

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
[Coram: A.C. Mrima, J.]
CIVIL APPEAL NO. E1294 OF 2024

-between-

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| 1. FAITH & HOPE PROPERTIES K LTD. | |
| 2. DAVID | KABOGO |
| RUTHIA..... | |
| APPLICANTS/APPELLANTS | |

-versus-

- | | |
|---------------------|---------------------|
| JOHN WAGECHE | KARIUKI..... |
| RESPONDENT | |

RULING

Background:

1. In its judgment of 30th April 2025, this Court found the Small Claims Court default judgment against the Applicants to have been regular. This Court observed that the Applicants were accorded ample opportunity to file their responses, but failed to do so without any reasonable explanation. It also observed that, in all, the trial Court handled the matter quite well.
2. It was the dismissal of the appeal that instigated the current review application which is subject of this ruling.

The Application:

3. The application under consideration was by way of a Notice of Motion which was dated 6th May 2025. It was brought pursuant to *Order 45* of the *Civil Procedure Rules* and *Sections 3A* and *80* of the *Civil Procedure Act*, sought the following orders: -
 - a. *Spent*
 - b. *Spent*
 - c. *Spent*

- d. *THAT this Honourable Court to vary and or review the orders emanating from the Judgement delivered 30th April 2025 that is to say;*
- i) *THAT this Honourable Court do review the dismissal of the Appeal unconditionally.*
 - ii) *THAT this Honourable Court do vary its Judgment and instead order that since this is a land matter the respondent ought to rescind and surrender possession and ownership document prior to any refund of the purchase price as decreed in the Small Claim court finding.*
- e. *THAT a declaration do issue that the court having been satisfied that there was a dispute involving land the Small Claim Court did not have jurisdiction under the Act to enter Judgement in default.*

4. In the grounds in support of the application, the Applicants stated the there was existence and discovery of new and important matter or evidence which after the exercise of due diligence, was not within its knowledge. It was also their case that there was some error on the face of the record and sufficient reason to warrant the review. They urged that this Court has unfettered discretion to make such order as it thinks fit and that unless the judgment is reviewed, there is real threat to levy execution without affording them an opportunity to contest the same. In the supporting affidavit *David Kabogo* deposed that that there is an apparent error of law since the default Judgement subject of the appeal was arrived at by the Small Claim Court dealing with matter land whereas Section 12 of the small Claim Court Act ousts jurisdiction in land matters.
5. It was the Applicants' case that the dismissal of the appeal left the Applicants exposed to execution whereas the Respondent had not rescinded the contract for the sale of land, had not surrendered possession and had not handed over the document of ownership in his possession.
6. In their written submissions dated 11th June 2025, the Applicants claimed that they had realized that the default judgment was irregular since there was no service to the Applicants to warrant the Small Claim Court enter judgment, neither was there such a

request for interlocutory judgment in the proceedings. The Applicants referred to the case of *Ali Bin Khamis -vs- Salim Bin Khamis Kirobe & Others* [1956] 1 EA 195 where it was observed that where orders were made and there was failure to serve, a Court ought to set aside such orders *ex debito justitiae*. It was their case that the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. The Applicants further submitted that the subject matter in dispute is, in substance, a land matter, *albeit* presented and disguised as a claim for money held and payable. It was its case that breach of contract for sale of land, in view of section 12 of the Small Claims Act, could not have been resolved by the Small Claim Court. They asserted that the lack of jurisdiction and the *ex-parte* condemnation constitutes an important matter and sufficient reason to warrant review.

The Respondent's case:

7. *John Wageche Kariuki* challenged the application through his Replying Affidavit deposed to on 11th May 2025 and written submissions dated 18th July 2025. In the Replying Affidavit, he deposed that the application was frivolous, vexatious and abuse of the Court process meant to delay or defeat the fruits of his judgment and an attempt to appeal the judgment of this Honourable Court. He argued that the Appellants had not demonstrated any new evidence or error on the face of the record, or any other reason entitling the Court to review its judgment. He asserted that he neither possess any of the claimed documents nor does he possess the alleged property since the Applicants never gave him possession of the said property. In any event, he deposed that the Applicants did not own the land they purported to sell to him and as such they claimed that the alleged conveyancing documents can only be worthless papers made up of a receipt and a Certificate of ownership issued by the 1st Appellant/Applicant to perpetrate the illegality.
8. The Respondent further deposed that the documents have been part of the record from inception and cannot be christened to be new documents. He submitted that the

Applicants did not disclose and/or prove the purported new and important matters.

9. As regards the claim that there was error on the face of the record for lack of jurisdiction, the Respondent submitted that the issue was neither raised in the grounds in support of the application nor was it referred to in the Supporting Affidavit. Notwithstanding the foregoing, it was his case that the facts are not new since they were within the Applicants' knowledge throughout the trial before the Small Claims Court and in this Court. In addition, he deposed that he never took possession at any time as the land shown to him did not belong to the Applicants. He stated that this issue was a ground of appeal and was canvassed and was an attempt to appeal the Court's decision through the back door.
10. On the strength of the decision in *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, the Respondent submitted that the application did not meet the requirements for a review. He urged this Court to dismiss the application with costs.

Analysis:

11. The only issue for determination is whether the application meets the threshold for review.
12. *Rule 30 of the Small Claims Courts Rules, 2019* [as amended] accords that an appeal from the Small Claims Court to the High Court shall be in accordance with *Order 42 of the Civil Procedure Rules*. The Civil Procedure Rules, being subsidiary legislation, give way to the application of the parent statute being the Civil Procedure Act, Cap. 21 of the Laws of Kenya. The power of review in the High Court is anchored under *Section 80 of the Civil Procedure Act* and *Order 45 of the Civil Procedure Rules, 2010*. *Section 80 of the Act* provides as follows: -

80. 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.

13. Further, *Order 45 of the Civil Procedure Rules* provides as follows: -

45. 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 reasons, desires to obtain a review of the decree or order may apply for a review of judgment to the court which pass the decree or made the order without unreasonable delay.

14. Courts have severally rendered on this subject such that the applicable principles are well settled. For instance, the Supreme Court in **Parliamentary Service Commission V Martin Nyaga Wambora & Others** [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in **Mbogo and Another v Shah** [1968] EA, on the issue of review as follows: -

(31) *Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows: -*

- i. *A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.*

- ii. *Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court.*
- iii. *An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.*
- iv. *In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.*
- v. *During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.*
- vi. *The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:*
 - a. *as a result, a wrong decision was arrived at; or*
 - b. *it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.*

15. Additionally, the Court of Appeal in **National Bank of Kenya V Ndungu Njau** (Civil Appeal 2111 of 1996) held thus: -

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 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 proceeds on an incorrect expansion of the law.

16. While analyzing the import of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, the High Court in **Republic v Advocates Disciplinary Tribunal ex parte**

Apollo Mboya (2019) eKLR crystallized the principles for consideration in reviewing its own decisions as follows: -

- 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.*
- 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 CPC 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 CPC 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 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.*

17. Behind the above legal background comes a consideration of the application. This Court has revisited and intently considered its judgment rendered of 30th April 2025. The Court has also reconsidered the grounds set out in the Memorandum of Appeal, upon which the appeal was premised.
18. The application is premised on two grounds being error or omission on the face of the record and discovery of a new and important matter of evidence. As to whether there is an apparent error or omission on the face of the record that would operationalize Order 45 of the Civil Procedure Rules, the ‘*error*’ or ‘*mistake*’ is hinged on the claim that the dispute in question involves land which is denied by the Respondent. His case is that he is simply seeking a refund of monies paid. Such a determination cannot be said to be self-evident. It would call for *lengthy and complicated arguments and reasoning*, which is outside the intent and scope of Order 45 of the Civil Procedure Rules. In any event, this Court agrees with the Respondent that the claim is a straightforward one where the Respondent is only seeking a refund. The ground, therefore, fails.
19. On the other ground on whether the Applicants discovered an important matter, the record has no material to support that fact. The alleged documents were indeed produced in evidence by the Respondent as ‘DK-1’. As such, the contention also fails.

Disposition:

20. Deriving from the foregoing, this Court finds no merit in the application and hereby makes the following final orders: -

[a] The Notice of Motion dated 6th May 2025 is hereby dismissed.

[b] Costs assessed at Kshs. 15,000/= to the Respondent payable within 21 days of this Order and in default execution to issue.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 19th day of November, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

No appearance of Parties.

Michael/Amina - Court Assistants.