Case Number:	Civil Case 594 of 2004
Date Delivered:	18 Dec 2007
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Commercial Courts Commercial and Tax Division)
Case Action:	Ruling
Judge:	Jessie Wanjiku Lessit
Citation:	Kenya Shell Limited v Kileleshwa Service Station Ltd [2007] eKLR
Advocates:	-
Case Summary:	..
Court Division:	-
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 594 OF 2004

KENYA SHELL LIMITED …….....…….. PLAINTIFF

VERSUS

KILELESHWA SERVICE STATION LIMITED…….DEFENDANT

RULING

The Defendant in this suit has by a Notice of Motion application dated 7th July 2006 sought the following orders:

1. **That the judgment and decree passed herein be reviewed.**

2. **Further that the order directing the plaintiff to pay Shs. 13,088,000/= be set aside.**

3. **That the order directing the plaintiff to pay the costs of the suit to the defendant be set aside.**

4. **That the costs of this application be provided for.**

The application is expressed to be brought under Order

XLIV Rule 1 of Civil Procedure Rules and Section 80 of the Civil Procedure Act.

There are two grounds for the application cited on the

face of the application in the following terms:

1. **There is a mistake and an error apparent on the face of the record in that:**

(a) An order for payment of profits in lieu of notice has been made without being sought and without being made an issue in the suit by any other means and without the parties addressing the Court on the point and in any event without being made an issue in the suit by any other means.

(b) An order for payment of Shs. 13,088,000/= to the Defendant by the plaintiff has been made without being sought and without evidence being presented on the point and in any event without being made an issue in the suit by any other means.

(c) The plaintiff has been ordered to buy the equipment owned by the defendant without the prayer for such an order being made and in any event without being made an issue in the suit by any other means.

2. There is sufficient cause for the review of the judgment.

There was an affidavit sworn in support of the application by **DUNCAN IRUNGU**, the Retail Territory Manager of the Plaintiff.

The application is opposed. The Defendant has filed Grounds of Objection dated 20th July 2006 in which six grounds are cited as follows:

(i) "That the said application is frivolous, misconceived and lacks merit.

(ii) That the said application offends the mandatory provisions of the Civil Procedure Act (Chapter 21 Laws of Kenya) and Rules made thereunder.

(iii) That there is no error or mistake apparent on the face of the judgment delivered on 6th June 2006.

(iv) That the plaintiff is guilty of an inordinate and inexcusable delay in bringing the said application.

(v) That the order issued on 23rd June 2006 does not conform strictly to the judgment delivered by the honourable court on 6th June 2006.

(vi) That this court lacks jurisdiction to entertain the said application".

The application was argued by Mr. Kiragu for the

Applicant and by Mr. Arua for the Respondent. The parties in this suit were heard before **Ochieng', J**. and judgment delivered on the 6th June 2006. It is this judgment that the Plaintiff/Applicant seeks to review by having the order that the Plaintiff pays KShs.13,088,000/= and the costs of the Counter claim to the Defendant set aside. The Plaintiff's contention is that there is an error apparent on the face of the record for reasons:

(a) There was no prayer for the court to order payment of profit in lieu of notice to terminate the defendant's licence to occupy the suit premises.

(b) There was no prayer by the defendant for payment of the value of his investment in the property. The plaintiff has therefore been denied an opportunity to produce evidence on what the value of the equipment is.

(c) The effect of the judgment is that the plaintiff has been ordered to purchase the defendant's equipment at a price fixed by the court. There was no prayer for the plaintiff to be compelled to purchase the Defendant's equipment.

(d) An issue not framed by the parties nor arising from the pleadings has been adjudicated upon.

The Plaintiff also contents that issues for determination by the Court had been drawn, filed and served, and that the Defendant raised no objections to the issues as drawn. The agreed issues are summarized on the face of Duncan Irungu's affidavit as follows:

"(a) Whether the termination notice issued by the plaintiff on 28th June 2004 is a valid and lawful notice.

(b) Whether the plaintiff is entitled to possession.

(c) Whether this suit is res judicata in light of Njagi J's judgment in High Court Civil Case Number 462 of 2000."

There are no disputes raised on the facts as set out in Mr. Irungu's affidavit.

The Defence further amended plaint and counterclaim dated 6th October 2000, which was the basis of the judgment of the court, claimed the following judgment:

(a) Vacant possession of the petrol station erected on LR No. 4858/16 Kileleshwa Nairobi.

(b) Damages for trespass.

(c) Mesne Profits from 10.03.00 until premises are delivered upto the Defendant.

(d) Costs of this suit.

The decree issued by the court in this suit is also annexed to Mr. Irungu's affidavit at pages 32 and 33 of same. This too is not disputed. The decree has summarized the claim by the Plaintiff and the counterclaim by the Defendant as follows:

CLAIM

1. A permanent injunction restraining the defendants, its servants and/or agents from using, dispensing from or in any way dealing with the plaintiff's tanks, pumps, pipes and equipment.

2. A mandatory injunction compelling the defendant, its servants and/or agents to move out of the plaintiff's premises and deliver vacant possession of the premises known as Land Reference Number 4858/16 in Kileleshwa, Nairobi.

3. Damages

4. Costs

COUNTER CLAIM

1. A declaratory order that the plaintiff's termination letter dated 28th July 2004 is of no legal effect.

2. A permanent prohibitory injunction to restrain the plaintiff, its agents, employees, servants and whomsoever from repossessing, tampering and/or interfering with the said petrol station.

3. An order the defendant be reimbursed all the losses that were occasioned by the plaintiff's

actions.

4. Any other relief that this Honourable Court may deem fit and just to grant.

5. Costs of this suit.

6. Interest on (1) and (6) above at court rates from the date of filing this counter claim till the date of payment in full.

The decree summarizes the order made in the judgment of **Hon. Ochieng, J** as follows:

"1. That the Plaintiff's suit be and is hereby dismissed.

2. That the 90 days notice given by the Plaintiff to the Defendant was not reasonable.

3. That the defendant would be entitled to six months' notice.

4. That in lieu of notice, the Plaintiff may obtain possession of the petrol station upon paying to the defendant the equivalent of profits which the Defendant would have earned over the period of six months.

5. That the calculation of the profits shall be based on the difference between the wholesale and retail prices on the sale of motor fuel made by the Defendant at the petrol station in issue during the period of six months prior to 28th July 2004.

6. That the Defendant be compensated by the Plaintiff to the tune of Kshs.13,088,000/= whereupon the Plaintiff would retain all the equipment which was purchased by the defendant for use at the petrol station.

7. That the Plaintiff do pay to the Defendant the costs of the suit and of the counter claim to be taxed and certified by the Taxing Master of this Court."

The principles that apply to application for review are settled and Mr. Kiragu did a commendable job in reviewing the matter. Order XLIV Rule 1 of Civil Procedure Rules provides thus:

"44 (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."

Section 80 of the Civil Procedure Act on the other hand provides:

"80. 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".

Both these provisions confer unfettered right to apply for review in the circumstances specified and donates to the court an unfettered discretion to make such order as it thinks fit. See ***SARDAR MOHAMED –V- CHARAN SIGNGH N. SINGH & ANOTHER* 1959 E.A. 793** and ***WANGECHI KIMIYA & ANOTHER –V- MUTAHI WAKIBIRU* [1982-88] 1 KAR 977**.

In **MULLA ON CODE OF CIVIL PROCEDURE ACT V OF 1908, 15TH EDITION,** at pages 2724 and 2725, the editor discusses when a review can be granted on grounds of mistake or error apparent on the face of the record and the scope of the review. It is stated:

"A review may be granted whether on any ground urged at the original hearing of the suit or not, whenever the court considers it necessary to correct an evident error or omission and it is immaterial how the error or omission occurred.

But the point of law must be indisputable. An error apparent on the face of the record must be such as can be seen by one who wins and reads, that is, an obvious and patent mistake and not something much can be established by a long drawn process of reasoning on points on which there may conceivable be two opinions. If an elaborate process of reasoning is necessary to arrive at the conclusion that there is an error apparent on the face of the record, it cannot be said that there is an error apparent on the face of the record."

The issue is whether there was an error apparent on the face of the judgment as urged by Mr. Kiragu. Mr. Kiragu's contention was that the order, made granting an award of Kshs. 13 million to the defendant, together with costs of the suit, was an error as the Defendant had neither pleaded any such prayers nor was any evidence led to prove the amount awarded. Mr. Kiragu submitted that the compensation granted to the defendant was never an issue before the court and neither was any evidence led regarding compensation to the defendant. Mr. Kiragu submitted that not only were parties bound by their pleadings, and confined to their issues, the court too has no power to make an order outside the pleadings unless by consent of the parties. Mr. Kiragu submitted that such an order were a nullity.

Mr. Kiragu relied on the Court of Appeal case of **CHALICHA F. C. S. LTD. VS ODHIAMBO & 9 OTHERS [1987] KLR 182.** where **Platt, Gachuhi and Apaloo JJA** held:

"Cases must be decided on the issues on the record. The court has no power to make an order, unless it is by consent, which is outside the pleadings. In this instance the issues raised by the judge and the order thereon was a nullity".

The cited authority is quite clear that any order made outside the pleadings and without the consent of the parties is a nullity. The issues as I perceive them are two fold. Whether the Learned Judge's orders were outside the pleadings and the agreed issues of the parties; and, the scope of the Courts power to review.

There is no agreement between Counsel whether or not the order made by **Ochieng, J** was outside the pleadings of the parties. I have already set out Mr. Kiragu's submission on the matter. Mr. Arua on the other hand submitted that the order for payment of Kshs.13,088,000/= was captured in prayer 3 of the counter claim. Prayer 3 of the counter claim sought order that:

"An order that the Defendant be reimbursed all the losses that were occasioned by the Plaintiff's actions."

Mr. Arua argued that the order for compensation to the tune of Kshs.13,088,000/= was made against this prayer and he refers to the analysis in the Hon. Judge's judgment and final order. I will consider the analysis as set out in Mr. Arua's submissions.

Mr. Arua referred the court to pages 3 and 4 of the judgment as proof that evidence was led to support the prayer sought and that in the circumstances the order made was in order. Mr. Arua argued that since the judge ruled that the 90 days notice given by the Plaintiff to the Defendant to vacate the premises was found to be unreasonable, that it went without saying that the Plaintiff had to pay profits. Mr. Arua argued, that the payment of profits was in line with the judge's order that the Plaintiff purchases the Defendant's equipment to the tune of Kshs.13 million. Arua referred to page 22 where the order is made.

I have referred to pages 3 and 4 of the judgment. At both pages the Hon. Judge analysis the views expressed by the Plaintiff and Defendant witnesses in regard to the 90 days notice issued by the Plaintiff to the Defendant dated 28th July, 2004. No where in both pages was any mention made regarding equipment at the suit premises or the costs of purchase or installation of the said equipment. Indeed, I have perused the entire judgment have and found nowhere where the learned Judge alluded to any evidence in regard to the cost of equipment prior to making the order in question at page 22.

I have keenly considered Mr. Arua's submissions and I find that he mixed up the issues. On the one hand he argues that a prayer was made for compensation of losses. On the other hand he argues that the order for payment of Kshs.13,088,000/= was made in support of that prayer. He again argues that the Plaintiff was also bound to pay for the Defendant's profits. That cannot be a correct position. Prayer 3 of the counter claim sought for "reimbursement of losses". At pages 21 and 22 of the judgment the Hon. Judge ordered reimbursement of the costs of equipment in the following terms.

"Meanwhile, the Defendant has poised an important question. It said that whereas it might be in a position to remove the equipment which it installed at the station, he would have nowhere to take them. I find that is a reasonable position to take. Therefore, I order that the Defendant shall be compensated by the Plaintiff to the tune of Kshs.13,088,000/=, whereupon the Plaintiff would retain all the equipment which was purchased by the Defendant, for use at the petrol station."

From this exerpt of the Hon. Judge's judgment, it was clear in his mind that the payment of Kshs.13,088,000/= he ordered was for the costs of the equipment installed by the Defendant in the Plaintiff's (suit) premises. The payment was not to reimburse losses or cover profits as argued by Mr. Arua.

Having come to this conclusion it follows then that the Hon. Judge's order, requiring the Plaintiff to pay to the Defendant the cost of equipment, was an error as none of the prayers in the counter claim sought any order for payment of the cost of equipment and neither was any evidence led to support it. It is also quite clear from the issues framed by the parties that the matter of the cost of equipment was never an issue before the Hon. Judge.

I will add also that the costs of equipment is a special damages claim and it is trite that special damages must be specifically pleaded and specifically proved. The Defendant did not plead special damages for cost of equipment to the tune of Kshs.13,088,000/= or at all. No evidence was led either to support the sum ordered by the Hon. Judge to be paid to the Defendant. I will leave the issue of costs to a later stage in this ruling.

The second issue is the scope of review. While Mr. Kiragu argues that review can be made where there is an error apparent on the face of the record, Mr. Arua argues that a review can only be ordered on the entire judgment or none at all. I have already reviewed the cases relied upon by Mr. Kiragu.

Mr. Arua first of all relied on Order XIV rule 7 of Civil Procedure Rules to state that the rule empowers a court to try any issue not framed by the parties on terms stated therein. Order XIV rule 7 provides:

"Where the Court is satisfied, after making such inquiry as it deems proper.

(a) that the agreement was fully executed by the parties;

(b) that they have a substantial interest in the decision of such question as aforesaid; and

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the court; and shall, upon the finding or decision of such issue, pronounce judgment according to the terms of the agreement, and upon the judgment so pronounced a decree shall follow."

Mr. Kiragu on the other hand argued that Mr. Arua misconstrued the application of Order XIV rule 7 and quoted it out of context. I agree with Mr. Kiragu. Rule 6 of Order DIV is clear that it is only after parties to a suit enter into an agreement in writing concerning a question of fact or how they wish the Court to determine between them, then under rule 7 the Court upon being satisfied that the agreement was duly executed by the parties and that both parties have a substantial interest in the decision of such question and that the question is fit to be tried and decided shall proceed to try the issue and state its finding or decision thereon.

The question of fact or law to be decided by the Court under Rule 6 and 7 of Order XIV has nothing to do with contractual agreements between the parties entered into prior to the filing of the suit as Mr. Arua argued. The question of fact or law has to do with the issues that the parties wish to have determined by the Court. I believe that these rules are in line with the Court of Appeal finding in **CHALICHA F. C. S. LTD,** supra. The rules do not empower the court to frame its own issues outside of the pleadings in the case and framed issues by the parties.

Mr. Arua's other argument was that the Applicant has no right to have a review of part of the Judge's order or judgment that the judgment has to be viewed in its entirety or none at all. He relied for this proposition on **GULLAM HUSSEIN MULLA JIWANJI & ANOTHER VS JIWANJI & ANOTHER [1929-30]12 KLR 41**. The Court of Appeal for Eastern Africa in that case held:

"Each decree necessarily follows the judgment upon which it is grounded and if a person is aggrieved at the decree his application should be for a review of the judgment upon which it is based. But, in my opinion, however aggrieved a person may be at the various expressions contained in a

judgment or even at various ruling embodied therein, unless that person is aggrieved at the formal decree or the formal order based upon the judgment as a whole, that person cannot under Order XLII appear before the Judge who passed the judgment and argue whether this or that passage in the judgment is tenable or untenable."

The learned Judges of Appeal were in the cited case saying that a party could only seek a review of a decree or order based upon the judgment as a whole. The Justices never stated that review should be of the entire judgment passed. On my understanding, what the Justices of Appeal meant that a party could only ask for review of an order or decree based on the entirety of the Judgment not on the basis of various expressions or rulings embodied in the judgment. I think that the next cases cited by Mr. Arua are helpful to explain what an error is and when it can form the basis of a review.

The case of **NYAMONGO & NYAMONGO ADVOCATES VS KOGO [2000]** LLR 3017 where **GICHERU, TUNOI** and **LAKHA JJA** observed:

"We have carefully considered the submissions made to us by the advocates of the parties to this Appeal. An error apparent on the face of the record cannot be defined precisely or exhaustively, there be 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.

"A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review thought it may be a good ground for an appeal."

Applying the above principles to the present case, we are satisfied that there were not errors apparent on the face of the record such as would have entitled the superior court to review its earlier order. Like the learned Judge in the superior Court, we also agree that the application for review correctly failed. As to costs awarded by the superior Court, the Respondent was clearly successful in obtaining a refusal of the review application made by the appellant. Costs are a matter of discretion and unless it is shown that the learned Judge was plainly wrong or exercised her discretion erroneously in principle or otherwise, this court will not interfere with an order for costs."

The second case is that of **NATIONAL BANK OF KENYA LIMITED VS NDUNGU NJAU CA NO. 211 OF 1996** where **KWACH, AKIWUMI** and **PALL JJA** held:

"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 evidence 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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it."

Having considered all the cases cited by both counsel and then submissions I do find that there was indeed an error apparent on the face of the Court's judgment of 6th June, 2006 which resulted in the decree in question. The error was one which can be reviewed on an application for review under Order XLIV rule 1 of Civil Procedure Rules and Section 80 of the Civil Procedure Act.

I also find that there is no rule or law that requires the entire judgment forming the basis of the decree or order complained of to be reviewed.

I do find that the order for payment of Kshs.13,088,000/= being cost of equipment was erroneously made as explained in this ruling, and that it ought to be reviewed by setting it aside.

The issue of costs are the discretion of the Court and for this reason, I do not think that, from the circumstances of this case, the Hon. Judges order for costs can be a subject of review. Having come to the conclusion I have, I make the following orders.

a) That the order directing the Plaintiff to pay Kshs.13,088,000/= be and is hereby set aside.

b) The Plaintiff will have the costs of this application.

Dated at Nairobi this 18th day of December 2007.

LESIIT, J

JUDGE

Read, signed and delivered in the presence of:

M/s Karim for the Plaintiff/Applicant

N/A for the Respondent in open Court.

WARASAME, J

JUDGE

18.12.2007