Wambugu & 3 others v Ngunjiri (Civil Appeal E054 of 2024)
[2025] KEHC 4098 (KLR) (17 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4098 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E054 OF 2024

DKN MAGARE, J

MARCH 17, 2025

BETWEEN

EDWARD WAMBUGU ..... 1ST APPELLANT

CYRUS RUIJI ..... 2ND APPELLANT

LAWRENCE THEURI ..... 3RD APPELLANT

GEORGE KIRAGU ALIAS MUREITHI ..... 4TH APPELLANT

AND

FRANCIS MUTURI NGUNJIRI ..... RESPONDENT

RULING

1. This is a ruling on an application dated 30.11.2024 and filed by the Respondent seeking reliefs as follows:

    a. Spent

    b. The Honorable Court be pleased to review the Judgment in Civil Appeal No. E054 of 2024 in the matter of *Edward Wambugu, Cyrus Ruiji, Lawrence Theuri, and George Kiragu Alias Mureithi v Francis Muturi Ngunjiri* delivered on 31.10.2024.

    c. That the Honorable court misdirected itself on the following issues:

        i. That the Rent Restriction Tribunal has no jurisdiction to deal with claims emanating with issues of damage to the tenant's motor vehicle.

        ii. That the Rent Restriction Tribunal deals with issues of rent only.

        iii. That I approached the small claims court, which has pecuniary jurisdiction to deal with issues of malicious damage to property as per Section 12(1) of the Small Claims Act.

d. That no court order was issued to levy distress before the destruction of the motor vehicle KBQ 874M.

e. That the trial magistrate failed to appreciate that there was no consent proven or corroborated.

2. The application is brought under the provisions of Order 45 of the *Civil Procedure Rules* and is supported by the applicant's affidavit. The Appellants filed a replying affidavit sworn on 18.12.2024 by Edward Wambugu opposing the application on the ground that the power of review is limited to discovery of a new matter and mistake on the face of the record. It was also deposed that the application is a disguised appeal.

Submissions

3. The Applicant filed submissions dated 23.2.2025. It was submitted that Section 12(1) of the *Small Claims Court Act* expressly grants jurisdiction over tortious claims involving damage to property, making it the proper forum for this case.

4. It was also submitted that there was an error when the High Court repeatedly referenced the existence of a non-existing court order by the material day on (20th February 2024), yet the order was issued on 25th March 2024, (35 days) after the destruction of the vehicle. It was submitted under Order 45 Rule 1 of the *Civil Procedure Rules* that a court may review its judgment if:

a. There is a clear error on the face of the record

b. New and important evidence has emerged

c. There is a fundamental misapprehension of the law

5. The Respondent filed submissions dated 20.1.2025. It was submitted that this was not a proper application for review under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*, as there was no error apparent on the face of the record. They submitted that review was an equitable remedy which this court ought to grant as a matter of discretion but was not applicable to this application. They relied on the case of *Parliamentary Service Commission v Martin Nyaga Wambora & Others* (2018) eKLR.

Analysis

6. The main issue is whether the Applicant has met the legal threshold for an order of review on account of the error apparent on the face of the record. The jurisdiction of this Court to grant review is well set out in the law. Section 80 of the *Civil Procedure Act* states that:

> " 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".

7. Order 45 of the *Civil Procedure Rules* provides for review and it states as follows:

> " (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"

8. Kuloba J (as he then was) in *Lakesteel Supplies v. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 stated as doth:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

9. The ground for review is said to be an error on the face of the record. This is a review of disputed facts. However, the court's jurisdiction is limited to questions of law. The Court found that the Small Claims Court case arose from an order by the Rent Restriction Tribunal. The court equally found that the dispute was of the nature of a criminal matter. Consequently, the Small Claims Court had no jurisdiction under Section 12 of the *Act* to deal with issues of rent.

10. The questions raised do not rise to an error that can be reviewed within the meaning of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. The position and circumstances asserted by the Applicant have not changed. The review will, therefore, not serve to give effect to this

court's intention when making the decision. It will give a completely different intention. The Court of Appeal in *Mahinda v. Kenya Power & Lighting Co. Ltd* [2005] 2 KLR 418 expressed itself as follows:

> "The Court has however, always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of the Court on the basis of arguments thought of long after the judgement or decision was delivered or made."

11. Therefore, there is no error apparent on the face of the record in so far as the court set aside the decision of the court to strike out the suit. It must be remembered that the power of this court is limited to questions of law. Whether there are factual disputations is irrelevant. Section 38(1) of the *Small Claims Act* provides as follows:

    (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.

    (2) An appeal from any decision or order referred to in subsection (1) shall be final.

12. The decision entered herein was final in its nature and effect. The parties already had disputations in the criminal justice system. The Small Claims Court cannot handle such matters. I find the application lacking merit as no single point of law is omitted. The Applicant should and must learn to live with decisions that have already been made.

13. Regarding costs, the Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

> "It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

14. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

15. In the circumstances the Notice of Motion dated 30.11.2024 is dismissed with costs of Kshs. 15,000/= payable within 30 days, in default execution do issue.

Determination

16. The upshot of the foregoing is that I make the following orders:

    a. The Notice of Motion application dated 30.11.2024 lacks merit and is dismissed.

    b. The Appellants/Respondents are entitled to costs assessed at Kshs. 15,000/=.

    c. 30 days stay of execution.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 17TH DAY OF MARCH, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Lucy Mwai for the Appellants/Respondents

No appearance for the Respondent/Applicant

Court Assistant – Michael