



REPUBLIC OF KENYA



Waweru & 4 others v Banana Hill Matatu Savings & Credit Society Ltd (Miscellaneous Application E458 of 2019) [2025] KEHC 4528 (KLR) (Civ) (3 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS APPLICATION E458 OF 2019

CJ KENDAGOR, J

APRIL 3, 2025

**IN THE MATTER OF SECTION 79 AND 81 OF THE
COOPERATIVE SOCIETIES ACT NO. 12 OF 1997 LAWS OF KENYA**

BETWEEN

DAVID NJUKU WAWERU 1ST APPLICANT
GODFREY NG'ANG'A 2ND APPLICANT
PETER NJENGA MIRINGU 3RD APPLICANT
SAMWEL KINGARA 4TH APPLICANT
MICHAEL MUNGAI KAMAU 5TH APPLICANT

AND

BANANA HILL MATATU SAVINGS & CREDIT SOCIETY LTD . RESPONDENT

RULING

1. Before this Court is an application dated 4th October, 2020 which is brought under Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#), Cap 21 and Order 45 Rule 1 of the [Civil Procedure Rules](#).

The Application seeks the following orders:-

1. Spent;
2. Spent;
3. Spent;
4. That the Court be pleased to review the ruling delivered and orders issued by Hon. Lady Justice Maureen Odero on 2nd October, 2020.



5. That in the alternative, the court be pleased to re-open the trial and/or hearing of the Applicant's Chamber Summons Application dated 3rd October, 2019;
 6. That the costs of this Application be provided for.
2. The Notice of Motion Application listed seven (7) grounds to support the requested orders as follows:
- a. That the Hon. Justice Maureen Odera delivered a ruling on 2nd October 2020 dismissing the Chamber summons application dated 3rd October 2019 which was in the nature of a reference from the Co-operative Tribunal on Taxation of a Bill of Costs dated 22nd October, 2018.
 - b. The ruling had an error apparent on the face of the record since the Honorable Judge on page (3) paragraph (3) of the ruling stated as follows:-

.....The application was canvassed by way of written submissions. The Respondent filed its written submissions on 14th February 2020. However, the Applicants despite having been accorded sufficient time failed to file any submissions in the matter'.
 - c. The statement by the Learned Judge that the Applicants had not filed submissions was erroneous since the Applicants prepared and filed their submissions on the matter on 16th December 2019 at the High Court Milimani Commercial Division and a receipt was issued by the Court serialized as 729550081 and the transaction code was MLG9PEF7V9.
 - d. Since the application was canvassed by way of written submissions, the fact that the court did not take cognizance of the Applicant's submissions means that the Applicants did not get an opportunity to be heard in support of their application by way of Chamber Summons dated 3rd October 2019.
 - e. It follows that in the interests of justice and the sense of natural justice, the court ought to give the Applicants an opportunity to be heard.
 - f. That the application has been made diligently without unreasonable delay.
 - g. It is meek and just that the orders be granted as prayed.
3. The application was supported by the Affidavit of Ruth Nyambura Kibebo, Advocate for the Applicants. The Applicants averred that the Learned Judge only considered the Respondent's submissions in arriving at the decision to dismiss the chamber summons application with costs. The Applicants' case was a reference from taxation by the Co-operative Tribunal in Case No 155 of 2016.
4. The Application was dispensed of by way of written submissions which I have duly considered.

Analysis and determination

5. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides:

- “(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.”

6. The Applicants highlighted an issue concerning the Court’s ruling, stating that they had not filed submissions. However, the Applicants assert that they submitted their submissions to the High Court at the Milimani Commercial Division and received a receipt from the Court to support their claim. They argue that this constitutes a ground for review due to an error apparent on the face of the record.
7. The Court of Appeal had the following to say in an application for review in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR);

“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.”

8. In *Muyodi v Industrial and Commercial Development Corporation and another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record in the following terms:

“In *Nyamogo M Nyamogo v Kogo* [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or 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 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 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 or wrong view is certainly no ground for a review although it may be for an appeal”

9. An error apparent on the face of the record must be evident to the eye and not one that yields two results.
10. Given the proposition above, the issue currently before the court is whether the Court’s findings (that the applicants did not file submissions while preparing their ruling and, therefore, did not factor them into the final decision) affect the basis of the decision the Court arrived at.
11. In addressing that question, the Court has considered the purpose of submissions in any proceedings. The Court of Appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR stated the following:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally



parties' "marketing language", each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

12. Based on the observations above, it is clear that submissions are integral to any proceedings before the Court. However, they cannot substitute the pleadings and evidence presented by the parties. Submissions reflect a party's conclusive stance on any issue before the Court and express their viewpoint on the matter. This does not mean that the opinion is definitive or serves as an order for the Court to follow or consider it.
13. The Applicants herein have contended that the absence of their submissions before the Court at the time of preparation of the ruling in support of their application denied them an opportunity to be heard; hence, the Court's decision would have been different if the submissions were considered. They have not highlighted the relevant sections of their submissions that could have led the Judge to make a different decision.
14. There is no evidence in the record to suggest that the Court made any error on the face of the record in its ruling. The non-consideration of submissions does not undermine the validity of the ruling, which was based on the pleadings and facts presented.
15. The Applicant's assertions that the Court should have arrived at a different conclusion in its ruling, serve as grounds for an appeal as it challenges the decision's merits. They do not constitute a basis for a review focused on an error apparent on the face of the record.
16. In the upshot, the application lacks merit and hereby dismissed with costs.
17. It is so ordered.

DATED, DELIVERED AND SIGNED IN NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 3RD DAY OF APRIL, 2025.

.....

C. KENDAGOR
JUDGE

In the presence of;

Court Assistant - Beryl

Mr. Otieno Advocate for Respondent

No attendance by Applicant

