



**Gitonga v Njuguna & another (Petition E010 of 2024)
[2025] KEHC 6288 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PETITION E010 OF 2024
DKN MAGARE, J
MAY 14, 2025**

BETWEEN

CHARLES WAMBUGU GITONGA PETITIONER

AND

DORCAS WAITHIRA NJUGUNA 1ST RESPONDENT

JOHN MWAURA KAMAU 2ND RESPONDENT

RULING

1. This is a ruling in respect of an application dated 3.2.2025. The same is indicated to be brought under order 9, order 12 rule 7 order 22 and order 45 of the Civil Procedure Rules. The rules are irrelevant in so far as the application before the court is concerned. However, by dint of Order 51, rule 10, the court shall hear the same. The said rule provides as follows:
 - (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.
 - (2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.
2. The application sought the following orders:
 1. Spent
 2. The Honourable Court be pleased to review with a view of setting aside orders issued on 03.02.2025 dismissing the matter and marking the file as closed and subsequently reinstate the petition dated 1.10.2024 for hearing and determination of this application(sic)



3. In the alternative the honourable court be pleased to allow the petition dated 1.10.2024 as prayed at the hearing and determination of this application. (sic)
4. Costs
3. The applicant was mischievous in prayer 3, seeking to have the petition, which is dismissed, allowed through the back door. This is stealing a match from the respondent. The said prayer is dismissed in limine with costs of Ksh. 7,500/= payable within 15 days.
4. The court will, in dealing with this application, tackle three fundamental questions. These will determine the matter as raised in the application. The issues are:
 - a. Jurisdiction to deal with the orders sought.
 - b. Merit of the application
 - c. Reliefs.
5. By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of issues presented in a formal way for its decision. Therefore, jurisdiction is everything. Without it the court has to down their tools. In the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR, Nyarangi JA, as he then was stated as doth:

“With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what

I have already said is consistent with authority: “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

6. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

“This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution*



confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

7. The jurisdiction to set aside these particular proceedings flows from the fundamental principle of natural justice that no man (woman or entity) may be condemned unheard. No man should ever be condemned unheard, as expressed in the truism that the audi alteram partem principle. In *Rex vs Deferral* 1937 AD 370 and 373, the court posited that:

The audi alteram partem principle literally means, “hear the other side. This means that no ruling of any importance, either on the merits or on procedural points, should be made without giving both parties the opportunity to express their views. The audi alteram partem principle is followed in judicial proceedings, in our country, along with the rights such as legal representation, the right to adduce and challenge evidence in cross examination and the right to present one’s evidence to the dispute or claim.

8. The matter was fixed for mention. The court called the same out and dismissed. This was an error on the face of the record, it cannot be allowed to stand. The matter was for mention. The court dismissed the matter when it was for mention. There appear to also be technical issues related to the applicant’s attendance. further, it has come out that Respondent had not been served. there is no loss they will suffer. As held in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR an error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. The court stated as follows:

35. The Indian Supreme Court[8] made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. In *Attorney General & O’rs v Boniface Byanyima*,[9] the court citing *Levi Outa v Uganda Transport Company*[10] held that the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.”

36. There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by ‘error apparent’. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.[11]

37. The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.



9. 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 determined judicially on the facts of each case. In the case of *Nyamogo & Nyamogo v Kogo* {2001} EA 170, the court indicated as follows in respect of the question of what an error on the face of the record is, as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

10. The question the court will deal with is the effect of the order given and the manner in which it was given. The matter was not listed for hearing but for a mention. The matter was not for hearing. If it were, then the question would have arisen. The respondent misled the court that the matter was for hearing when it was not. In the case of *Paul Odhiambo Ogunde v Maersk Kenya Limited* [2016] eKLR, the court held as doth:

A related issue is whether it is in order to enter default judgment on a mention date. It is settled in law that substantive orders are not to be granted on the date a matter comes up for mention ((see *Rahab Wanjiru Evans v Esso Kenya Limited (Civil Appeal No 13 of 1999)* and *Kenya Commercial Bank Limited v Naphtaly J.B. Hawala (Civil Application No 240 of 1997)*). In light of this jurisprudence, it seems to me that it is not open for the Court to make substantive orders on a mention date. This is mainly because parties do not have an opportunity to make substantive submissions on a mention date and orders thus made could well occasion an injustice.”

11. In the case of *Anthony Milimu Lubulellah, Advocates v Patrick Mukiri Kabundu & 3 others* [2019] eKLR the court posited as follows:

.....In *Rahab Wanjiku v Esso Kenya Limited* [1995-1998 EA 332] this court stated:

“We have no doubt that where a matter is fixed for mention, as it was in this case, the learned judge had no business determining on the date, the substantive issues in the matter. He can only do so, which was not the case here, if the parties so agree and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties, which he did not do and moreover, gave no good reasons for adopting such a procedure which is repugnant to the administration of justice. As regards whether the learned judge erred in invoking his inherent jurisdiction under section 3A of the *Civil Procedure Act*, which has been described by Hancox, JA as he then was, in *Wanguku v Kani* [1982-1988] 1 KAR 780 at 785 as “residual jurisdiction which should only



be exercised in special circumstances... in order to put right that which would otherwise be a clear injustice” the learned judge gave the following reason for taking this course:

“This is because business premises which (sic) are closed awaiting the hearing of the application and the case.” With respect, there is nothing special about this state of affairs, neither does it entitle the learned judge to ignore basic requirements such as those demand by the principles of natural justice, in determining substantive issues in contention between opposing parties without their consent on a mention date. Having regard to the wording of section 3A, the unsolicited action taken by the learned judge could, ironically, be seen to have been the type of injustice which section 3A itself, was intended to avoid or prevent.”

12. The Court of Appeal in the case of *Wanjiku v Esso Kenya Ltd (1995-1998) 1 EA 332 CAK* when faced with the issue of substantive orders issued on a mention date, had this to say:

Where a matter is fixed for mention, the court has no business determining the substantive issues therein on that date, and it can only do so, if the parties so agree and of course after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. There must be good reasons for adopting contrary procedure repugnant to the administration of justice.”

13. While handling a similar question in the case of *M/S Master Power Systems Limited v Public Procurement Administrative Review Board & 2 others [2021] eKLR*, the court pronounced itself as follows:

“With respect, I am persuaded by the appellant’s argument that no substantive orders should be made during a mention. In this case the parties appeared before this court and proceeded to make submissions on whether or not the appeal should be dismissed. The record shows that the parties had not consented to allow the court make substantive orders during a mention. It would appear that this court was made to believe that the parties had given their consents to enable this court make substantive orders. It is apparent that no such consent was given. I am convinced that there being no consent order is an error apparent on the face of record. In the circumstances this court is obliged to set aside such an order.”

14. The same question was dealt with in the case of *Republic v Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited [2014] eKLR* as follows:

33. First and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties consent to the hearing. In *Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998* the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In *Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332*, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. Dealing with the same issue the Court of Appeal in *AG vs. Simon Ogila Civil Appeal No. 242 of 2000 (supra)* held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly, in *Peter*



Nzioki & Another vs. Aron Kuvuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in Kenya Commercial Bank vs. N J B Hawala Civil Application No. 240 of 1997.

34. What emerges from the foregoing jurisprudence is that the Court, without the consent of the parties could not lawfully dismiss the application. However, if the Court was minded to proceed, it was obliged to hear the submissions of the parties. In this case, it is clear from the record that the advocate for the applicant was not ready to proceed on the day the application was dismissed hence there was no consent. Again even if the Court was minded to proceed, the proper procedure would have been to disallow the adjournment of the matter and the ordering of the matter to be heard before dismissing the same. In *Dr. Samson Auma vs. Jared Shikuku & Another* Civil Appeal No. 191 of 2002 the Court of Appeal expressed itself as follows:

“Where an application for adjournment was made, it needed to be dealt with on its merit first and either be allowed or rejected and whichever way the Judge was minded to decide it, it was his duty to dispose of it first. It was a matter that called for his discretionary powers.....To avoid deciding on an unopposed application for adjournment which was not frivolous as the appellant’s counsel was before the Court of Appeal, the other counsel bereaved and the case was not yet ready for hearing as certain procedures were yet to be finalised before it could be heard, and dismissing the entire case on another ground not canvassed before it was a serious misdirection. The correct procedure that the Superior court should have adopted was first to decide on whether or not to allow the adjournment application, then the suit would proceed to hearing and then it would be up to the appellant’s counsel to decide on how to prosecute his client’s case in the absence of the plaintiff..... The action taken by the court in this matter of failing to decide the application for adjournment on its merits and proceeding to dismiss the entire case on grounds that were not before him namely the absence of the parties at a time before the hearing proper could begin involved an incorrect exercise of the learned Judge’s discretion and did result in grave injustice as the appellant’s case was terminated before the appellant could be heard on its merits and therefore the Court of Appeal is entitled to interfere.”

15. The next question is whether the questions raised were for setting aside or for appeal. Since the decision was made on a mention date and ex parte, then it remains amenable to setting aside like all other ex parte orders. Setting aside is not an appeal but exercise of discretion to avoid both hardship and injustice. In the case of *Mureithi Charles & another v Jacob Atina Nyagesuka* [2022] eKLR, G V ODUNGA J, as he then was, posited as follows regarding setting aside:

In considering whether or not to set aside a judgement, a judge has to consider the matter in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties before it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed. Hence the justice of the matter and the good sense of the matter, are certainly matters for the judge. It is, as I have held elsewhere in this ruling an unfettered discretion, although it is to be used with reason, and so a regular judgement would not usually be set aside unless the court is satisfied that there is a defence on the merits, namely a prima facie defence which should go to trial or adjudication. The principle obviously is that, unless and until the court has pronounced a judgement upon the merits or by consent it is to have the power to invoke the expression of its coercive power, when that has been obtained only by a failure to follow any of the rules of procedure. It is then not a case of the



judge arrogating to himself a superior position over a fellow judge, but being required to survey the whole situation to make sure that justice and common sense prevail. Indeed, there is no parallel with an appeal. The judge before whom the application for setting aside is presented will have a greater range of facts concerning the situation after an inter partes hearing, than the judge who acts ex parte. Moreover, the judge is not interfering with the findings made by a fellow judge but is making sure that injustice or hardship would not result from accident, inadvertence or excusable mistake or error. The substance of his judgement would be that in view of the defence, there is prima facie defence. He may not be satisfied with the blunders or non-attendance of the defendant or his advocate, but nevertheless he may hold that it would be just to set aside the ex parte judgement. See *Bouchard International (Services) Ltd vs. M'mwereria* [1987] KLR 193; *Evans vs. Bartlam* [1937] 2 All ER 647.

16. The next question is who is to bear the costs? The issue of costs is governed by Section 27 of the [Civil Procedure Act](#), which provides as follows:

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

17. 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.

18. The parties were not to blame. The best orders for each party to bear their costs for the dismissal part. however, the Applicant must bear costs for the mischievous prayer no. 3

Determination

19. In the circumstances, I make the following orders:-

- i. The orders issued on 3.02.2025 are hereby set aside. The petition and the preliminary objection is set down for hearing.
- ii. Prayer 3 is dismissed with costs of Ksh 7,500/= for being mischievous
- iii. Directions to be given shortly.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OF MAY, 2025.

Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE



Represented by: -

Mr Wambugu for the petitioner/Applicant

Ms Musyimi for the Respondents

Court Assistant – Michael/Munguti

