



**Shitanda v West Kenya Sugar (Civil Appeal E025 of 2022)  
[2025] KEHC 11206 (KLR) (29 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11206 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL E025 OF 2022**

**RK LIMO, J  
JULY 29, 2025**

**BETWEEN**

**DAMARIS NASIMIYU SHITANDA ..... APPELLANT**

**AND**

**WEST KENYA SUGAR ..... RESPONDENT**

**RULING**

1. Damaris Nasimiyu Shitanda, the applicant herein has moved this court vide a Notice of Motion dated 25/7/24 for the following reliefs/orders namely;
  - i. Spent.
  - ii. That this court be pleased to set aside the orders of 5/7/24 striking out the appeal.
  - iii. That upon grant of prayer (ii) this court be pleased to set down the appeal for hearing.
  - iv. The costs be provided.
2. The applicant has based his prayers on the following grounds namely;
  - a. That the judgment was delivered on 5/7/24 where the appeal was struck out for failure to file Record of Appeal.
  - b. That the applicant had actually filed the Record of Appeal on 31/3/2024 and there is a possibility that it was misplaced from the court file.
  - c. That there is a clear mistake on the face of the record which was occasioned by Registry and that the same should not be visited on the applicant.
  - d. That the applicant is desirous to have his appeal determined on the merits and is ready to cooperate with directions given.



- e. That the application is made in good faith and no prejudice will be occasioned to any party if it is allowed.
  - f. That this court should grant the orders in the interest of justice.
3. The applicant has sworn a supporting affidavit dated 25/7/24 where she has reiterated the grounds listed above. She has exhibited the copy of the judgment sought to be reviewed and the Record of Appeal she alleges was filed.
  4. In her written submissions dated 31/10/24 done through her counsel M/s Arusei Chepchumba & Co Advocates, the applicant invokes the provisions of Section 80 Civil Procedure Act and Order 45 Rule 1 of Civil Procedure Rules and contends that her application is riding on an error on the face of the record.
  5. She submits that her appeal was struck out for the simple reason that the court found that Record of Appeal had not been filed yet according to her there was a Record of Appeal filed on 31/3/23.
  6. She claims that following the directions of the court on 13/6/2023 a copy of the Record of Appeal was availed through her counsel. She regrets that the Record of Appeal was not placed on the court file despite the fact that the same had been filed and availed.
  7. The respondent has opposed this application through grounds of opposition dated 8/10/2024 and written submissions dated 11/11/24 done through learned counsel Masinde & Co Advocates.
  8. The respondent faults the applicant for not extracting the order sought to be reviewed and maintains that there was no mistake on record to warrant a review.
  9. The respondent contends that this court is now functus officio after the delivery of judgment dated 5/7/24 and that the remedy for the applicant lies in the higher court.
  10. It faults the applicant for laches and indolence for failing to file Record of Appeal and that the intended appeal has no chance of success.
  11. The respondent submits that litigation ought to come to an end pointing out that this matter has been pending since 2021.
  12. This court has considered this application and the response made. This is an application for review brought under Order 45 Rule 1 of the Civil Procedure Rules. Order 45 Rule 1 provides.

“ 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”.



13. The applicant submits that she is aggrieved by the decree made in the judgment dated 5/7/25 because her appeal was struck out on grounds that there was no Record of Appeal filed and therefore incompetent.
14. The applicant has sworn an affidavit that there was a Record of Appeal filed and blames the Registry for failure to place the said Record of Appeal on the court file.
15. I have considered the objection raised by the respondent that the application herein is incompetent for failing to annex the order/decreed dismissing the suit but looking at the application, there is a copy of judgment dated 5/2/2024 which the applicant is seeking to have it reviewed. The objection that there is failure to annex the copy of order on the application is therefore not well grounded. It is sufficient in my view to annex a copy of either a ruling or the judgment sought to be reviewed because that is the substance of the matter.
16. The applicant's averment that there was a Record of Appeal filed but misplaced has not been challenged by the respondent. I have looked at the file and I have seen a Record of Appeal dated 30/3/23 on the file. The same appears to have been received in the Registry on 31/3/23 as per the court stamp. Again that fact is not contested and so it appears that the applicant has established sufficient cause to warrant this court exercise its discretion pursuant to Order 45 Rule 1 of Civil Procedure Rules. In exercising those revisionary powers the court is not functus officio because Section 80 of *Civil Procedure Act* gives the court powers to review an order or decree under the guidelines provided under Order 45 Rule of the Civil Procedure Rules.
17. This court finds that revising the order striking out the appeal will not prejudice the respondent. It has a chance to show or demonstrate that the appeal filed lacks merit or basis.

In the premises, this court for the interest of justice finds that it is fair to open the door to the applicant to access justice rather than closing it particularly when there are chances that the Record of Appeal was not placed in the court file through some inadvertence from the court staff.

I will allow the application dated 25/7/25 by revising the order dismissing the appeal with an order reinstating the same. I will direct the parties to take a mention date upon delivery of this ruling to highlight the respective submissions filed.

Costs of this application shall be in the appeal.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 29<sup>TH</sup> DAY OF JULY, 2025.**

**HON JUSTICE R.K. LIMO**

**KITALE HIGH COURT**

Ruling delivered in open court

In the presence of

Mutunga holding brief for Masinde for the respondent

Gemenet for the appellant

Duke/Chemosop- court assistants

