



Frontiers Children Development Organization v Naita Construction Co. Ltd (Civil Appeal E002 of 2022) [2024] KEHC 1780 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL E002 OF 2022
AC MRIMA, J
FEBRUARY 28, 2024**

BETWEEN

FRONTIERS CHILDREN DEVELOPMENT ORGANIZATION APPELLANT

AND

NAITA CONSTRUCTION CO. LTD RESPONDENT

RULING

1. On 20th day of September, 2023, this Court rendered the judgment in this appeal. The Court struck out the appeal for the reason that the decree appealed against had not been obtained thereby rendering the appeal grossly incompetent.
2. By a Notice of Motion dated 11th October 2023 which was filed on 12th October 2023, the Appellant sought the following orders: -
 1. That this application be certified urgent and be heard ex-parte in the first instance on a priority basis.
 2. That pending hearing and determination of this application inter-parties, the appellant/applicant be granted a stay of execution.
 3. That this honourable court be pleased to review its judgment delivered on the 20th day of September 2023.
 4. That the extracted decree dated 9th October 2023 be admitted and allowed as part of the record of appeal.
 5. That the cost of this application be provided for.
3. The application was supported by an Affidavit sworn by the Appellant's Program and Sponsorship Co-ordinator one Maurice Lokwaliwa.



4. The application was opposed vide Grounds of Opposition dated 16th October 2023 wherein it was posited that the application did not meet the threshold for review under the law.
5. By the directions of this Court, the application was heard by way of written submissions which parties duly complied. Several relevant decisions were referred to by the parties.
6. This Court has carefully perused and understood the application, the parties' submissions as well as the decisions referred to.
7. Review entails a Court making a departure from its earlier finding on an issue. A Court may do so on its own motion or upon application by a party. Review is discretionary.
8. In exercising such discretion, the Court must abide by the principles established for the exercise of such powers either by the law or settled judicial precedents.
9. The power of review in the High Court is anchored in the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya and the Civil Procedure Rules, 2010.

10. Section 80 of the *Civil Procedure Act* provides as follows: -

Any person who considers himself aggrieved—

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act,
- may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 further provides for review in the following manner: -

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.

12. Courts have severally dealt with the issue of review. The Supreme Court in Application No. 8 of 2017, *Parliamentary Service Commission -vs- Martin Nyaga Wambora & others* [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in *Mbogo and Another -vs- Shah* [1968] EA, upon establishing the following principles: -

- (31) Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:



- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

13. The Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya vs. Ndungu Njau* observed as follows in respect of reviews applications: -

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 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 proceeds on an incorrect expansion of the law.

14. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules was considered by the High Court in Miscellaneous Application 317 of 2018, *Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.



- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
15. Returning to the case at hand, and on the above guidance, it is apparent that the Appellant is challenging the manner in which the Court dealt with the insufficiency of the record. When the appeal was struck out, the Appellant proceeded to and extracted the formal decree in the primary suit before the trial Court. The decree is dated 9th October 2023.
 16. The Appellant then filed the instant application wherein it mainly sought to review the judgment and for an order that the decree be admitted and allowed as part of the record of appeal.
 17. On the foregoing background, several issues come to the fore. One, that there is no discovery of new or important matter or evidence. Two, there is no mistake or an error apparent on the face of the record. Three, the Appellant has failed to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically and consequently arrived at a wrong decision, thereby causing an apparent injustice. Four, the mistake on the part of Counsel that resulted to the appeal being struck out can still be remedied since the Appellant has an option of filing another appeal.
 18. In the end, the following orders do hereby issue: -
 - a. The Notice of Motion dated 11th October, 2023 is hereby dismissed with costs.
 - b. The Appellant is hereby granted leave to appeal against this ruling, if need be.Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 28TH DAY OF FEBRUARY, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

No appearance for Mr. Maina, Counsel for the Petitioner/Applicant.



Mr. Aseso, Counsel for the Respondent.

Juma – Court Assistant.

