



REPUBLIC OF KENYA



**KENYA LAW**  
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**Munialo v Comity & another (Miscellaneous Reference Application  
12 of 2024) [2025] KEHC 9931 (KLR) (9 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9931 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MISCELLANEOUS REFERENCE APPLICATION 12 OF 2024**

**S MBUNGI, J**

**JULY 9, 2025**

**BETWEEN**

**STANELY MASINDE MUNIALO ..... APPLICANT**

**AND**

**JULIANA AUMA COMITY ..... 1<sup>ST</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. By way of a notice of motion application dated 14<sup>th</sup> April 2025, the applicant herein seeks the following orders;
  - a. That the application be certified as urgent (spent)
  - b. That the Honourable court hear and determine this matter in the first instance, and the services of the applications be dispensed with.
  - c. That the court be pleased to stay execution of the orders issued on 30<sup>th</sup> January 2025.
  - d. That the stay of execution orders be and hereby served upon Jakacha Auctioneers.
  - e. That the orders issued on 30<sup>th</sup> January, 2025 by this Honourable court be pleased to assess the fee payable on all the 17 items contained in the Respondent's bill of costs in the said Kakamega Magistrate Court Election Petition No. E001 of 2022 dated 22/09/2023.
  - f. That upon review and setting aside, in the alternative and without prejudice to the foregoing, the Hon. Court be pleased to remit the respondent's bill of costs for fresh assessment by a different election court within Kakamega station.
  - g. That the costs of this application be provided for



- h. That such further and other relief be granted to the objector/applicant as this court deems fit and expedient in the circumstances.
2. The application is premised on the grounds on the face of the application and the supporting affidavit of the applicant, Stanley Munialo Masinde.
3. The applicant avers that this court was wrong in denying to grant them a stay of the taxing masters ruling claiming that there was an error on record as the court agreed with the decision of the taxing officer the bill of costs as the bill of costs was not accompanied with any documents as outlined under order 21 Rule 9 A of the Civil Procedure Rules.
4. They faulted the ruling of this court in agreeing with the decision of the taxing master who in his discretion increased the costs with no justification.
5. According to the applicant, this court failed to appreciate that taxation of costs and assessment of costs meant the same thing.
6. They further claimed that the court erred in stating that their approach of reference was misconceived and that they should have opted for an appeal.
7. They pray that this court reviews its orders where they had initially requested a setting aside of the reference.

#### **Applicant's submissions**

8. In their submission dated 23<sup>rd</sup> May 2025 raised 5 issues for determination, being;
  - a. Does this application meet the threshold for review?
  - b. Does this Honourable court have jurisdiction to sit on a reference from the lower court and to assess the fee payable on all the 17 items contained in the respondent's bill of costs in the said Kakamega Magistrate Court Election Petition No. E001 of 2022 dated 2/09/2023?
  - c. Does this Honourable court have power in the alternative and without prejudice to the foregoing to remit the respondent's bill of costs for fresh assessment by a different election court within Kakamega station
  - d. Costs
  - e. Whether such further and other reliefs be granted to the objector/Applicant as this court deems fit and expedient in the circumstances.
9. On whether the application meets the threshold for a review, they quoted Order 45 (2) of the Civil Procedure Rules 2020 and cited the case of Republic vs. Public Procurement Administrative Review Board & 2 others (2018) eKLR and the supreme court decision in Ajit Kumar Rath vs. State of Orisa & others, 9 Supreme court cases on the court's discretion during a review.
10. They pray that this court find that this application meets the threshold to be reviewed and set aside the orders made on 30<sup>th</sup> January 2025 and reassess the fee payable in the 17 items, and in the alternative, refer it back to the Magistrate's court.
11. On whether the court has jurisdiction to sit on a reference from the lower court, they quoted Order 21 Rule 9A of the Civil Procedure Amendment Rules.



12. The applicant avers that this court erred by agreeing with the decision of the Magistrate's court election petition E001 of 2022 on the bill of costs although it was not accompanied by any supporting documents.
13. They hold that the award was unreasonable and punitive to the applicant, and the court should have corrected the punitive error by returning the bill for a proper assessment or deciding based on the law.
14. They submitted that the court had the jurisdiction to intervene in a wrong taxation claim by way of a reference and not an appeal; hence, that was an error on the part of this court. They opined that this court can sit on a reference from the lower court.
15. They finally pray that this court without prejudice assess the items on the bill of costs and it the alternative subject it for a fresh assessment.

### **Issue for determination**

16. Having carefully considered the application and the submissions, the main issue for determination by this court is whether the applicant has met the threshold for the grant of orders of setting aside and review of the orders issued by this court on 30<sup>th</sup> January 2025.

17. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows: -

#### Rule 1

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 order made 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 which he applies for the review.

18. It then follows that Order 45 provides for three circumstances under which an order for review can be made.
19. For the review orders to be allowed, the applicant must demonstrate to this court that there has been 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. Secondly, the applicant must demonstrate to the court that there has been some mistake or error



apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

20. In the instant application, the applicant prays for the setting aside of the orders made on 30/1/2025 on the grounds that there is an error apparent on the face of the record.
21. According to the applicant, the error apparent on the face of the record is that the court agreed with the taxing master on the bill of costs when it was not accompanied by any supporting documents.
22. The applicant states that this court made a mistake by agreeing with the decision of the taxing master in awarding the respondent costs that, in their opinion, were too high and further that it made an error in not recognizing that the taxation of costs and assessment were the same thing.
23. I have perused the ruling of this court dated 25<sup>th</sup> January 2025 and note that the court did not agree with the decision of the taxing master as alluded to by the applicant. This court discussed the jurisdiction to entertain the matter of reference and dismissed this application on the grounds of procedural defects, stating that the issues raised would have been determined by issues of an appeal as opposed to a review.
24. I note that the court did not delve into the substantive issues on the decision of the taxing master on the assessment of the bill of costs.
25. The errors raised by the applicant was not self-evident. The Court of Appeal in *National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996 (UR)* held that;

“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. “

26. In *Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR* the court stated:

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 provisions of law cannot be a ground for review.

The court went on to say: -

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 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 purposes 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. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record



if it is not manifest or self-evident and requires an examination or argument to establish it.

27. From the above, it is clear that the error ought to be so glaring on the face of it that there can possibly be no debate about it. An error which has to be established by a long, drawn-out 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.
28. It is thus my considered view that the applicant ought to have filed an appeal against the ruling of this honourable court as opposed to this application, which did not fall within the confines of the parameters prescribed for review.
29. Accordingly, the applications dated 14<sup>th</sup> April, 2025, lack merit and is hereby dismissed with no orders as to costs.
30. It is hereby so ordered.
31. Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 9<sup>TH</sup> DAY OF JULY, 2025.**

**S.N MBUNGI**

**JUDGE**

In the presence of:

Court Assistant – Elizabeth Agong'a

Mr Wendo for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents present online.

