reading of the judgment of this court, it is evident that the court intended to award costs to the Applicant and not to the 1st Respondent, having allowed the appeal. In conclusion, he states that costs go to the successful litigant and the court ought to correct the error apparent on the face of the record.

3. Ben Musundi Waliubah (hereafter the 1st Respondent) opposes the motion by way of a replying affidavit dated 10.05.2023. He deposes that in the judgment delivered on 04.11.2022 the court ordered the Applicant to pay to the 1st Respondent the thrown away costs in the lower court suit including costs of the motion giving rise to this appeal. That hence the alleged error relating to the award of costs as asserted by the Applicant is misplaced.

4. He further deposes that the legal principle is that costs of and incidental costs to all suits are awarded at the discretion of the court; that the court has discretion as to whether costs are payable to one party by the other, the amount or when payment ought to be made; and that in view of the absolute and unfettered discretion of the court to award costs, a party has no right to costs unless the court awards the same. He further contends that it is apparent from the judgment that the court took into consideration the events and facts leading up to the appeal, which goes to show that indeed discretion was exercised judicially and with reason. In conclusion he asserts that there is no error on the face of the record demonstrated and the court ought to dismiss the Applicant's motion with costs.

5. The motion was canvassed by way of written submissions. On the part of the Applicant, counsel cited the case of Republic v Public Procurement Administrative Review Board & 2 Others [2018] eKLR in contending that the motion has met the test to warrant review of the court's decision, and having moved the court within reasonable time. As regards the mistake or error apparent on the face of the record, counsel submitted that the Applicant was the successful litigant in respect of the decision delivered on 04.11.2022 hence entitled to be awarded costs, rather than the 1st Respondent. Here reiterating the general rule that costs follow the event and urging the court to correct the error on the face of the record.

6. The foregoing was supported by the decisions in National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, the English decision in Reid, Hewitt & Co. v Joseph, AIR 1918 Cal 717, Myers v Defries (1880) 5 Ex D 180 and Levben Products v Alexander Films (SA)(PTY) Ltd 1957 (4) SA 225 (SR) at 227 as cited in Party of Independent Candidate of Kenya & Another v Mutula Kilonzo & 2 Others [2013] eKLR. Finally, counsel argued that the Applicant would be prejudiced if not awarded costs to cover its losses and its success on appeal thereby nullified. The court was therefore urged to allow the motion as prayed.

7. On behalf of the 1st Respondent, counsel anchored his submissions on the provisions of Order 45 Rule 1 of the CPR, the decisions in Republic v Public Procurement Administrative Review Board (supra) and Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR. To support the submission that a mistake or error apparent on the face of the record is one that is self-evident and does not require any detailed examination by the court. That the Applicant's asserted entitlement to costs under the guise of an error apparent on the face of the record, is not a proper ground for review.

8. It was further argued that under Section 27 of the CPA, costs are at the discretion of the court, as exercised by this court in its judgment on 04.11.2022. In that regard, the decisions in Haraf Traders Limited v Narok County Government [2022] eKLR, Impressa Ing Fortunato Federice v Nabwire [2001] 2 EA 383 and County Government of Tana River & Another v Hussein Fumo Hiribae [2021] eKLR were called to aid. He reiterated that the court, being alive to pertinent facts and events leading up to the appeal, consciously proceeded to make the award on costs in the exercise of its discretion. Counsel urged the court to dismiss the motion with costs.

9. The 2nd Respondent, through counsel intimated to the court that he would rely on the 1st Respondent's response and submissions in opposition to the Applicant's motion.

10. The court has considered the material canvassed in respect of the motion. The Applicant's motion essentially seeks the review of the order of 4.11.2022 awarding costs to the Respondents. The Applicant's motion is premised on the ground of error or mistake apparent on the face of the record, regarding the order on costs made in the judgment of this court delivered on 04.11.2022. The motion is premised on the provisions of Order 45 (1) of the CPR which 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."

11. There is a long line of authorities on the principles applicable to a review application 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 in discussing these principles, and specifically the ground of mistake or error apparent on the face of the record stated:

> "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." (Emphasis added)
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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."

12. Further, in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR 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:
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> > "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]..."

13. Has such an error been demonstrated here? By the judgment of this court, the appeal herein was determined in favour of the Applicant, the apparent basis of the Applicant's belief that it is entitled to costs. The judgment delivered on 04.11.2022 being the substratum of the motion deserves some replication. In the portion leading up to the award of costs, this court delivered itself as follows; -

> "21. It was contended by the 1st Respondent that the Appellant upon being served had subsequently entered appearance through the firm of M/s Momanyi & Associates. The memorandum was said to be dated October 25, 2011. The said memorandum was not included in the record of appeal before the court and although the lower court file was by the Milimani Chief Magistrate's Court letter dated February 26, 2017 sent to this court, the court file is not enclosed in the appeal file as is the usual practice. Thus, this court has not had the benefit of viewing the purported memorandum of appearance. Given the mix-up as to the respective order of parties as sued in the plaint and as cited in the summons to enter appearance, which anomaly the trial court did not apparently notice, and the fact that it is unclear whether the person served on behalf of the Appellant was a principal officer of the Appellant, it is debatable whether the service on the Appellant was proper and a firm finding cannot be made on the regularity of the judgment.
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> 22. In the absence of conclusive proof that the judgment was regularly obtained, the same ought to have been set aside without imposing the onerous

condition for deposit of the decretal sum which condition in the ambiguous circumstances disclosed amounted to a fetter on the right to be heard. More so as the draft defence exhibited by the Appellant was not prima facie frivolous. The Court of Appeal in Daniel Lago Okomo v Safari Park Hotel Ltd & Another [2017] eKLR cited its decision in Kenya Trade Combine Ltd v Shah, Civil Appeal No 193 of 1999, where it had stated:

> "In a matter of this nature, all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed."

23. Had the lower court addressed its mind in more detail to the anomalies in the service upon the Appellant asserted by the 1st Respondent conjunctively with the apparent triable issues raised in the draft defence, it would have come to a similar conclusion. In the circumstances, the appeal is allowed, and the ruling of the lower court is hereby varied by setting aside the requirement that the Appellant deposits the decretal sum as condition for the setting aside of the exparte judgement and leave to defend. However, given the facts of this case, the Court will substitute therefore an order that the Appellant pays thrown away costs in the lower court including the costs of the motion giving rise to this appeal to the 1st Respondent within 21 days of assessment and to bear the costs of the appeal."

14. The order on costs was made pursuant to the provisions of Section 27 of the CPA which provides that; -

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

15. There is no dearth of authorities expounding on the above provision. The Court of Appeal in Punchlines Limited v Joseph Mugo Kibaria & 10 others [2018] eKLR discussed this provision at length, stating inter alia as follows: -

> "As for costs, the substantive law governing an award of costs is enshrined in section 27 of the *Civil Procedure Act* (CPA). It provides:
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> ....

The High Court in the Party of Independent Candidates of Kenya versus Mutula Kilonzo & 2 others, HC EP No. 6 of 2013, had this to say on the issue of costs:-

> "It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion .... But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."

In Richard Kuloba, Judicial Hints on Civil Procedure, 2nd Edition, page at page 101, the author states as follows:-

> " The law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs- the court has no discretion and cannot take away the plaintiff's right of costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course" ......(sic)".

16. The Court of Appeal proceeded to state that; -

> " In Devram Dattan versus Dawda [1949] EACA 35, the predecessor of this court held, inter alia, that it is trite law that the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case. Being a judicial discretion, the law demands that it must be exercised judiciously on facts. The question of the sufficiency of the facts on the basis of which the trial Judge is called upon to exercise such discretion is entirely a matter for the Judge himself to decide, and the court of Appeal will not interfere with the exercise of such discretion except within the limits permitted by law.
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> In Supermarine Handling Services Ltd versus Kenya Revenue Authority [2010] eKLR (Civil Appeal 85 of 2006), the court provided guidelines that costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. Second, that where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. For example, where the trial court gives no reason for its decision; or alternatively where the reasons given do not constitute "good reason" within the meaning of the rule.
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> See also cases of James Koskei Chirchir versus Chairman Board of Governors Eldoret Polytechnic [2011] eKLR (Civil Appeal No. 211 of 2005), John Kamunya & another versus John Ngunyi Muchiri & 3 others [2015] eKLR, and Robric Limited & another versus Kobil Petroleum Ltd & another, Nairobi CA No. 109 of 2015.
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> Applying the above threshold to the appellant's complaint on the award of costs made against it by the trial court, we find no justification in interfering with the trial Judge's order."

17. The Applicant's contention is that as the successful party in the appeal, it, and not the Respondents, was entitled to costs, and that the failure of the court to award it costs amounts to an error apparent on the face of the record. A position countered vehemently by the Respondents, on their part citing the court's due exercise of its discretion. As stated in Associated Insurance Brokers (supra) "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."

18. While the general rule is that, costs follow the event, and consequently that the successful party ought to be awarded costs, a court in the exercise of its discretion can depart from that stricture where there exist grounds to justify such a course of action. In arriving at the decision on costs, this court in its judgment set out reasons why costs would not follow the event, despite the Applicant's success in the appeal. The Applicant may be aggrieved with the court's reasoning in respect of the order on costs, but it cannot approach the court to seek review of the order under the ground of error apparent on the face of the record. Indeed, I agree with the Respondents that no such error has been demonstrated here. In the court's considered view, what the Applicant is pressing 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. This comprises a ground of appeal rather than a ground for review.

19. In 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."

20. The Applicant having abjured the right to appeal the order of this court on costs 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 Applicant's covert invitation to sit on appeal over its own decision. In the result the motion dated 22.02.2023 must fail and is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JANUARY 2024.

C.MEOLI

....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

For the Applicant: Mr. Muya h/b for Mr. Gitonga

For the 1st Respondent: Mr. Njomo

For the 2nd Respondent: MS. Chepchirchir h/b for Mr. Wageni

C/A: Carol