



Masaka v Mwenesi t/a Musalia Mwenesi Advocates (Miscellaneous Civil Suit E354 of 2021) [2025] KEHC 13523 (KLR) (Civ) (25 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13523 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL SUIT E354 OF 2021
JN MULWA, J
SEPTEMBER 25, 2025**

BETWEEN

BERNARD SHINALI MASAKA PLAINTIFF

AND

**STEPHEN MUSALIA MWENESI T/A MUSALIA MWENESI
ADVOCATES RESPONDENT**

RULING

1. The Applicant Bernard Shinali Masaka by his application dated 14/02/2023, being dissatisfied with the ruling of the court dated 27/10/2022 seeks an order of review under Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*, as well as the Decree issued on 14/12/2022.
2. He also seeks an order that the Respondent do pay to him or his nominees Kshs. 874,172.32 together with interest at 14% from 15/05/2012 being the balance he (Respondent) holds on his behalf after set-off of his advocate-client costs as assessed by the Taxing Officer with interest from 15/05/2012.
3. The Applicant in his supporting affidavit further posits that there is no reason why the Respondent has failed to pay to him the above sum and thus seeks interest on the same at court rates.
4. In opposition to the application, the Respondent swore a Replying Affidavit sworn on 5/03/2025 in which he posits that the decree sought to be reviewed is not annexed, and that the Applicant by a Notice of Appeal dated 29/10/2022 sought or intended to appeal against the ruling subject of this ruling.
5. In further objection, the Respondent avers that the judge in dismissing the Applicants suit held that there was no basis upon which the Applicant was entitled to payment of the whole of the taxed party and party costs when he had not paid in full the Respondents fees.



6. The Respondent further posits that as the application is for review, under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, the court cannot be called upon to exercise its discretion whether to order payment of the sum sought or not without amendment of the originating summons that started the suit and also in view of there being no error apparent on the face of the record of the ruling of the judge, as is envisaged under Order 45 CPR. He has urged for dismissal of the application with costs.

Both parties did not file submissions.

Analysis and Determination

7. It is evident that the Applicant seeks an order of review of the ruling of the court dated 27/10/2022 under Order 45 Rule 1 CPR; on account of discovery of new and important matter or evidence which after due diligence, was not within the Applicants knowledge, or on account of some mistake or error apparent on the face of the record, or any sufficient reason.

8. The provision provides the parameters under which an order of review may be granted:-

(i) 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.

9. It is on record that the Applicant intended to appeal against the impugned ruling as demonstrated by filing the Notice of Appeal dated 29/10/2022.

None of the parties told the court whether or not the actual appeal has ever been filed or not.

10. For the record, Section 80 of the Civil Procedure Act gives the Court Power of review while Order 45 sets out the rules which restrict the grounds of review, jurisdiction and scope of review as stated therein.

In absence of clear indication by the parties of an existence of a competent appeal before the court of appeal, the court will, in exercise of its discretion take the view that no appeal has been filed, the Notice of Appeal only being an intention by a party to file an appeal as held in the case of Shah & 7 Others v. Mombasa Bricks & Tiles Ltd & 5 Others (2023) eKLR.

11. A review order may be granted when the court considers it necessary to correct an apparent error or omission on the part of the court. The error must be self-evident and should not require an elaborate argument to be established see Nyamogo & Nyamogo v. Kogo wherein the court rendered that:-

“an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judiciously on the facts of each case”.

12. The court continued to state that:-

“There is 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 be conceivably be two opinions can hardly be said to



be an error on the face of the record... mere error or wrong view is certainly no ground for review though it may be one for appeal”.

13. I have carefully considered the impugned ruling to find out if the application meets the above criteria under Order 45 rule 1 [CPR](#).

What comes to mind is whether there is a mistake or error on its face. The party and party bill of costs was taxed at Kshs. 6,372,935.32 with interest and costs.

Ordinarily, party and party costs are held in trust for the client as stated at Section 80 of the [Advocates Act](#) that provide:-

“ Any person, who being an Advocate is entrusted in his professional capacity with any money, valuable security or other property to retain in his custody with instructions to pay or apply it for any purpose in connection with his duty as an advocate fails to pay, apply or account for the same after completion the purpose for which it was given, shall be guilty of an offence.

14. There is no dispute that the Respondent received Kshs. 6,372,943.32 from IEBC being payment of costs in the Election Petition No. 2/2008 at Kakamega as found by the judge in the ruling. These costs are provided under Schedule VI part A of the [Advocates Remuneration Order](#).

The law provides that party and Party Costs belong to the client, while Advocate-Client Costs belong to the Advocate as stated under Schedule VI Part B as stated in the case of [Republic Vs. Lucas M. Maitha Chairman, Betting Control and Licencing Board & 4 Others Ex-parte Interactive Gaming and Lotteries Ltd.](#)

15. It is trite that the Advocate is not entitled to the whole amount taxed in a party and party bill of costs, but is entitled to costs as may be taxed by the taxing officer.

Further, as ably stated by the judge in the impugned ruling citing the case of [Samuel Omondi V. Lore & Co. Advocates](#) [2022] eKLR,... Monies taxed in a party-to-party bill of costs belong to the successful client, and the advocate is generally under an obligation to pay over the same to the successful client, unless by an agreement between the advocate and the client the said costs may be used otherwise.

16. The Party and Party costs lodged by the Respondent dated 16/01/2012 was taxed and certificate of taxation issued on 12/05/2012 for Kshs. 6, 372, 935,32.

On the other hand, the Advocate-Client Bill of Costs was taxed and a certificate of Taxation dated 28/04/2021 issued on 26/05/2021 was in the sum of Kshs. 5,498,763 considering the above two, the difference of Kshs. 874,172.32 is money that should have been paid to the client by the Respondent Advocates, after a set off from the total sum of Kshs. 6,372,935.32 received from IEBC a fact not disputed or challenged.

17. It is therefore self-evident that the judge in the impugned ruling dated 27/10/2022 made an error, which is self-evident on the face of the record thus justifying an exercise of discretionary power granted to the court under Section 80 of the [civil Procedure Act](#).

This is so in my view, because all the material facts and documents were available at the time the decision/ruling was made. Nothing new has been brought to the court’s attention to warrant review.

18. Further, the learned judge while analyzing the matter before him ably cited the same legal principles and legal provisions but at the end, denied the Applicant the prayers he sought and proceeded to dismiss the suit with costs.



I find this to be a classic case when a court is mandated to exercise its discretion under the power of review to correct an error made by the court.

19. In the end, I find that the Applicant has met the threshold for grant of the prayer he seeks at prayer 2 of the motion. There is no substance in the respondent's opposition to the motion.

Consequently, the motion dated 14/02/2023 is allowed.

The Respondent is ordered and directed to pay the Applicant the sum of Kshs. 874,172.32 with interest at court rates from 15/06/2012 until payment in full.

Each party shall bear own costs on the motion.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2025.

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JANET MULWA.

JUDGE

