



REPUBLIC OF KENYA



KENYA LAW
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**Ombok v Sukari Industries Ltd (Civil Appeal 31 of 2019)
[2024] KEHC 12369 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL 31 OF 2019
KW KIARIE, J
OCTOBER 17, 2024**

BETWEEN

AGUNYO PETALIS OMBOK APPELLANT

AND

SUKARI INDUSTRIES LTD RESPONDENT

RULING

1. Agunyo Petalis Ombok moved the court through a Notice of Motion dated the 22nd day of April 2024 under sections 3, 3A and 99 of the [Civil Procedure Act](#), Order 45 Rule 1 and Order 51 of the [Civil Procedure Rules](#). He is seeking the following orders:
 - a. That this honourable court be pleased to review its judgment dated and delivered on 30th November 2021 to capture the proper arithmetic calculations and, subsequently, the right quantum of damages.
 - b. That costs of this application be provided for.
2. The application was premised on the following grounds:
 - a. That this honourable court delivered judgment in favour of the appellant/applicant on 30th November 2021.
 - b. That there is no appeal which has been preferred against the said judgment as at the time of filing this application.
 - c. That there is an error apparent on the face of the record on the last page of the judgment regarding the court's arithmetic calculations, which is fit for review under section 99 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#).



- d. That there is an error involving the assessment and calculations of damages payable to the appellant.
 - e. That the error is only on the arithmetic calculation and does not go to the rationale or reasoning of the court.
 - f. That the appellant/applicant's attention was drawn to the error when applying for warrants of execution to enable him to realize the fruits of the judgment.
 - g. That it is in the interest of justice and fairness that this application be allowed by granting the orders sought.
3. The respondent opposed the applications and stated:
- a. This court did not pass the decree, which is subject to the application for review.
 - b. That there is no error on the face of the record.
 - c. The application was brought after an excessive and unreasonable delay.
 - d. That there is no prejudice or miscarriage of justice to warrant the review.
4. Order 45 Rule 1 provides as follows:
- (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.
5. The appellant applicant drew the attention of this court to paragraph 10 of the judgment dated the 30th day of November 2021. The paragraph reads:
10. In the instant case, the appellant was entitled to damages. The learned trial magistrate had assessed the damages for the expected 190 tones $\times 3800 = 144,400.00$. I therefore set aside the judgment by the trial magistrate and substitute it with an award of ksh 144,400.00 in favour of the appellant, less the transportation costs to be agreed on by the parties with costs in this court and the lower court.
6. The applicant has argued that the arithmetic is erroneous. According to him, the damages ought to be ksh 722,000.00. This is the result of multiplying 3800 by 190 tones.
7. The respondent contended that the trial court arrived at ksh 144,400.00 damages. The formula applied was $0.2 \times (70 + 65 + 55) \times 3800$.



8. When this court allowed the appeal, it did not deviate from the award by the trial magistrate. This was clear from paragraph ten. It is, however, clear that there was an error in calculations in paragraph ten. The formula should have been $0.2x(70+65+55) \times 3800$, equal to ksh 144,400.00 instead of 3800×190 , which equals ksh 722,000.00. I, therefore, correct the error and amend paragraph ten with the formula used by the trial court and arrive at general damages of ksh 144,400.00 in favour of the appellant, less the transportation costs to be agreed on by the parties with costs in this court and in the lower court.
9. Since the court's error occasioned this application, each party will bear its costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 17TH DAY OF OCTOBER 2024

KIARIE WAWERU KIARIE

JUDGE

