



REPUBLIC OF KENYA



**Ongo’u v Abongo & 3 others (Civil Appeal E037 of 2023)  
[2024] KEHC 15155 (KLR) (25 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E037 OF 2023  
RE ABURILI, J  
NOVEMBER 25, 2024**

**BETWEEN**

**JACK OMONDI ONGO’U ..... APPELLANT**

**AND**

**DANCAN OCJIENG ABONGO ..... 1<sup>ST</sup> RESPONDENT**

**PETER OTIENO ONYNGO ..... 2<sup>ND</sup> RESPONDENT**

**PETER ODIRE ..... 3<sup>RD</sup> RESPONDENT**

**DENIS OMONDI ..... 4<sup>TH</sup> RESPONDENT**

*(Appeal arising from an appeal from the decree and judgment of Nyando SPM  
in Civil Suit No. 316 of 2019 by Hon. S.O.Temu, SPM delivered on 9/2/2023)*

**RULING**

(Application for review of the judgment of this Court delivered on 11/4/2024 on account of error on the face of the record)

1. The applicants in this case are the respondents in the main appeal which was determined vide judgment of this Court on 11<sup>th</sup> April, 2024, partially allowing the appeal which set aside the order dismissing the appellant’s suit in the lower court and substituting it with an order allowing the appeal, entering judgment for the appellant in the sum of Kshs 220,000.
2. In the application dated 6<sup>th</sup> May, 2024, the respondents/ applicants seek for review of the judgment of this court on account that this court made an error apparent on the face of the record, by finding that the receipts which were produced as exhibits were not contested by the trial court, yet the judgment of the trial court clearly show that the court discredited the receipts produced in evidence by the appellant.



3. In response to the application, the appellant filed written submissions contending that the application by the respondents is misconceived because their advocate came on record after judgment and that there was no consent from the previous advocate as contemplated in Order 9 of the Civil procedure Rules. He urged this Court to strike out the application dated 6<sup>th</sup> May 2024 on that ground alone. No merit arguments were put forth by the appellant's counsel.
4. I will dispose of this issue of legal representation as provided for under Order 9 of the Civil Procedure Rules first before I can delve into the merits of the application for review of this Court's Judgment.
5. The mischief of the rule in Order 9 of the CPR was defined in S.K. Tawadi v Veronica Muehlmann [2019] eKLR where the Court observed and I concur that:

‘ In my view the essence of Order 9 Rule 9 of the CPR was to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace them’.
6. The above Rule in my view is intended to protect the interest of the outgoing advocate. It follows that failure to comply with the rule does not in any way prejudice the other party. In this case, the outgoing advocate has not raised any issue with the incoming advocate. In addition, the issue being raised is in my view, a procedural technicality which should not defeat justice as stipulated in Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities.
7. Accordingly, I find and hold that the preliminary issue raised by the appellant's counsel does not hold and it is hereby dismissed.
8. Onto the merits of the application for review of the judgment of this Court delivered on 11<sup>th</sup> April, 2024, which prayer has not been contested by the appellant is that the respondents/ applicants also pray that the judgment be set aside on the ground mainly that there is an apparent error and mistake on the face of the judgment which error does not require an elaborate argument to establish because it self-evident hence this court has jurisdiction to correct the error.
9. In the supporting affidavit sworn by Dancan Ochieng Abong'o the 1<sup>st</sup> respondent, it is deposed annexing the judgment of this Court which is sought to be reviewed and the judgment of the trial court which was subject of the appeal before this Court.
10. The respondents urged this Court to relook at the judgment which allowed the special damages awarded to the appellant and the statement that the trial court in Nyando SPM CC 316 of 2019 did not discredit the receipts which were produced in evidence, and compare it with the judgment of the lower court as annexed where the trial court at page 22 of the judgment stated that the evidence by the appellant herein did not add up and gave reasons as follows:

“ The plaintiff produced receipts as exhibit P1 -P6. The maker stated that he did not supply the said goods nor did he construct the structures for the defendant and that he had prepared the receipt on demand.

That was clear that receipts were not for goods purchased but they were prepared as requested by the plaintiff for purposes of this suit.

The alleged receipt invoices were numbers 220 dated 24/7/2014 for Kshs 47,900 numbers 221 dated 14/3/2013 for Kshs 21,840/- and number 222 dated 5/12/2014 for Kenya Shillings 47,100.



That clearly demonstrated that indeed the receipt were plucked and written for the purposes of the suit but not for goods purchased nor supplied as they are being consecutive serial numbers but for different years and the 220 invoice being written on 27/7/2014 whereas the one bearing number 221 was written on 14/11/2013.

That was clear that the receipts not for actual expenses but goes work for this suit.

It is thus clear that the plaintiff did not know the value of the alleged damages nor did he prove that indeed the properties were destroyed worth Kshs 290,000/- or 1.1. million.

11. Order 45, Rule 1(b) of the *Civil Procedure Rules* is clear that for the court to review its decision, certain requirements should be met. The Order stipulates 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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

12. The aforesaid Order is grounded on section 80 of the *Civil Procedure Act*, Cap. 21 Laws of Kenya which 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.

13. Under Section 80 of the *Civil Procedure Act*, the court has unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, this discretion should be exercised judiciously and not capriciously. The Court must also not be seen to be sitting on its own appeal where the review sought appears to be grounded on an error of law or requiring arguments and interpretation of facts or law.



14. In this Court's judgment which is sought to be reviewed on account of apparent error on the face thereof, I stated as follows, regarding the receipts produced by the appellant in a bid to prove his case before the trial court at page 8 para 21:

“...In this case PEX1,2 and 3 are receipts produced by PW2 without any dispute and the Court did not discredit those receipts at all. The appellant pleaded for more but proved less.....i find that the trial court erred in dismissing the appellant's suit for want of proof.”

15. The Court of Appeal in Civil Appeal No. 2111 of 1996, *National Bank of Kenya v Ndungu Njau* held that:

“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 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 proceed on an incorrect expansion of the law.”

16. Having perused the two judgments, one of the lower court and that of this Court which is sought to be reviewed, side by side, and having re-examined the receipts which the appellant and his witness produced in evidence, it is apparently clear that the appellant produced documents which were procured for purposes of his case in the lower court and that he was never issued with receipts for purchase of the iron sheets. His witness also denied that he supplied any materials pleaded, to the appellant. The witness purported supplier of the material subject of the claim by the appellant clearly stated that he issued receipts as requested by the appellant not that he issued receipts for payment received.

17. That being the case, I am satisfied that there is an error apparent on the face of the judgment of this Court which does not require arguments, even if the matter was to go on appeal.

18. It is an obvious error of fact and not of law for interpretation. It is obvious that the appellant manufactured receipts and that he acted dishonestly by producing manufactured receipts in order to get judgment in his favour, which receipts and invoices were discredited by the trial magistrate, a fact which escaped the attention of this court.

19. For the above reasons, I am satisfied that the application dated 5/5/2024 meets the threshold for review as contemplated in section 80 of the *Civil procedure Act* as read with Order 45 of the *Civil Procedure Rules* and is therefore merited.

20. the application dated 5/5/2024 is hereby allowed. The judgment of this court rendered on 11/4/2024 is found to have an error apparent on the face thereof. It is hereby reviewed and set aside and substituted with an order dismissing the appeal filed by the appellant and that each party bear their own costs of the appeal and of this application for review.

21. This file is closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

