David & 2 others v Bakaya (Civil Appeal E200 of 2022)
[2025] KEHC 12790 (KLR) (Civ) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12790 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E200 OF 2022

AC MRIMA, J

SEPTEMBER 18, 2025

BETWEEN

ONYANGO NYAMBUOGI DAVID ..... 1ST APPELLANT

LATEMO 22 TRAVELLERS SACCO ..... 2ND APPELLANT

SAMUEL KAROKI ..... 3RD APPELLANT

AND

PAUL WAFULA BAKAYA ..... RESPONDENT

RULING

Introduction:

1. Dissatisfied with the judgment in this appeal delivered on 27th June 2024, the Appellant filed an application dated 25th July 2024 seeking the review of the said judgment.

2. The application was vehemently opposed and was eventually heard by way of written submissions, hence, this judgment.

The Application:

3. The application was instituted by Paul Wafula Bakaya, the Original Respondent in the appeal as the Applicant and was brought under Order 45 and 51 of the Civil Procedure Rules and section 3A and 80 of the *Civil Procedure Act*. It was supported by the Applicant's deposed to on a similar date.

4. In the grounds and affidavit in support of the application, the Applicant claimed that the Learned Judge erred in failing to note that the Respondents were duly served with the Proclamation Notice and Warrants of Attachment which was received by the driver one Mr. Onsongo on 21st September 2021. It was his case that it is imperative that this Court reviews the judgment and considers his evidence as

presented in pages 37, 38, 39, 100, 101 and 102 of the Record of Appeal, being warrants of Attachment of movable property, Warrants of Sale of Movable Property and a Proclamation notice. He posited that it was in the best interest of justice and fairness that the Court considers the important relevant evidence on record at the earliest opportunity to allow the review herein. In conclusion, it was his position they had brought the Application without unreasonable delay and that the Respondents would suffer no prejudice if it were allowed.

5. In his written submissions dated 23rd April 2025, the Applicant argued that the Application was within the provisions of section 80 of the *Civil Procedure Act* and Order 45 of the Rules therein. He claimed that the Application was not an appeal since there is an apparent error on record as the Judge failed to notice that the Respondents were issued with the Notice and the Proclamation form to sign, which is documented in the record of appeal.

6. He argued that the Court did not consider pages 37, 38, 39, 100, 101 and 102 of the record of appeal, being the warrants of attachment of movable property, warrants of sale of movable property and proclamation notice hence making a judgment for an unprocedural execution process misplaced. He asserted that injustice stands to befall upon him unless the error is corrected. He urged this Court to allow the application.

The Respondents' case:

7. The Respondents challenged the application through the Replying Affidavit deposed to by their Advocate, one Janerose Nanjira, deposed to on 1st November 2024. At the onset, it was her case that the application was misconceived and ought to be dismissed. To that end, she deposed that it was indeed true that the Respondent had moved to Court through the application dated 17th February 2022 and 25th February 2022 seeking orders for the release of the motor vehicle KBV 031A, the enlargement of time to comply with the Court orders and to file their response. She asserted that in the latter application, Respondents/Original Appellants herein sought orders for cancellation of the transfer of the motor vehicle and its unconditional release. She deposed that on 23rd March 2022, the Court dismissed both applications on the ground that they had been overtaken by events; the vehicle had already been auctioned.

8. Learned Counsel further deposed that dissatisfied with the foregoing, the Respondents preferred an appeal and filed a Memorandum of Appeal dated 29th March 2022. The appeal was eventually allowed when this Court found that the execution process was unprocedural and irregular. Based on the foregoing, it was her case that the process of reasoning cannot be treated as an apparent error on the face of the record justifying the exercise of power of review and the an erroneous decision cannot be corrected in the guise of exercise of the power of review.

9. She argued that the application entails a re-appraisal of the evidence and re-analysis of the decision to establish whether or not the execution process conducted by the Auctioneers was procedural and regular, a power outside the scope of review jurisdiction.

10. The Respondents did not file written submissions.

Analysis:

11. Section 80 of the *Civil Procedure Act* empowers the High Court to review its decree or orders as follows;

> 80. 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 judgement to the Court, which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

12. Order 45 Rule 1 of the Civil Procedure Rules sets down the criteria for review applications as follows: -

1. Application for review of decree or order:

(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.

13. Courts of superior jurisdiction have variously interpreted the foregoing provisions. In Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR the Court set out the principles to consider in the review of its own decisions. It was observed;

i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an Application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge

and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.

14. The Court of Appeal in Civil Appeal No. 2111 of 1996, National Bank of Kenya -vs- Ndungu Njau, remarked on review applications 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 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 proceed on an incorrect expansion of the law.

15. In Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR) the Court considered the import of some mistake or error apparent on the face of the record as captured in Order 45 of the Civil Procedure Rules. It rendered itself thus: -

> ... Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.
>
> The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.

16. Turning back to the factual foundation of the application, it is discernible the Applicant's quest for review is primarily hinged on the Judges failure to consider evidence lending credence to the fact that the Respondents were issued with warrants of attachment and sale of movable property and notice and proclamation thereof. This Court has had a look at the Record of Appeal. At pages 37, 38, 39, 100, 101 and 102 are the warrant of attachment of movable property, warrant of sale in execution of judgment and the notice by the auctioneers to the Respondents of public auction of the motor vehicle registration No. KBV 031A. In its judgment, the Court isolated the main issue for determination as whether the auction of the vehicle KBV 031A was lawfully and procedurally done by the auctioneers.

17. Upon considering the evidence the Court found that the Applicant herein had not sufficiently denied that claim of irregular attachment. For avoidance of doubt, the learned Judge observed that;

> .... The appellants only realized that their vehicle was up for sale when it was being attached by the auctioneers. This has not been sufficiently denied by the Respondent who tendered no evidence to show that they followed the right procedure.

18. The Court upon making the finding that the auction was unlawful made the following remarks;

> ... However, the court cannot entertain unlawful and unprocedural acts while taking shelter under the assertion that it has been overtaken by events.

19. Having reproduced the contents of the record and juxtaposed it against the pronouncement of the Court, it is immediately discernible that the Court made a reasoned finding on the irregularity of the auction. It observed that there was no evidence from the Applicant that the process culminating in the auction was regular. In its judgment, the Court considered the record and made a conclusive finding. The propriety of the findings of the Court is by no means a self-evident oversight or omission. The Applicant must do more than simply refer the Court to the warrants of attachment and of sale and ask this Court to depart from its judgment. Such process entails the reopening of evidence and reassessment of the question that the judgment's debtor's assets were correctly identified, assessment of evidence of proper service of notice to execute among other things which is a long-drawn process of reasoning that may ultimately yield two opinions.

20. In Nyamogo & Nyamogo v Kogo (2001) EA 170 the Court discussed what would constitute a long-drawn process. It observed as follows;

> .... An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 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. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.

21. Deriving from the foregoing, for the Applicant to subsequently invite this Court to make an alternative finding based on the very warrants of attachment and warrants of sale without pointing out the error apparent on record, he is essentially asking this Court for a re-appraisal of the evidence, a function of an appellate Court. Taking cue from the decision in Republic -vs-Advocates Disciplinary Tribunal Ex parte Apollo Mboya case (supra) an erroneous decision on claimed evidentiary issue, which is the thrust of the Applicant's case, cannot be the basis upon which he seeks a review. The Applicant's attempt to undo the judgment, hence, fails.

Disposition:

22. From the foregoing discussion, this Court finds no merit in the application and makes the following final orders: -

(a) The Notice of Motion dated 25th July 2024 is hereby dismissed.

(b) Costs to the Appellants/Respondents.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Ms Buluma, Learned Counsel for the Appellants/Respondents

Michael/Amina – Court Assistants.