



Said v Nyandiko (Civil Suit E218 of 2023) [2025] KEHC 12101 (KLR) (23 June 2025) (Ruling)

Neutral citation: [2025] KEHC 12101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

CIVIL SUIT E218 OF 2023

F WANGARI, J

JUNE 23, 2025

BETWEEN

KHALIF SAID APPELLANT

AND

HEZBON OCHIENG NYANDIKO RESPONDENT

RULING

1. By a Notice of Motion Application dated 28082024 brought under the provisions of inter-alia sections 3A and 80 of the *Civil Procedure Act*, Orders 45 Rule 1 and 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, the DefendantsApplicants sought the following reliefs:
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. That the made by Hon. Justice Wangari on 28th June 2024 be reviewed and set aside and Judgment and Decree of Hon. S. Gatambia delivered on 10082023 be in Mombasa SCC Suit No. E011 of 2023 be reinstated
 - e. That costs of this application be provided for.
2. The grounds in support of the application and the Supporting Affidavit sworn by the Applicant, states that the Judgment of this court was unfair as the court considered issues of fact and not of law as required by law. The decision was said to be an abuse of the court's discretion as the court considered issues that ought not to have been considered. The Judgment was said to have stepped outside the provisions of section 38 (1) of the *Small Claims Court Act*, and which decision completely closed door of justice to the Respondent Appellant.



3. The court was faulted for finding that the maker of the Fire Report was not called and that there was evidence to show that he was an expert in the area. The court further considered the issue of breach of terms of agreement. The above were said to be issues of fact and not of law as stipulated by section 38 (1) of the *Small Claims Court Act*. The Applicant sought to have the Judgment of the court reviewed and set aside the orders made on 28062024.
4. Contrary to the submissions by the Applicant that the application was not opposed, the Respondent filed his Replying Affidavit dated 14102024, the Respondent stated that this court sitting as an appellate court had a duty to re-evaluate, re-assess and re-analyze the evidence on record hence no fault was committed. The Applicant was said to be asking this court to sit on its own appeal which is against the law.
5. The Applicant was said to have failed to establish the existence of new evidence or clerical error on the face of the record to warrant the court to review its Judgment. The Respondent prayed to have the application dismissed with costs.
6. Directions were taken to have the application canvassed by way of written submissions. Both parties duly complied by filing their respective submissions as well as citing authorities in support of their rival positions. The Applicant's submissions are dated 23102024 while those of the Respondent are dated 14102024. I have given due consideration to both sets of submissions.

Analysis and Determination

7. I have carefully considered the application, the response, the submissions for and against, the authorities cited as well as the law and I propose to adopt the issues as framed by the Plaintiff which are as follows: -
 - a. Whether this court should review the Judgment as prayed; and
 - b. What is the order as to costs?
8. Review is founded upon the provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. This was underscored by Mativo, J (as he then was) in *Republic v Public Procurement Administrative Review Board & 2 Others* [2018] eKLR (cited by the Plaintiff). It was held thus: -

“...Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay...”
9. However, as decreed by the Court of Appeal in *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, a distinction must be drawn between grounds of appeal and grounds for review. The court held as follows: -

“...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...”

10. In his application for review, the Applicant stated that this being the final appeal as the second appeal is barred, it is sufficient reason to have the Judgment of the court reviewed. The main ground for review is that this court was in violation of section 38 (1) of the Small Claims Act. Section 38 provides as follows;

Appeals

- (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.

11. This court was faulted for analyzing the Fire Report Documents on appeal, which was said to be a matter of fact and outside the provisions of Section 38 (1) of the *Small Claims Court Act*. The claim in the lower court was for compensation as a result of damages caused by fire in the suit premises. Both the Claimant and the Respondent had claims against each other through the Statement of Claim and the Counter-Claim respectively. The trial court was to apportion liability between the parties, and Judgment was entered in favour of the Claimant with the Respondent being apportioned 100% liability.

12. For this court to ascertain the issue of liability, that is the causation of the fire and which party was responsible, the court cannot shut its eyes to the documents adduced by the parties, which includes the Fire Reports filed by both parties. Proof of documentary evidence is a matter of law. Making a decision based on the evidence adduced is an issue of law. I find no reason to disturb the Judgment of this court by way of review.

13. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. I find no reason to deny the Respondent costs of the application.

14. Having found the application successful, the following orders flow therefrom;

- a. The application dated 28082024 has got no merit and the same is dismissed.
- b. Costs to the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 23RD DAY OF JUNE, 2025.

.....

F. WANGARI

JUDGE

In the presence of:

Mr. Mutwiri Advocate hb for Mureti Advocate for the Applicant

Mr. Sadik Advocate hb Ms. Mohamed Advocate for the Respondent



Ms. Getrude, Court Assistant

F. WANGARI J.

