



**Muchena t/a Arimi Kimathi & Co Advocates v Kilonzo & 2 others (Miscellaneous Application 483 of 2015) [2024] KEHC 859 (KLR) (Commercial & Admiralty) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 859 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
MISCELLANEOUS APPLICATION 483 OF 2015**

**A MABEYA, J  
JANUARY 30, 2024**

**BETWEEN**

**PATRICK KIMATHI MUCHENA T/A ARIMI KIMATHI & CO  
ADVOCATES ..... APPLICANT**

**AND**

**MICHAEL MWASA KILONZO ..... CLIENT**

**AND**

**JULIUS CHUMBI WAITIKI ..... PURCHASER**

**AND**

**JOHN MBIJIWE T/A BEALINE AUCTIONEERS ..... AUCTIONEER**

**RULING**

1. The Motion before court is dated 21/3/2023. It is brought under section 80 of Cap 21 of the Laws of Kenya and Order 45 Rules 1, 2 and 3 (2) of the Civil Procedure Rules. It seeks the review of the Order of this court made on 28/2/2023.
2. The grounds thereof were set out in the body of the Motion and the affidavits of Patrick Kimathi sworn on 21/3/2023 and 27/4/2023 respectively. These were that; the court had ordered a refund of Kshs. 17 M plus interest yet the Advocate had only received the decretal sum; that the Court made an erroneous finding that the Advocate had no saleable interest yet Rule 76 of Order 22 refers to the judgment debtor.



3. The application was opposed by the purchaser vide his replying affidavit of 7/4/2023. He contended that the application was an abuse of the court process as it sought the court to sit on appeal on its own decision. That there was no error apparent on the face of the impugned ruling.
4. The judgment debtor likewise opposed the Motion vide Grounds of Opposition dated 24/5/2023. He contended that there was no error apparent on the face of the record, and that there were no grounds to warrant a review.
5. The parties filed their submissions dated 13/6/2023, 22/6/2023 and 26/6/2023, respectively. I have considered the rival affidavits and the submissions together with the authorities relied on.
6. This is an application for review. The principles are set out in Order 45 Rule 1 of the Civil Procedure Rules. These are; where there is an error apparent on the face of the record, where there is discovery of new evidence that was not present at the time the order was made or decree passed or for sufficient reason.
7. Before determining the issue before me, I wish to cite some of the cases on the Issue of review. In *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR, the Court of Appeal rendered itself thus:-
 

“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.

...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 the law. Misconstruing a statute or other provision of law cannot be a ground for review.”
8. In *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1EA 243 it was held:-
 

“In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 this court said 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 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.”
9. From the foregoing, it is crystal clear that where the complaint is misinterpretation of the law, it is not a ground for review but appeal. That where however, an error on a substantial point of law stares one on the face and not clear point for two interpretations, that is a ground for review.
10. In the present case, the issue is the interpretation of Order 22 Rule 76 vis a vis the position of the applicant. It is not in doubt that the applicant/advocate was a decree holder. That he was executing on his fees that had been certified and a certificate of costs issued which was ultimately turned into a decree.



11. It is also not in dispute that the 1<sup>st</sup> respondent was the client/respondent against whom the subject decree was issued. It is also not in dispute that the 1<sup>st</sup> respondent was the judgment debtor. In respect the decree being executed by the Advocate. Further that, the 1<sup>st</sup> respondent as the judgment debtor was the owner of both the attached property and the house erected thereon. That he was also the owner of the other properties to which the house straddled.
12. The foregoing means that; as the 1<sup>st</sup> respondent as judgment debtor had a saleable interest in the property attached and auctioned; he likewise had a saleable interest in the other properties where the house had straddled to.
13. It is clear from sub rule 76 of Order 22, that; the discretion to set aside given to this court is where the judgment debtor has no saleable interest in the auctioned property. The court set aside the sale and/or made the impugned ruling on the ground that the advocate/applicant did not have a saleable interest.
14. Rule 76 of Order 22 of the [Civil Procedure Rules](#) provides:-

“ The purchaser at any such sale in execution of a decree may apply to the court to set aside the sale on the ground that the judgment debtor had no saleable interest in the property sold.”
15. As already stated, the ruling of 28/2/2023 was based on the ground that the applicant/Advocate had not saleable interest. However, it is crystal clear that the advocate was a decree holder and not a judgment debtor. The judgment debtor was the 1<sup>st</sup> respondent. The 1<sup>st</sup> respondent as the judgment debtor did not only have a saleable interest in the one proclaimed and attached property but also the other properties to which the subject premises straddled to.
16. In view of the foregoing to the extent that the ruling of 28/2/2023 was predicated upon the ground that the applicant/Advocate did not have a saleable interest, that was an error apparent on the face of it. The person the Court is supposed to look at is who the judgment debtor is and whether he has a saleable interest.
17. In the present case the court did not look at the judgment debtor but the decree holder which was an outright error on the face of the record. The judgment-debtor herein had a saleable interest in both the proclaimed property as well as the other properties to which the house on the attached property straddled into.
18. Accordingly, I hold that there was an error apparent on the face of the record. That the ruling of 28/2/2023 is hereby reviewed and the motion dated 29/9/2021 dismissed. The order that commends itself to the court is to allow prayer 4 of the Motion dated 14/9/2021, dismiss the Motion dated 29/9/2021 in its entirety.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY, 2024.**

**A. MABEYA, FCI Arb, EBS**

**JUDGE**

