

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW CIVIL APPLICATION NO. E090 OF 2025

REPUBLIC.....APPLICANT

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

**THE NATIONAL TREASURY AND PLANNING,
OFFICE OF THE PRINCIPAL SECRETARY.....2ND RESPONDENT**

AND

KOBBY TECHNOLOGIES LIMITED.....EX PARTE APPLICANT

KINGSWAY BUSINESS SYSTEMS LIMITED.....INTERESTED PARTY

RULING

1. The Notice of Motion dated 29th July 2025 is brought under section 1A,1B,3A and 80 of the Civil Procedure Act, Order 45 Rules 1 and 2 and Order 51 Rule 1 of the Civil Procedure Rules and Article 159 of the Constitution. The application seeks for the court to review its ruling delivered on 7th July 2025 particularly Paragraph 8.The application is supported by the affidavit of Kenneth Kadenge sworn on even date.
2. The grounds upon which the review is sought are that there was no admission by the Business Development Manager, Mr Kenneth Kadenge that the applicant was yet to be paid the sum of Ksh 91,542,000/= as it is

clear from the ex parte applicant's 'Exhibit BNH-7' which was the replying affidavit of Kenneth Kadenge sworn on 23rd October 2024.

3. According to Mr. Kadenge, the interested party/applicant stands to suffer irreparable loss on its reputation as the Ruling of this court is now in the public domain having been reported in the Kenya Law Reports and is now open to public consumption.
4. It is stated that Paragraph 10 of the verifying affidavit of Bico Norris Hamalah sworn on the 8th April 2025 alludes to this "admission" which this honourable court is said to have addressed at paragraph 8 of its Ruling.
5. That the replying affidavit of Kenneth Kadenge sworn on the 23rd October 2024 arose in High Court Arbitration E063 of 2023 and the replying affidavit of Samson P. Wangusi, the Principal Administrative Secretary, State Department for National Treasury sworn on 23rd June 2025 therein at Paragraphs 14 and 15 buttresses the point that the milestones were not achieved and no payment was due to the Judgement Debtor from the Garnishee.
6. The interested party/applicant also filed a further affidavit sworn on 8th October 2025.
7. In the said affidavit it is contended that this court did not have the opportunity of perusing and/or taking into consideration the replying

affidavit sworn by Samson P. Wangusi on 23rd June 2025 as it was not before it at the time of writing its ruling.

8. It is also asserted that the entire proceedings of **Milimani Commercial High Court Arbitration E063 of 2022** are the subject matter of **Civil Appeal E573 of 2024** still pending before the Court of Appeal.
9. The interested party further states that “the out of Court settlement Agreement” referred to at paragraph 10 of the replying affidavit of Bico Norris Hamalah was anticipatory and not confirmed as it was dependent on certain milestones being achieved by the interested party and it is the very reason that the ex parte applicant did not execute the same and therefore this honourable court cannot effect an Agreement that is not duly executed by both parties as it has no force of law whatsoever.

Response

10. In response the ex parte applicant filed a replying affidavit sworn on 16th September 2025 by Bico Norris Hamalah, opposing the application for review and contending that that the Notice of Motion dated 29th July 2025 does not in any manner whatsoever meet the threshold for review of the Ruling dated 7th July 2025, and that it is grossly misconceived, lacks merit and is an abuse of the court process, which application ought to be dismissed with costs.

11. It is deponed that the interested party who has filed the instant application participated in the hearing of the application for leave to institute judicial review proceedings which was made through the ex parte applicant's chamber summons dated 8th April 2025, wherein it opposed the said application through a replying affidavit that was sworn on 12th May 2025 by Kenneth Kadenge.

12. Further deposition is that the interested party did not controvert paragraph No. 11 of the statutory statement dated 8th April 2025 and paragraph No. 10 of the verifying affidavit that was sworn on even date both of which were filed before this court.

13. According to the ex parte applicant, there is absolutely no error apparent on the face of the record in paragraph No. 8 of this honourable court's ruling which simply stated the ex parte applicant's position.

14. The ex parte applicant states that at paragraph No. 6 of the Replying Affidavit dated 23rd October 2024, Mr. Kenneth Kadenge deponed as follows:

“6. THAT indeed the contract has since lapsed but the National Treasury continues to withhold funds for the onsite support totaling to Kshs.91,542,000/= as we did not achieve the milestones set out.”

15. Also, that according to 'Exhibit BNH-8' of the verifying affidavit sworn on 8th April 2025, the interested party's advocates on record forwarded to the ex parte applicant an Out of Court settlement Agreement dated 24th March 2025, wherein paragraph no. 2 states:

“pending Government Payment Kingsway anticipates receiving KES 92,000,000 (Ninety-Two Million Shillings) from the National Treasury under Contract No. TNT/049/201 9-2020”.

16. That, the Out of Court Agreement dated 24th March 2025 is executed by two directors of the interested party and it confirms that the sum of Kshs.92,000,000/= was due for payment by the National Treasury.

17. That, the contents of paragraph No. 8 of the ruling of 7th July 2025 are undoubtedly derived from a wholesome evaluation of uncontroverted facts which were placed before the court and that therefore, there is no error apparent in the said paragraph as alleged by the interested party.

Submissions

18. The application was canvassed by way of written submissions.

19. The interested party/applicant filed written submissions dated 9th October 2025, reiterating what it stated in the notice of motion, supporting affidavit and further affidavit.

20. The ex parte applicant also filed written submissions dated 23rd October 2025.

21. In its submissions, the ex parte applicant argues that the filing of the affidavit of Samson Wangusi who is an employee of the 2nd respondent amounts to the interested party usurping the position of the 2nd respondent counsel in an unprocedural and unlawful manner to file documents on behalf of the 2nd respondent and it's a back door means of challenging the above quoted determination as well as being an attempt to mount a new defence and evidence.

22. According to the ex parte applicant, the said Replying Affidavit purports to introduce the issue of non-performance of the expired Tender Contract for the first time in court proceedings without an iota of independent previous evidence from the 2nd respondent through exercise of its contractual rights, which is untenable.

23. Further, that the issue of indebtedness of the 2nd respondent to the interested party was concluded when the Garnishee Order Absolute of 24th February 2025 was issued. It is submitted that this Court would be overreaching its jurisdiction by entertaining any evidence that purports to contradict a lawful order which was issued by a competent Court of concurrent jurisdiction.

24. The ex parte applicant also submits that Order 45, Rule 1(b) explicitly states that review on account of new evidence is predicated on an application for review on the ground of “*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.*” That in this case, no order for review on account of discovery of new evidence is prayed.
25. It is also submitted that the introduction of new evidence as filed is *mala fides* and meant to give the interested party a second bite of the cherry through relitigating an issue of fact in the pretext of an application which is craftily fashioned as one for an error apparent on the face of the record.
26. Further submission is that a party is bound by its pleadings and to support this position, the ex parte applicant relies on the case of **Captain Harry Gandy vs. Caspar Air Charters Ltd, (1956). 23 EACA, 139**, where the court is said to have held that a relief not founded on the pleadings will not be granted. This, according to the ex parte applicant, was also the position in the case of **Kinyua Muriuki & 2 others (Suing as Joy Mothers Women Group) (Civil Appeal E039 of 2023) [2024] KEHC 9231(KLR) (18 July 2024) (Judgment)**.

27. According to the ex parte applicant, since there is no prayer for review on account of discovery of new evidence, the replying affidavit of Samson Wangusi ought to be held as being at variance with the pleadings and as leading to a non-issue on the face of the orders being sought in the subject application and the grounds thereof.

28. The ex parte applicant also relies on the Supreme Court decision in the case of Florence **Wairimu Mbugua & Sylvia Murugi Mbugua (Suing as the administrators of the Estate of Joseph Kiarie Mbugua) & Another -vs- Timber Manufacturers & Dealers Limited Application No. E019 of 2023** where the Court addressed the nature of an error apparent on the face of the record. A similar position, according to the ex parte applicant, was taken in the case of **The East African Court of Justice (of first instance) At Arusha Application No. 14 of 2018-Paul John Mhozya -vs- The Attorney General of The United Republic of Tanzania.**

Analysis and Determination

29. I have considered the application by the applicant/interested party, grounds and supporting affidavit and the response by the ex parte applicant as well as the respective parties' written submissions. In my humble view, the main issue for determination, is whether the interested party/applicant has made a

case for the review of this court's ruling of 7th July 2025 particularly paragraph 8 of that ruling.

30. At the center of the applicant/ interested party's application is paragraph 8 of this court's ruling of 7th July 2025. This paragraph reads thus:

“That despite service of the Garnishee Absolute Order and a demand for payment having been issued upon the 2nd Respondent the amounts owing still remain unsettled. The Applicant states that on or about 1st April 2025 the 1st respondent was served with a Notice of Intention to file the instant proceedings.”

31. According to the interested party, this position is not correct and it argues that Mr. Kadenge never admitted that the ex parte applicant was yet to be paid the sum of Kshs.91,542,000/=.

32. The grounds for seeking a review of a court's order are clearly set out under the law and to begin with Section 80 of the Civil Procedure Act provides thus;

“80. Review

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.”

33. The Civil Procedure Rules under Order 45 Rule 1, operationalizes the above statutory provision and provides as follows:

“1. Application for review of decree or order [Order 45, rule 1]

(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.”


34. In **Republic v Public Procurement Administrative Review Board & 2 others** [2018] eKLR it was held that:

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

35. In **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya** [2019] eKLR John M. Mativo Judge (as he then was) culled out the following principles from a number of authorities, on when the court may review its own decision under Order 45 Rule (1) of the Civil Procedure

Rules:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.*
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.*

- 
- iii. *An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.*
 - iv. *An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
 - v. *A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.*
 - vi. *While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.[emphasis added]*
 - vii. *Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.*
 - viii. *A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.*
 - ix. *Section 80 of the Civil Procedure Act provides for a substantive power of review by a civil court and consequently by the appellate*

courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

- x. The power of a civil court to review its judgment/decision is traceable in Section 80 Civil Procedure Act. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”*

36. From the above statutory, procedural and judicial pronouncement, a review is not an appeal in disguise, it is confined to correction of an obvious error, consideration of new evidence not previously available, or for other sufficient cause. An error apparent on the face of the record must be self-evident, not one that requires elaborate arguments to establish.

37. In the instant case, the interested party/ applicant seeks review of paragraph 8 of the ruling delivered on 7th July 2025, contending that the Court misrepresented the evidence by suggesting that the interested party's Business Development Manager, Mr. Kenneth Kadenge, admitted that a sum of Kshs. 91,542,000/= was due to the ex parte applicant. The interested party/applicant maintains that no such admission was made and that the

funds were being withheld by the National Treasury pending achievement of certain milestones.

38. The ex parte applicant, on the other hand, avers that paragraph 8 of the impugned ruling merely summarised its own position as pleaded and supported by the record. It emphasizes that the court's paragraph 8 did not attribute any finding of admission to the interested party, but only reflected the case as presented by it.

39. Having considered the rival positions in this matter, I am not persuaded that the grounds raised by the interested party/applicant constitute an error apparent on the face of the record. The paragraph 8 in the ruling sought to be reviewed is not a decisional part of this Court's ruling rendered on 7th July, 2025 granting leave to the ex parte applicant to file substantive judicial review orders. The paragraph is merely a restatement of the ex parte applicant's case, as placed before the Court and as confirmed by the ex parte applicant itself.

40. It follows therefore, that whether the statement in Mr. Kadenge's affidavit amounted to an admission or a qualified assertion based on certain milestones to be achieved is a matter of interpretation, not a factual error capable of correction through review.

41. In addition, the interested party/applicant's assertion that this Court did not consider the replying affidavit of Samson P. Wangusi sworn on 23rd June 2025 is also without merit for the reason that, that very affidavit was not before this Court when the Court rendered its ruling and cannot now be introduced retrospectively through a review application for the court to see and make amends of what the ex parte applicant told the Court in its pleadings.

42. In other words, this court cannot be asked to correct a party's pleadings as presented and as restated by the Court in the summary of the respective party's factual positions.

43. In the premises, this Court finds and holds that the Notice of Motion dated 29th July 2025 does not meet the threshold for review under Order 45 Rule 1 of the Civil Procedure Rules, noting that the complaint raised is, in essence, a disagreement with the Court for merely restating an adverse party's position as stated in its pleadings.

44. Accordingly, the application dated 29th July 2025 is hereby found to be devoid of any merit and is dismissed with costs to the ex parte applicant.

Dated, Signed & Delivered virtually at 7.30 am from Nakuru this 18th Day of November, 2025

**R.E. ABURILI
JUDGE**

ORIGINAL