

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAKURU**  
**CIVIL APPEAL NO. E229 OF 2023**

**FREDRICK KIMUTAI KOROS.....APPELLANT/RESPONDENT**

**VERSUS**

**PAUL MURIUKI.....1<sup>ST</sup> RESPONDENT/APPLICANT**

**DARSON TRADING LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 5<sup>th</sup> June 2025 brought under Sections 1A, 1B, 3A, 63(e), 80, 99 of the Civil Procedure Act, 2010, Order 45 Rules 1 and 2 and Order 51 rule 1 of the Civil Procedure Rules, 2010, the **1<sup>st</sup> Respondent (Paul Miriuki)** sought for Orders;-

**1) Spent.**

**2) Spent.**

**3) *The Honourable Court be pleased to grant the 1<sup>st</sup> Respondent/Applicant leave to review out of time against the Judgment delivered by Hon. Patricia Gichohi on 30<sup>th</sup> April, 2025.***

**4) *The Honourable Court be pleased to review and set aside the Judgment issued on 30<sup>th</sup> April, 2025 and all consequential orders until the hearing and determination of the application herein.***

**5) *There be a stay of proceedings in Nakuru Small Claims Civil Case No. E003 of 2023 pending the hearing and determination of this application to review.***

**6) *The costs of this Application be provided for.***

**7) *Any other orders that the court may deem fit.***

2. The grounds for the application herein are that this Court did not consider crucial evidence that was on record, which could have led to a different ruling. The Applicant argues that the judgment is highly prejudicial and that he stands to suffer great prejudice and irreparable loss if it is not reviewed.

3. While giving details of the original case, Nakuru Small Claims Civil Case No. E003 of 2023, the Applicant states that he filed a personal injury suit seeking Kshs. 122,550 in special damages, costs, and interest. The suit stemmed from a road accident that occurred on 19<sup>th</sup> October, 2022, where a vehicle driven by the Appellant allegedly lost control and caused damages to the applicant's vehicle.
4. The applicant states that the Appellant and the 2<sup>nd</sup> Respondent did not enter an appearance or filed a defence despite being served with the documents as evidenced by an affidavit of a court process server named Peterson Ogera Moturi sworn on 7<sup>th</sup> February, 2023, confirming that he served a Mention Notice and Statement of Claim upon both respondents on 2<sup>nd</sup> February, 2023.
5. On the delay in filing this application, the Applicant states that this Court had directed that the judgment, subject of this review, would be uploaded to the Court Tracking System (CTS), but it was never uploaded. Despite multiple requests and physical follow-ups with the court registry, the judgment was still not available at the time of filing this application.
6. He therefore states that the application is brought in good faith and without undue delay, and the applicant urges the court to use its power under the overriding objective to facilitate a just and expeditious resolution.
7. In response to this application, the Appellant (**Fredrick Kimutai Koros**) filed a Replying Affidavit sworn on 2<sup>nd</sup> July, 2025. He argued that the application for review is fatally defective, misconceived, and an abuse of the court process.
8. He states that the judgment that the Applicant seeks to review was delivered on 30<sup>th</sup> April, 2025, while the Application herein was filed more than two months later. It is his position that the Applicant has not provided a justifiable reason for the delay in filing the application. He contends that the delay is inordinate and unexplained and that the application is an afterthought.
9. He further argues that the application is an appeal disguised as a review. According to the Appellant, the judgment was made on the merits after full hearing and consideration of all evidence and submissions.

10. He claims that the Applicant has not met the legal threshold for a review as there is no discovery of new evidence, no mistake or error on the face of the record, or any other sufficient cause. He asserts that the grounds presented by the applicant are a mere re-litigation of matters already determined.
11. Further, he states that the Applicant has not demonstrated any prejudice or miscarriage of justice that would warrant a review of the judgment.
12. In conclusion, he urges the Court to dismiss the application with costs as litigation must come to an end and granting the application would unduly prejudice him and defeat the ends of justice.

### **Applicant's submissions**

13. The Applicant outlined the background of the case. He argued that he filed a claim the SCCC No. E003 of 2023 for compensation and damages amounting to Kshs. 122,550 after his vehicle was damaged in an accident on 19<sup>th</sup> October, 2022, caused by a motor vehicle driven by the Appellant. That upon filing the suit, the Statement of Claim and Mention Notice were served on both parties but they failed to file a defence or enter an appearance, which led to a default judgment being entered in favour of the applicant.
14. However, that upon the Appellant appeal to this Court, this Court set aside the default judgment and granted the Appellant leave to defend the suit on 30<sup>th</sup> April, 2025.
15. The Applicant herein stated that he is aggrieved by this Court's decision and seeks a review of the High Court's judgment, arguing that the Court overlooked crucial evidence. Further that there is an error on the face of the record, as the court failed to consider the return of service and the fact that the Appellant/Respondent had been properly served with the originating documents.
16. The Applicant contended that this constitutes a sufficient reason for review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules and urged this Court to allow the Application as prayed.

17. He maintained the delay in filing the application for review was that the court failed to upload the judgment (delivered on 30<sup>th</sup> April, 2025) to the Court Tracking System. That despite repeated requests and follow-ups with the court registry, he could not obtain a copy of the judgment.
18. He argued that the delay should therefore be excusable. He urges the Court to find that the application was filed in good faith and without undue delay on his part.
19. He submitted that if the orders sought are not granted, he will be prejudiced as he will be prevented from enjoying the fruits of the Judgment they obtained two years ago.
20. In conclusion, he urged the court to grant the review with costs to him and provide a stay of proceedings in the lower court to prevent the review application from being rendered useless.

#### **Appellant submissions**

21. He argued that the application is legally incompetent, lacks merit, and amounts to an abuse of the court process .
22. On leave sought to review out of time, it was argued that the judgment in question was delivered on 30<sup>th</sup> April, 2025, but the application was filed on 5<sup>th</sup> June, 2025, without any explanation for the delay. In support of his argument, he cited the case of ***Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR***, stating that a litigant must lay a basis for seeking an extension of time but the Applicant herein failed to provide credible reason for the delay.
23. As regards the threshold for review, the Appellant argued that an applicant must demonstrate the discovery of new evidence, an error on the face of the record, or any other sufficient cause. He argued that that the Applicant failed to provide any of the above and is simply trying to re-litigate the appeal under the guise of a review. Reliance was placed on the case of ***Francis Origo & Another v Jacob Kumali Mungala [2005] eKLR***, which held that an erroneous conclusion of law or evidence is a ground for appeal, not review.

24. The Appellant argued that the applicant has not provided any legal or factual basis for a stay of proceedings in the lower court.
25. In conclusion, the Appellant argued that the Applicant has not met the conditions of stay and that a stay cannot be justified by merely filing an application without a strong prima facie case or imminent loss.
26. On that basis, the Appellant urged this court to dismiss the Notice of Motion dated 5<sup>th</sup> June, 2025, with costs and that the prayer for a stay of proceedings be denied.

### **Analysis and determination**

27. This Court has considered the application herein, the response and the submissions by parties. The only issue for determination is whether the application dated 5<sup>th</sup> June, 2025 is merited.
28. The grounds for the review of a judgment or order are strictly defined and are primarily set out in Section 80 of the Civil Procedure Act and Order 45, Rule 1 of the Civil Procedure Rules. For emphasis, Section 80 of the Civil Procedure Act states that;-

***“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.”***

29. Order 45 Rule of the Civil Procedure Rules provides that;-

***“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.”*

30. A review is not an appeal. It is not meant to re-litigate the entire case or act as a substitute for the appellate process. Review is a process where the same court that issued the original decision re-examines it. A party aggrieved by a decree or order may successfully apply for a review on the grounds stated in the law.
31. The first ground is the discovery of new and important matter or evidence which was not within the applicant's knowledge, or could not be produced by them, at the time the decree was passed, despite the exercise of due diligence. This principle, as emphasised by the courts time and again, requires that the new evidence must be significant enough that its inclusion would likely have altered the original judgment.
32. On mistake or error apparent on the face of the record, the Court of Appeal in **National Bank Of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR)** clearly stated that this must be an error that is self-evident and obvious, requiring no elaborate argument or re-hearing to establish. It must leap to the eye, such as a clear miscalculation or a palpable oversight of a law and not merely a disagreement with the court's prior reasoning.
33. The third ground that is, any other sufficient reason, must be analogous to the first two grounds. As established in several cases including **Pancras T. Swai v Kenya Breweries Limited [2014] KECA 883 (KLR)**, this ground should not be used to enable re-litigation of the case.

34. In the present case, the Applicant alleges that he is seeking review of this Court's judgment of 30<sup>th</sup> April, 2025, primarily on the basis that the Court did not consider crucial evidence and information which was on the record and which could have led to a different ruling.
35. His position is that the Court overlooked the return of service that showed that the Appellant herein was served with the Court process, therefore that had the Court addressed its mind to the said Affidavit of service, it would have arrived at a different outcome.
36. A reading of the grounds in support of the application and the Supporting Affidavit, shows that the Applicant herein is challenging the reasoning of this Court rather than pointing out mistake and error on the face of record.
37. His basis for seeking for review falls outside the three grounds of review stated above. Those are issues for an appeal and not review.
38. In the circumstances, the 1<sup>st</sup> Respondent's application dated 5<sup>th</sup> June, 2025 lacks merit and is hereby dismissed with costs.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of November, 2025.**

**PATRICIA GICHOHI**

**JUDGE**

**Ms Chepkemoi for Ms Ondande for Appellant/Respondent**

**Ms Musavaka for Ms Wachuka Maina for 1<sup>st</sup> Respondent/Applicant**

**N/A for the 2<sup>nd</sup> Respondent**

**Kamau, Court Assistant**