



Gakarau v Kenyan Alliance Insurance Company Limited (Civil Miscellaneous 360 of 2012) [2025] KEHC 10698 (KLR) (Commercial and Tax) (3 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10698 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL MISCELLANEOUS 360 OF 2012**

F GIKONYO, J

JULY 3, 2025

BETWEEN

CHARLES GITAU GAKARAU PLAINTIFF

AND

KENYAN ALLIANCE INSURANCE COMPANY LIMITED DEFENDANT

RULING

Review

1. The significant order sought in the notice of motion dated 28th November 2024 is a review and setting aside of the judgment delivered on 2nd October 2024.
2. The notice of motion expressed to be brought under Order 45 of the Civil Procedure Rules, is premised upon grounds set out in the application and the supporting affidavit sworn by the defendant's legal manager, Linda Njenga, on 28th November 2024.
3. The application is made on the ground of account of an error apparent on the face of the record. The error is that the court delivered judgment before determining the defendant's application dated 9th June 2023 to reopen defence and call its witness to testify.
4. The defendant augmented the ground through its written submissions dated 24th February 2024, and the case of Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 others [2014] KEHC 2430 (KLR).
5. The application is opposed by the plaintiff through a replying affidavit sworn on 15th January 2025. The plaintiff contended that the application is bad in law and that the defendant is undeserving of the orders sought. He faulted the defendant for failing to secure the attendance of its witness and for failing to utilise technology by embracing virtual proceedings when its witness was out of the country.



6. The plaintiff asserted that the application of 9th June 2023 is res judicata as the defendant has sought similar orders through a previous application dated 26th April 2023 that was heard and dismissed by the trial court.

Analysis and Determination

7. The Court has the discretion to grant a review of an order or decree. Section 80 of the *Civil Procedure Act*. The discretion must be exercised based on reason and not on a whim. Potent grounds for which review may be granted are set out in Order 45 of the Civil Procedure Rules, to be: ‘discovery of new and important matter or evidence, or on a mistake or error apparent on the face of the record, or for any other sufficient reason’.
8. According to the defendant, the error on the face of record is in non-determination of its application dated 9th June 2023 to reopen its case and call its witness to testify.
9. In *Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006* as cited in the case of *Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR* the Court of Appeal held that: -

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh.”
10. Accordingly, the defendant’s application, which seeks to reopen the case, has to be based on strong grounds.
11. The defendant’s gravamen is that its application dated 9th June 2023 was not heard and determined before the delivery of judgment.
12. Of significance is, the application of 9th June 2023 seeks for similar orders which it sought in a previous application dated 26th April 2023 that was heard and dismissed by the trial court. It is therefore, res judicata.
13. This was not controverted by the defendant. The defendant only averred that
 4. ...One of the witnesses, William Munyoki, a government chemist, was however out of the country for official duty when the matter came for defence hearing and was unable to testify.
 5. The witness was out of the country for several months and given the age of this matter, having been filed in 2012, the defendant reluctantly closed its case on 26th April 2023. Parties were then directed to file their submissions and the matter was fixed for mention on 15th June 2023 to confirm compliance.”
14. The defendant simply failed to procure the attendance of its witnesses during the hearing and closed its case. This is not an error on the face of the record in the sense of order 45 of the CPR.
15. I am not satisfied that the defendant has established strong grounds for review, as required.
16. In the upshot, the defendant’s application dated 28th November 2024 is dismissed with costs for want of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 3RD DAY OF JULY, 2025



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F. GIKONYO M.

JUDGE

In the presence of: -

1. Wairegi for Plaintiff
2. Ms. Tambo for Awiti for Defendant
3. Kinyua C/A

