



**Biomedical Laboratories Limited v Onyango (Suing as the legal representatives of the Estate of the Late Felix Healon Omondi (Deceased) & 2 others (Civil Appeal 250 of 2018) [2022] KEHC 15515 (KLR) (Civ) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15515 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL APPEAL 250 OF 2018**  
**CW MEOLI, J**  
**NOVEMBER 17, 2022**

**BETWEEN**

**BIOMEDICAL LABORATORIES LIMITED ..... APPELLANT**

**AND**

**MARGARET MERCY ACHIENG ONYANGO (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE FELIX HEALON OMONDI (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE ONYANGO OKUMU (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE FELIX HEALON OMONDI (DECEASED) ..... 2<sup>ND</sup> RESPONDENT**

**GEORGE ONYANGO OKUMU (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE STEIN ARAFINA ONYANGO (DECEASED) ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal from the ruling of Hon P Gesora (Mr) (CM) delivered on 18th May 2018 in Nairobi Milimani CMCC No 1536 of 2013)*

**JUDGMENT**

1. This appeal emanates from the ruling delivered on May 18, 2018 in Nairobi Milimani CMCC No 1536 of 2013. The events leading to the instant appeal are as follows, Margaret Mercy Achieng Onyango and George Onyango Okumu the Plaintiffs in the lower court (hereafter the 1<sup>st</sup> and 2<sup>nd</sup> respondent) sued George Onyango Radido (Administrator of the estate of the late Stein Arafina Onyango) the 1<sup>st</sup> defendant in the lower court (hereafter the 3<sup>rd</sup> Respondent), Ali Mwanaisa, the 2<sup>nd</sup> Defendant in



the lower court, Biomedical Laboratories Limited, the 3<sup>rd</sup> Defendant in the lower court (hereafter the Appellant) and Michael Mwangi Muthee, the 4<sup>th</sup> Defendant in the lower court.

2. The claim was for damages under the Law Reform Act and the Fatal Accidents Act in respect of fatal injuries sustained by Felix Healon Omondi (hereafter the deceased) in a road traffic accident on September 18, 2011. The Appellant was sued as the beneficial, actual, insured, ostensible owner of motor vehicle KAU 100L. It was averred that the deceased was travelling towards Ngong as a lawful passenger in motor vehicle registration number KBH 847L along Ngong Road near and that at Lenana High School By-pass the its driver so negligently drove managed and or controlled the said motor vehicle registration number KBH 847L that he caused it to collide with motor vehicle KAU 100L which was equally negligently driven, controlled and or managed by the 2<sup>nd</sup> Defendant in the lower court or the Appellant by themselves or through the 4<sup>th</sup> Defendant in the lower court.
3. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants in the lower court entered appearance and filed a statement of defence on July 16, 2013 and July 24, 2013 respectively. Interlocutory judgment was however entered as against the Appellant and the 3<sup>rd</sup> Respondent on October 28, 2013 and November 21, 2014 respectively, who despite having been duly served failed to enter appearance and file a defence. On October 14, 2015 a consent order was recorded before the trial court whose general effect was that the suit as against the 2<sup>nd</sup> and 4<sup>th</sup> Defendant's in the lower court was withdrawn with costs to be borne by the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent; that judgment on liability was entered at 05:95 in favour of the 1<sup>st</sup> Respondent & 2<sup>nd</sup> Respondent against the 3<sup>rd</sup> Respondent; and that parties would thereafter file written submissions on quantum. The parties complied.
4. On February 29, 2016 judgment was delivered in favour of the 1<sup>st</sup> Respondents & 2<sup>nd</sup> Respondent to the effect that liability was apportioned at 5% as against the 1<sup>st</sup> Respondent & 2<sup>nd</sup> Respondent and 95% to be borne by the 3<sup>rd</sup> Respondent and Appellant herein with damages being assessed at Kshs 5,424,500/- in favour of the 1<sup>st</sup> Respondent & 2<sup>nd</sup> Respondent against the Appellant and 3<sup>rd</sup> Respondent.
5. On October 17, 2017 the Appellant moved the court seeking that the court be pleased to set aside and or review the judgment to the extent that it apportioned liability against the Appellant and the Appellant be deemed as duly discharged from the suit and or the claim against the Appellant be deemed as having been abandoned by reason of the consent order recorded in court on October 14, 2015. The motion was expressed to be brought *inter alia* under Order 10 Rule 11 and Order 45 Rule 1 of the Civil Procedure Rules (CPR) on grounds on the face of the motion amplified in the supporting affidavit of Kennedy Ochieng, counsel for the Appellant. He deposed that by the consent order recorded by the parties on liability judgment on liability was entered at 5% as against the 1<sup>st</sup> Respondents & 2<sup>nd</sup> Respondent and 95% as against the 3<sup>rd</sup> Respondent. However, that the court thereafter delivered judgment on February 29, 2016 that erroneously apportioned liability against the Appellant contrary to the terms of the consent order recorded by the parties on October 14, 2015. Counsel further asserted that the court had no jurisdiction to vary the consent judgment on liability and there was a fundamental error on the face of the record justifying the review and or setting aside of the judgment to the extent that it apportioned liability against the Appellant.
6. The 1<sup>st</sup> Respondent & 2<sup>nd</sup> Respondent opposed the motion through a replying affidavit dated October 21, 2017. The motion was canvassed by way of written submissions. By a ruling delivered on May 15, 2018 the lower court dismissed the Appellant's motion dated October 17, 2017 with costs, provoking



the instant appeal which is based on the following grounds in the amended memorandum of appeal dated September 22, 2019: -

- “ 1. The learned trial magistrate erred in law and fact in finding as he did, that the interlocutory judgment against the Appellant was never effectively set aside by consent order recorded by the parties on October 14, 2015.
  2. That the learned trial magistrate erred in law and in fact by failing to find that there was in fact an error on the face of the record and therefore acted in error in failing to properly evaluate and interpret the law and thus reaching erroneous decision.
  3. The learned trial magistrate erred in law and fact in entering judgment against the Appellant notwithstanding that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in concert with the 2<sup>nd</sup> and 4<sup>th</sup> Defendant agreed to circumvent the law relating to adduction of evidence and the conduct of hearing without the involvement of the Appellant.
  4. That the learned trial magistrate erred both in law and principle by applying erroneous principle thus arriving at erroneous decision with the result that the court ended up with a contradicting finding on the issue of liability with the case of Milimani CMCC No 1768 of 2013 Robert M Munyororo versus George Radido and Micheal Muthee which arose from the same road traffic accident and was determined on full merit and after a full trial.
  5. The learned magistrate erred in law and in fact by making a finding that the Appellant had taken too long to move the court.” (sic)
7. In urging the appeal, counsel for the Appellant called to aid *Halsbury’s Law of England*, 4<sup>th</sup> Edition Paragraph 329 and *Chitty on Contracts*, Paragraph 18-014. He reiterated the basic facts relating to the entry of the interlocutory judgment against the Appellant, the subsequent consent judgment on liability entered on October 14, 2015 in the ratio of 05:95 in favour of the 1<sup>st</sup> & 2<sup>nd</sup> Respondent as against the 3<sup>rd</sup> Respondent and the eventual judgment apportioning liability was at 05:95 in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent against both the Appellant and 3<sup>rd</sup> Respondent. Counsel took the position that a consent upon proper execution and adoption by the court, it is akin to a contract binding the parties to it. That the 3<sup>rd</sup> Respondent had no authority to enter into a consent on behalf of the Appellant and there was not shown to exist between them an agency relationship as would bind the Appellant on account of the principle of vicarious liability. Consequently, it was counsel’s submissions that the court erred in finding that the 95% liability to be borne by the 3<sup>rd</sup> Respondent under the consent judgment extended to the Appellant.
8. He further argued that upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s withdrawal of the cases as against the 2<sup>nd</sup> and 4<sup>th</sup> Defendant’s in the lower court, the remnant claim was against the 3<sup>rd</sup> Respondent and the Appellant and by the subsequent consent on liability between the 1<sup>st</sup> & 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent, there was effectively no liability against Appellant, therefore the interlocutory judgment against the Appellant being of no effect. Citing *Samuel Wambugu Mwangi v Othaya Boy’s High School* [2014] eKLR counsel submitted that the consent was executed freely and in full knowledge of relevant facts and determined completely the liability in the matter as apportioned between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent.



9. The 1<sup>st</sup> Respondent & 2<sup>nd</sup> Respondents defended the trial court's decision. Counsel anchored his submissions on Section 78 of the *Civil Procedure Act* (CPA) with respect to the principles that ought to guide a court on a first appeal. While calling to aid the decisions in *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR and *Michael Mungai v Ford Kenya Elections & Nominations Board* [2013] eKLR counsel asserted that a court sitting on appeal would only interfere with the exercise of discretionary jurisdiction of the subordinate court in a review application, if the aggrieved party demonstrated that the trial court misapprehended evidence, applied wrong principles, took into account irrelevant/extraneous factors or failed to consider relevant factors and thus arrived at a decision that was patently wrong.
10. Counsel contended that the Appellant's motion in the lower court was not a proper motion for review but a mischievous invitation to the court to sit on appeal over its own judgment and to arrive at a different decision. Counsel complained that the Appellant had raised new issues of fact in the memorandum of appeal not canvassed before the trial court. In his view, the question of liability was determined by the trial court in the final judgment which did not alter or amend the consent order of October 14, 2015, and hence the issues raised in the Appellant's motion were res judicata and the court functus officio. He cited *Fred Academy Ltd v Emma Kinya Mugambi* [2021] eKLR and *Ferrotech Industries Ltd v Mwadime Ali Hare* [2021] eKLR to support the submission that the Appellant's motion did not meet the threshold for review and was besides filed eighteen (18) months after final judgment. The court was urged to dismiss the appeal with costs.
11. The court has perused the record of appeal as well as the original record and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor v Associated Motor Boat Co Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
12. The Court of Appeal stated in *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
13. The lower court in dismissing Appellant's review motion expressed itself in part as follows:

“I have considered the application herein, reply made and submissions by parties. It is true that in the consent recorded on October 14, 2015 liability was apportioned in the ratio of 5:95 in favour of the plaintiff and against the 1<sup>st</sup> defendant. There was no mention of the 3<sup>rd</sup> defendant in the said consent. There is however an interesting scenario against the Applicant herein. Interlocutory judgment has been entered against it and had not been set aside. The court had this to say on the same.

“.....Despite the consent, it is clear that the interlocutory judgment remained on record. The Plaintiff is liable at 5% and the 1<sup>st</sup> and 3<sup>rd</sup> defendants jointly and severally liable at 95%.....”



It is clear that by the time the consent was recorded there was judgment against the Appellant herein. This judgment was never set aside or dealt with in any way. Counsel had a duty to do so. I find no error apparent on the court record or there being a new matter that has come up after the judgment or order granted or for any other reason to warrant this court exercise its discretion and review the judgment of this court.

I also find and hold that the Applicant has taken too long to move the court in this regard and I find and hold that this application lacks merit and I proceed to dismiss it with costs.” (sic)

14. The Appellant’s motion before the subordinate court was anchored on Order 45 (1) of the [Civil Procedure Rules](#) 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.”

15. In the court’s view, this appeal turns on the question whether the lower court properly exercised its discretion in disallowing the application for review, as the grant or refusal of an application for review of any decree or order involves the exercise of discretion. However, such discretion must be exercised judicially and upon reason, rather than arbitrarily or capriciously. The Court of Appeal in [Mashreq Bank PSC v Kuguru Food Complex Limited](#) [2018] eKLR stated;

“This Court ought not to interfere with the exercise of a Judges’ discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Shah v Mbogo* (supra):

“A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”. [Emphasis added]

See also [United India Insurance Co Ltd v East African Underwriters \(K\) Ltd](#) [1985] EA 898:

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16. In *Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited* [2020] eKLR the Court of Appeal stated that;

“An application for review, therefore, involves exercise of judicial discretion. The circumstances in which this Court, as an appellate court, can interfere with the exercise of judicial discretion are limited”.

17. There is a long line of authorities concerning the principles governing an application for review brought under Order 45 Rule (1) of the *Civil Procedure Rules*. In the judgment of Okwengu JA in *Associated Insurance Brokers v Kenindia Assurance Co Ltd* [2018] eKLR the Court of Appeal stated that:

“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:

“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)

In *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 EA 173 this Court further explained an error apparent on the face of the record as follows:

“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.”

18. 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:

“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]...”

See also [National Bank of Kenya Ltd v Ndungu Njau](#) (1995-98)2EA 249

19. The Appellant’s review motion dated October 17, 2017 was premised on two grounds namely, error apparent on the face of the record and any other sufficient reason. In that regard it was deposed by the Appellant’s counsel at paragraph 2, 3, 4 & 10 in the supporting affidavit dated October 17, 2017 that:

“2. That this court recorded an order/judgment on liability by consent of the parties on October 14, 2015 *inter alia* as follows:-

“1) .....

2) Judgment on liability be and is hereby entered at 5% against the Plaintiff and 95% against the 1<sup>st</sup> Defendant.

3) .....

3. That the court then delivered its judgment on 29<sup>th</sup> February 2016 that erroneously apportioned liability against the 3<sup>rd</sup> Defendant which was contrary to and in contradiction of the consent order recorded by the parties on October 14, 2015 as aforesaid.

4. That a decree was also issued herein that is contrary to the consent judgment on liability in that the same apportions liability against the 3<sup>rd</sup> defendant.

10. That there is a genuine and sufficient reason for the court to review and or set aside the judgment delivered on February 29, 2016 to the extent that the same apportions liability against the 3<sup>rd</sup> Defendant and contrary to the consent judgment on liability entered on October 14, 2015.” (sic).

20. Consequently, what this court ought to determine is whether the Appellant demonstrated before the lower court the asserted error or mistake apparent on the face of the record and or any other sufficient reason? Concerning the former, the Court of Appeal held in [National Bank of Kenya Ltd v Ndungu Njau](#) (1995-98)2EA 249 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-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.

In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who 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 the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it.”

21. The expressly stipulated grounds for review under Order 45 Rule 1 are to be read disjunctively with the limb providing for review “for any other sufficient reason”. The Court of Appeal in *Wangechi Kimita & Another v Mutahi Wakibiru* (1982-88) 1 KAR 977 stated with regard to the words “for any other sufficient reason” per Nyarangi JA as follows:-

“... I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly S 80 of the Civil Procedure Act confers unfettered right to apply for a review and so the words “for any other sufficient reason” need not be analogous with the other grounds specified in the Order: See *Sadar Mohamed v Charan Singh* (1959) EA 793”.

22. Hancox JA (as he then was) in agreeing with Nyarangi JA said at page 981 states:-

“I would add that I also agree with the reasoning of Nyarangi J.A that the third head under Ord 44 r 1(1), enabling a party to apply for a review namely “or for any other sufficient reason” is not necessarily confined to the kind of reason stated in the two proceeding heads in that sub-rule, which do not themselves form a “genus or class of things with which the third general head could be said to be analogous”.

23. Later, Gicheru JA in the *Official Receiver and Liquidator v Freight Forwarders Kenya Limited* [2000] eKLR while reiterating the dicta in *Wangechi Kimita* (supra) stated that:-

“These words (“for any other sufficient reason”) only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record.”

See also *Tokesi Mambili & Others v Simion Litsanga Sabwa*, Civil Appeal 90 of 2001 .

24. The undisputed pertinent chronology of events in the lower court suit is well captured in the judgment of the lower court, the trial magistrate noting that there was interlocutory judgment as against the Appellant whereas as at when. Inexplicably, the Appellant had never attempted to set aside the interlocutory judgment. The consent judgment of October 14, 2015 was in the following terms: -

- “ 1. The suit against the 2<sup>nd</sup> and 4<sup>th</sup> Defendants is hereby withdrawn with costs to be borne by the Plaintiffs such costs be agreed failing to which the costs be assessed.
2. Judgment on liability be and is hereby entered at 05:95 in favour of the Plaintiff against the 1<sup>st</sup> Defendant.”



3 .....  
4 .....  
5 .....”

25. The trial court stated in its final judgment:-

“An interlocutory judgment against the 3<sup>rd</sup> Defendant was entered on October 28, 2012 in default of appearance and defence. A consent on liability was entered on October 14, 2015 at 05:95 in favour of the deceased and against the 1<sup>st</sup> Defendant. By a further consent, the suit against the 2<sup>nd</sup> and the 4<sup>th</sup> Defendants was withdrawn with costs to be borne by the Plaintiffs, with the costs to be agreed, failure of which the same were to be assessed. Despite the consent, it is clear that the interlocutory judgment remained on record. The Plaintiff is liable at 05% and the 1<sup>st</sup> and 3<sup>rd</sup> Defendant joint and severally liable at 95%.”

26. Based on the foregoing, Gesora (CM) in his impugned ruling found that there was no error apparent on the face of the record was demonstrated by the Appellant. Applying the test in *National Bank of Kenya Ltd (supra)* and established precedent, and looking at the pertinent facts, this court agrees with the 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s argument that the review motion was not a proper motion for review but a camouflaged appeal, the liability question having been consciously considered and determined in the final judgment of the trial court. It is evident from a reading of the said judgment that the court was alive to the existence of the consent judgment in respect of the 3<sup>rd</sup> Respondent on one hand, and the interlocutory judgment against the Appellant on the other. For these reasons the court proceeded to find the Appellant and 3<sup>rd</sup> Respondent jointly and severally liable for the 95% that was apportioned in respect of the consent order dated October 14, 2015.

27. This court is here not concerned with whether this determination was legally sound but whether this was a matter suited to a review application. Clearly, the court’s finding, whether legally sound or not, did not qualify as an error on the face of the record. It seems that perhaps an appeal would have been the more appropriate cause of action for the Appellant.

28. On the question whether any other sufficient reason had been established, Gesora, CM in his ruling found in the negative although not discussing the matter in any depth. Looking at the material placed before the lower court, this Court agrees with the finding because the matters raised in the motion essentially constituted an invitation to the trial Court to sit on appeal on its own judgment. The Court could not properly consider the merits of its impugned determination on liability as the Appellant sought by the review motion. The invitation was properly rejected as the trial court became functus officio upon rendering its determination, rightly or wrongly, on the question of the Appellant’s liability in its final judgment.

29. The Court of Appeal in *Solacher v Romantic Hotels Limited & another* (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR) cited with approval the decision of Bennett J in *Abasi Belinda v Frederick Kangwamu and Another* [1963] EA p 557 to the effect 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.”

30. In view of the foregoing, this court is of the considered view that the lower court properly rejected the motion for review which in any event was filed after an inordinate period of delay. The appeal is



without merit and is accordingly dismissed with costs to the respondents. is court, the appeal herein ought to suffer fate of dismissal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF NOVEMBER 2022.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

Ms. Mwangangi for the Appellant

Mr. Maweu for the Respondents

C/A; Carol

