



REPUBLIC OF KENYA



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**Aseka v Mwanja (Civil Appeal E100 of 2023)
[2025] KEHC 14077 (KLR) (6 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14077 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E100 OF 2023**

S MBUNGI, J

OCTOBER 6, 2025

BETWEEN

PATRICK ASEKA APPELLANT

AND

ZAKAYO MWANJA RESPONDENT

JUDGMENT

Background

1. This appeal arises from the ruling of the Chief Magistrate's Court at Kakamega delivered on 8th June 2023 by Hon. J.R. Ndururi, Principal Magistrate, in Kakamega CMCC No. 342 of 2017.
2. The dispute traces back to Kakamega CMCC No. 342 of 2017, in which the Plaintiff, Rick Aseka, filed an application by way of Notice of Motion dated 15th March 2023 seeking review of earlier court orders.
3. Upon consideration, the learned trial Magistrate held that the Notice of Motion dated 15th March 2023 lacked merit and directed that each party bear their own costs.
4. Being aggrieved by the decision of the learned magistrate, the Appellant lodged a Memorandum of Appeal in which it set down the grounds of appeal as follows: -
 - i. That the learned trial Magistrate erred both in law and in fact in failing to address himself to the legal principles governing an application for review.
 - ii. That the learned trial Magistrate misdirected himself both in law and in fact in failing to find that the Appellant was entitled to the fruits of litigation.
 - iii. That the learned trial Magistrate erred both in law and in fact in failing to judiciously exercise the discretion bestowed upon him under Order 45 Rule 1 and 2 of the Civil Procedure Rules.



- iv. That the decision of the learned trial Magistrate has denied the Appellant the right to a fair trial, hearing and is against his constitutional rights.
 - v. That the learned trial Magistrate failed to analyze the Appellant's pleadings and submissions.
 - vi. That the decision of the learned trial Magistrate has led to a miscarriage of justice
5. For the foregoing reasons, the Appellant prays that this appeal be allowed, the ruling of the Chief Magistrate's Court delivered on 8th June 2023 be set aside and/or varied, that his application dated 15th March 2023 be allowed, that the Respondent be condemned to pay the costs of both the appeal and the lower court application, and that this Court do issue such further orders as it may deem fit in the circumstances.
 6. The court issued directions that the appeal be canvassed by written submissions.

Appellant's Submissions

7. The Appellant challenged the trial court's ruling of 8th June 2023, which dismissed his application for review of the orders allowing the Respondent to settle the decretal sum of Kshs. 264,358/= by monthly installments of Kshs. 10,000/=. He argued that the repayment plan was too low and prejudicial, as it would take over two years to clear the debt.
8. The Appellant submitted that under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules 2010, the trial court had jurisdiction to review its orders on sufficient grounds. He maintained that the Respondent had failed to demonstrate his means or earnings to justify the installment plan.
9. Reliance was placed on *Bernadette Namwanja v Nick Owuor t/a Lake Motors Garage* [2020] eKLR, where the Court directed that decretal sums be paid within twelve months, emphasizing that a decree holder's rights take priority over those of a judgment debtor.
10. The Appellant argued that justice demanded prompt repayment since the Respondent had unlawfully harvested and sold his sugarcane in 2016, benefiting from proceeds that rightfully belonged to the Appellant. He urged the Court to consider the oxygen principles under sections 1A and 1B of the *Civil Procedure Act*.
11. For these reasons, the Appellant prayed that this Court reviews and varies the ruling of the trial court by ordering that the decretal sum be paid within twelve months, and that he be awarded the costs of this appeal.

Analysis and Determination

12. Upon a careful evaluation of the pleadings filed and submissions, the singular issue is whether the learned Magistrate erred in law and fact by dismissing the Appellant's application for review of the orders allowing payment of the decretal sum in installments.
13. The jurisdiction to review a court's orders is circumscribed by statute to prevent abuse and ensure finality in litigation.
14. The provision of Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit

15. This is elaborated in Order 45 Rule 1 of the Civil Procedure Rules, 2010, which states

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.

16. The above provisions circumscribe the jurisdiction of this Court in an application for review. The conditions set out under Order 45 of the Civil Procedure Rules, 2010, are not optional hurdles but mandatory thresholds.

17. That said, the statutory imperatives do not license indolence or permit litigants to re-litigate matters on a whim. The Applicants having invoked Order 45 of the Civil Procedure Rules, the pivotal question is whether they have satisfied the stringent standard enunciated in the authorities governing review

18. The Court of Appeal in *Kithoi v Kioko* (1982) KLR 177, pronounced itself on the above as follows

“..... the Civil Procedure Rules Order XLIV demands inter alia, that an application for review must be based in the discovery of new and important evidence which was not within the applicant’s 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 on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, falling which the application will not be granted.”

19. The court in *National Bank of Kenya Ltd V Ndungu Njau* [1997] eKLR held:

“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 provision of law cannot be a ground for review

20. The Court of appeal in *Nyamogo & Nyamogo Advocates v Kogo* [2001] EA 173 pronounced itself on this as follows:

An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to 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 or 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal

21. From the foregoing, the grounds are limited to: discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or any other sufficient reason. The application must be made without unreasonable delay.
22. It is clear that review, is not a vehicle for re-arguing the case or substituting an appeal, nor can it address an alleged misconstruction of law or a different judicial view. Similarly, review is not intended to correct perceived errors in judgment or to allow parties to ventilate issues that could have been raised earlier.
23. Coming back to the matter herein, The orders for payment in installments were made pursuant to Order 21 Rule 12 of the Civil Procedure Rules, 2010, which grants the court discretion to direct such payment for sufficient reason, either in the decree or post-decree with the decree-holder's consent
24. Here, the record indicates the installments of KShs. 10,000/= were deemed appropriate based on the parties' representations. Challenging the quantum or duration is a matter for appeal, not review, as it requires re-evaluation of evidence and merits, which is impermissible under Order 45.
25. In essence, the appeal recasts arguments better suited for an appeal against the original orders, not their review. As reiterated in *Nkubitu v Memeu* (Civil Appeal E005 of 2024) [2024] KEHC 5864 (KLR), review is not a substitute for appeal, and the court must guard against attempts to prolong litigation unduly.
26. For these reasons, I find the appeal lacks merit. The learned Magistrate properly exercised discretion in dismissing the review application, and no grounds exist to set aside or vary the ruling of 8th June 2023.

Orders

- i. The appeal is hereby dismissed.
 - ii. Each party shall bear their own costs of the appeal.
27. Right of Appeal 30 days, explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF OCTOBER, 2025

S.N. MBUNGI

JUDGE

In the presence of:

Court Assistant: Elizabeth Agong'a

Mr. Idi for the Applicant present.

