



REPUBLIC OF KENYA



KENYA LAW
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**Ndaruga v Theuri & 2 others (Civil Appeal E072 of 2021)
[2025] KEHC 6169 (KLR) (14 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL APPEAL E072 OF 2021
DKN MAGARE, J
MAY 14, 2025**

BETWEEN

PHILIP MURURI NDARUGA APPELLANT

AND

PETERSON NDEGWA THEURI 1ST RESPONDENT

HERMAN NDIRITU KINGORI 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Appeal from the Judgment and decree of the Hon. M. Okuche,
given on October 29, 2021 in Nyeri CMCC No. 304 of 2018.)*

RULING

1. The court made a decision regarding the appeal from the Judgment and decree of the Hon. M. Okuche, given on October 29, 2021 in Nyeri CMCC No. 304 of 2018. The court dismissed the appeal for lack of merit. This was largely on one ground, the 2nd Respondent was not the complainant in the lower court. The complainant was Gatemu Housing Cooperative Society Limited. Secondly, there was no case against the 1st Respondent who was deceased.
2. The case against that respondent was withdrawn in the lower court. Consequently, I struck out the appeal against the deceased 1st respondent. No judgment was obtained against the Attorney General. In any case, the case against the Attorney General was time-barred by dint of section 3(1) of the Public Authorities Limitation of Action Act.
3. It was not necessary to go to any grounds of appeal, after finding that there was no case against all the respondents. The Applicant immediately filed an application for review, stating that the court had ignored its grounds of appeal in the amended appeal. The court had read the said grounds and the grounds in the original appeal. Other than grammar and syntax, there were no practical differences.



4. The court indicated the old grounds instead of the new ones. However, the court had already found that there was nothing to hear.
5. The 2nd Respondent filed a replying affidavit dated 31.1.2024. He stated that the application has not reached a threshold for review. He stated that there was no demonstration that the applicant failed to demonstrate that there was anything showing an error apparent on the face of the record.

Analysis.

6. The court notes that a notice of appeal was filed in the file on 25.11.2025. This raises the question of whether the court can handle a review when the notice of appeal had not been withdrawn. The suit was dismissed as it was against the wrong parties. The suit against the Attorney General was time-barred. The grounds do not change the tenor of the judgment. If the court indicated old grounds, that can be corrected under the slip rule under Sections 99 and 100 of the *Civil Procedure Act*.
7. I note that the new grounds were humongous. The grounds offended Order 42 Rule 1 of the Civil Procedure Rules which provides:
 - (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
 - (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.
8. The Court of Appeal had this to say about compliance with Rule 86 of the Court of Appeal Rules (which is *pari materia* with Order 42 Rule 1 of the Civil Procedure Rules) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”



9. The court abhors repetitiveness of grounds of appeal which tends to cloud the key issues in dispute for determination by the court. In the case of *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of appeal observed that : -

“Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

“The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

10. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. All the grounds raised only one question, that is, whether the Appellant proved his case for malicious prosecution. The court determined this question. If the appellant was dissatisfied with the decision, the only available avenue was to appeal. He has expressed his intention to appeal by filing a notice of appeal. The applicant is clearly hedging his bets by carrying out forum shopping. The Court of Appeal in *Parag Bhabwanjigi Savani vs Jitu Tribhovanshai Savani and 2 Others* 2017 eKLR stated as hereunder:

“We have recently had occasion to decry the tendency of parties to engage in a game of gambling. And probably forum shopping by the filing of a duality or multiplicity of suits over the same subject matter in the hope of landing a successful punch somewhere by a process of spreading their suits and hedging their bets.”

11. There is no effect whatsoever if the court lists different grounds that are materially the same as the amended grounds. The alleged error does not go to the root of the case. The new grounds do not revive the suit against the 1st and 3rd Respondents or make the 2nd Respondent a complainant in the lower court. He was simply a witness for the state.

12. Review is provided for under Section 80 of the *Civil Procedure Act*, which 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”.

13. Further, 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”

14. Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor Kisumu HCCC No. 191 of 1994* posited as follows regarding exercise of review:

“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.”

15. A review is not an opportunity to appeal and regurgitate the arguments made during the main proceedings. This is not an appeal. There are no new facts except what I considered in declining an adjournment. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. My brother, LN Mugambi, in *Josiah v Nyaga (Civil Appeal 34 of 2021)* [2023] KEHC 2054 (KLR) (16 March 2023) (Ruling) posited as doth regarding review.

Courts have the discretion to allow review on three grounds; where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay. The applicant herein has pleaded that there was an error on the face of the record which warrants this court to exercise its discretion and review the orders issued on October 3, 2022.



19. Courts of similar and superior jurisdiction have discussed the several grounds for allowing review. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

In *Nyamogo & 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 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-out 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 a wrong view; certainly, there is no ground for a review, although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.

16. What I understand the applicant to be saying is that the court reached an erroneous decision, by indicating in the body of the judgment the old grounds of appeal. There are no grounds for review. The grounds were made at the introductory part. In the analysis, the court deals with all issues. However, there are no new grounds for review. The appeal was dealt with on the basis of its incompetence and not the errors in the judgment of the court below. The facts I considered then are the same herein. In the case of *Onyango & 2 others v Awaa & 2 others (Civil Appeal E075 of 2022)* [2023] KEHC 26344 (KLR) (4 December 2023) (Judgment), RE Aburili, J posited as doth:

Is there any other sufficient cause that this court can leverage to order a review of the impugned ruling? In *Republic v Cabinet Secretary for Interior and Co-Ordination of National Government Ex Parte Abullahi Said Sald* [2019] eKLR, the court observed, with respect to any other sufficient reason as follows: "A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Singh and Another* [19] it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Mulla in the Code of Civil Procedure [20] (writing on Order 47 Rule 1 of the Civil Procedure Code of India), (the equivalent of our Order 45 Rule 1), states that the expression 'any other sufficient reason'...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement. [21]

31. I also find useful guidance in *Tokesi Mambili and others vs Simion Litsanga* [22] where they held as follows: -

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

28. I have said enough to demonstrate the grounds under which an order of review may be granted.

17. In the case of *HA v LB* [2022] eKLR, Odunga J as then he was stated as follows regarding review and appeal:



12. Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the *Civil Procedure Act* under which section 3A empowers the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. To allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the *Civil Procedure Act* whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court’s seal of approval to persons who wish to play lottery with judicial process. Accordingly, I associate myself with the decision in *The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi* (supra) that both options cannot be pursued concurrently or one after the other.

13. In this case, the Appellant, having sought to review the order made on 27th May, 2021, cannot now purport to appeal against the same. He can only appeal against the decision made on 4th November, 2021.

18. No basis is laid for setting aside the judgment given on 14.11.2024. The application dated 25.11.2024 is dismissed with costs to the 2nd Respondent.

19. 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.

20. 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.



21. 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.

22. The application dated 25.11.2024 is thus dismissed with costs of Ksh. 15,000/= to the 2nd Respondent.

Determination.

23. In the circumstances, the court makes the following orders:

- a. The application dated November 25, 2024 is dismissed with costs of Ksh. 15,000/= to the 2nd Respondent payable within 30 days in default, execution to issue.
- b. The file is closed.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 14TH DAY OF MAY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Pro se applicant – present

Ms. Magua for the 2nd Respondent

Court Assistant – Michael

