



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mambo v Tero (Civil Appeal E033 of 2021)  
[2025] KEHC 15476 (KLR) (30 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15476 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E033 OF 2021**

**AC BETT, J**

**OCTOBER 30, 2025**

**BETWEEN**

**TITO M MAMBO ..... APPELLANT**

**AND**

**HENRY ACHEHA TERO ..... RESPONDENT**

*(Being an appeal from the Judgement of Hon. E. Malesi (PM)  
in Kakamega CMCC. 116 of 2018 dated 8th June 2021)*

**RULING**

**Introduction**

1. By a Notice of Motion dated 5<sup>th</sup> December 2024, the Appellant sought the following orders:
  1. Spent
  2. That there be a stay of execution of the decree herein and the decree of the lower Court in Kakamega CMCC No. 116 of 2018 pending the hearing and determination of this application inter partes.
  3. That the Judgment delivered on 21<sup>st</sup> July 2023, the decree, and further orders herein be reviewed and/or set aside.
  4. That the costs of this Application be provided for.
2. The application is predicated on the grounds set out on the face of the Notice of Motion and is supported by the affidavit of Tito M. Mambo, the Appellant herein.
3. In response, the Respondent filed a Replying Affidavit sworn by Henry Acheha Tero opposing the application.



4. The matter was thereafter set down for directions, and parties were required to file their respective submissions regarding the Application.

## **Background**

5. On 8<sup>th</sup> July 2021, the Appellant lodged the present appeal through a Memorandum of Appeal filed by his Advocate on record. The appeal was subsequently admitted for hearing.
6. On 19<sup>th</sup> May 2022, when the matter came up before Musyoka J., the court directed that the appeal be disposed of by written submissions to be filed within thirty (30) days. The Appellant was to file and serve his submissions first to enable the Respondent to file and serve his, and the matter was fixed for mention for further directions on 14<sup>th</sup> July 2022.
7. The Appellant avers that following the said directions, the matter later came up for mention on several occasions without his knowledge or that of his Advocate, and that the appeal was fixed for judgment without notice to them before they had filed their written submissions.
8. He asserts that no Notices were ever issued notifying him that the trial Judge had, upon transfer to Busia, taken the court file to write the judgment.
9. The Appellant's account is that his Advocate only became aware in March 2024 that judgment had been delivered on 21<sup>st</sup> July 2023, upon being served with the Respondent's Bill of Costs for taxation.
10. He states that his attempts to trace the court file before judgment were unsuccessful, reiterating that he was denied an opportunity to be heard. He contends that had he been informed of the judgment date and the whereabouts of the court file, he would have made efforts to file submissions.
11. The Respondent disputes this narrative and maintains that the Appellant was duly accorded an opportunity to be heard. In particular, he points to the court's clear directions of 19<sup>th</sup> May 2022 and to reminders issued thereafter, including a letter dated 15<sup>th</sup> May 2023 served upon the Appellant, urging compliance with the court's directions.
12. The Respondent also contends that on 27<sup>th</sup> October 2022, the court fixed a judgment date of 3<sup>rd</sup> March 2023, which was later vacated with a direction that judgment would be delivered on notice.
13. The Respondent's further account is that on 2<sup>nd</sup> June 2023, the court fixed 21<sup>st</sup> July 2023 as the date for delivery of judgment, and that the Appellant's counsel had, in 2022, served Mention Notices dated 26<sup>th</sup> February 2022 and 22<sup>nd</sup> July 2022 for directions and fixing of judgment date respectively. According to the Respondent, when the matter came for fixing of judgment date, the Appellant had still not filed submissions as directed.
14. The Respondent argues that the Appellant's non-compliance with the court's directions cannot be attributed to the court and that the delay since judgment was delivered on 21<sup>st</sup> July 2023 is inordinate.
15. He further notes that the matter has progressed to the stage where the Bill of Costs is pending taxation, and avers that the present application is an afterthought aimed at frustrating execution of the judgment

## **Appellant's Submissions**

16. The Appellant submits that the prayers in his application should be granted, relying on the grounds on the face of the application and the supporting affidavit sworn on the same date.
17. The Appellant was the Defendant in Kakamega CMCC No. 116 of 2018, where judgment was entered against him, leading to the filing of this appeal. The appeal was admitted, and on 19<sup>th</sup> May 2022, the



court directed that it be disposed of by written submissions to be filed within thirty (30) days, with a Mention scheduled for 14<sup>th</sup> July 2022.

18. The Appellant submits that thereafter the matter came up for Mention without his knowledge, and was fixed for Judgement in his absence. He avers that he became aware in March 2024 that Judgement had been delivered on 21<sup>st</sup> July 2023 when served with the Respondent's Bill of Costs.
19. He argues that during the period in question, the trial Judge was transferred to Busia and took the court file to write the judgment without any notice to the parties. He contends that he had valid grounds of appeal that, if considered, could have influenced the court's decision.
20. He relies on Order 45 Rule 1 of the Civil Procedure Rules, arguing that there is an error apparent on the face of the record, as no notice was issued notifying the parties that the file had been taken by the trial Judge on transfer to write the judgment. He further notes that no judgment date was ever served upon him.
21. The Appellant also contends that the trial court failed to appreciate that the payment in dispute was for construction bricks duly delivered, as evidenced by a receipt on record, and not a loan as alleged by the Respondent.
22. The Appellant urges the court to allow the application, review and set aside the Judgement delivered on 21st July 2023 with the resultant decree and orders, and grant him an opportunity to be heard on the appeal.

### **Respondent's submissions**

23. The Respondent asserts that an appeal was lodged and admitted following the Appellant's dissatisfaction with the judgment in Kakamega CMCC No. 116 of 2018. On 19<sup>th</sup> May 2022, the court directed that the appeal be disposed of through written submissions, with the Appellant to file and serve his submissions first.
24. The Respondent avers that on 15<sup>th</sup> May 2022, correspondence was sent to the Appellant reminding him of the court's directions, but no action was taken in response. It is contended that the Appellant's claim of not being allowed to be heard is therefore untrue.
25. It is submitted that by 27<sup>th</sup> October 2022, six months had passed since the court granted thirty (30) days to the Appellant to file submissions and serve them, and a similar period to the Respondent thereafter.
26. By the time a judgment date was given, the timelines had lapsed, and whether the trial Judge had been transferred with the court file was immaterial, as the Appellant had already failed to comply.
27. The Respondent maintains that the Appellant has not demonstrated any error apparent on the face of the record, and that issues of non-notification or the Judge's transfer cannot excuse the failure to comply with court directions.
28. It is argued that the Appellant's conduct amounts to frustrating the Respondent and is intended to delay the enjoyment of the fruits of the judgment in Kakamega CMCC No. 116 of 2018. The Respondent notes that the Appellant continues to benefit from stay orders and has engaged in repeated applications to the Respondent's detriment.
29. The Respondent prays that the application dated 5<sup>th</sup> December 2024 be dismissed with costs, and that the judgment delivered on 21st July 2023 be upheld.



## Analysis & Determination

30. Upon a careful evaluation of the pleadings filed, the affidavits on record, and the rival submissions of learned Counsel, the central issues arising are:
- (a) Whether the Appellant has satisfied the legal threshold for review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010; and
  - (b) If so, whether the consequential prayer for stay of execution should issue.
31. 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”
32. This is operationalized by 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.
33. 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.
34. That said, the statutory imperatives do not licence indolence nor permit litigants to re-litigate matters on a whim. The pivotal question for the Applicants having invoked Order 45 of the Civil Procedure Rules is whether they have satisfied the stringent standard enunciated in the authorities governing review. The Court of Appeal in *Kithoi v Kioko* (1982) KLR 177, pronounced itself 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.”

35. 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.
36. The Appellant seeks review on the basis of an alleged error apparent on the face of the record.
37. The Court of Appeal in *Nyamogo & Nyamogo Advocates v Kogo* [2001] EA 173 pronounced itself on what constitutes an error apparent on the face of the Record 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.
38. The same Court in *National Bank of Kenya v Ndungu Njau* [1997] KECA 71 (KLR), held that where review is sought based on an apparent error or omission:-

“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.”
39. Coming back to the matter herein, the alleged lack of notice is not self-evident from the record. The Respondent refers to directions on 19<sup>th</sup> May 2022, a reminder letter of 15<sup>th</sup> May 2023, and fixing of judgment dates, with the Applicant serving mention notices in 2022 but failing to comply with the directions of the court. This dispute requires evidence and argument, not prima facie visibility.
40. Whether notice was served is a factual question requiring evidence, precisely, the type of inquiry that takes the matter outside the narrow scope of review under Order 45.
41. Furthermore, no new and important matter has been discovered which could not, with due diligence, have been presented earlier. The allegation that the payment in question was for bricks rather than a loan is not new; it was part of the trial defence. That is pure ground of appeal, not review.
42. The final ground for review, any other sufficient reason, fares no better. The Appellant had clear directions from the court on 19<sup>th</sup> May 2022 to file submissions within thirty days. It is not disputed that by the time judgment was set for delivery, whether in March 2023 or July 2023, those submissions had not been filed. The non-compliance is definitely attributable to the Appellant.



43. The inordinate delay in filing the instant application also serves as the decisive factor militating against the grant of the relief sought.
44. The Judgement in question was delivered on 21<sup>st</sup> July 2023. Even accepting the Appellant's assertion that he became aware of the said judgement only in March 2024, a period of nine months elapsed before the present Motion was lodged.
45. Such delay is manifestly unreasonable and unexplained. An application for review is intended as an expeditious remedy to address patent errors or sufficient cause, rather than a protracted means to revisit a matter that has been duly concluded.
46. Turning to the prayer for stay of execution, the fate of that prayer is tied to the viability of the substantive review. Without an arguable case for review, there is nothing to stay.
47. Furthermore, the Appellant has not demonstrated the substantial loss he stands to suffer beyond the ordinary consequences of execution.
48. The upshot is that the Appellant has not surmounted the high bar for review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.
49. I find the Notice of Motion dated 5<sup>th</sup> December 2024 unmerited. It is hereby dismissed in its entirety. Costs are awarded to the Respondent.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF OCTOBER 2025.**

**A. C. BETT**

**JUDGE**

In the presence of:

Mr. Siro holding brief for Mr. Getanda for the Appellant

No appearance for the Respondent

Court Assistant: Polycap

