



REPUBLIC OF KENYA



KENYA LAW
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Raiya Construction Limited v Sun Sand Dunes Limited; Kukadia (Objector) (Civil Appeal 179 of 2012) [2025] KEHC 16941 (KLR) (21 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16941 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 179 OF 2012
M THANDE, J
NOVEMBER 21, 2025**

BETWEEN

RAIYA CONSTRUCTION LIMITED PLAINTIFF

AND

SUN SAND DUNES LIMITED DEFENDANT

AND

KANTILAL KUKADIA OBJECTOR

RULING

1. Before this Court for determination is a Notice of Motion dated 21.8.24 in which the Defendant seeks review of this Court's ruling of 2.8.24 by reinstating the certificate of costs dated 5.4.22 and by dismissing the Objector's application dated 4.6.24.
2. The grounds upon which the Application is premised are that in its decision setting aside the certificate of costs, the Judge relied on the judgment of this Court where it was ordered that each party bears own costs. However, that in Civil Appeal No. 26 of 2017 filed by the Defendant, the Court of Appeal in its judgment of 24.5.18 set aside the decision of the High Court in its entirety and awarded the Defendant costs. The Defendant averred that the Objector failed to disclose this fact in his application dated 4.6.24 seeking to set aside the certificate of costs. The Defendant thus contends that there was an error on the face of the record as the Court did not consider the decision of the Court of Appeal and urged that the prayers sought be granted.
3. The Application is opposed by the Objector vide a replying affidavit sworn on 4.10.24. The Objector's case is that he was not a party to the suit but that the Defendant went after his property, necessitating the filing of the application to bar the Defendant and its agents from attaching and selling his goods. Further, that the judgment of the Court of Appeal was never brought to his attention and the only decision his advocates are aware of is that of this Court of 7.3.17. Additionally, that litigation must



come to an end and that allowing the Application would amount to reopening the case afresh and that the defendant ought to have presented all facts to the Court at the appropriate time before the ruling was delivered. The Objector argued that should the Court of Appeal decision be found to be genuine then the Defendant would seek execution against him as the Plaintiff ceased operations last year and is no longer in existence. He urged that the Application be dismissed with costs.

4. Parties filed their written submissions which I have duly considered.
5. The record shows that in his application dated 4.4.24, giving rise to the impugned ruling, the Objector referred to the judgment of this Court of 7.3.17 where each party was ordered to bear own costs but made no mention of the judgment of the Court of Appeal. In his replying affidavit, Job Nyasimi Momanyi, the Defendant's counsel did state that the Objector's application was intended to frustrate a judicial process and specifically to bar the Defendant from enjoying the fruits of its judgment delivered on 24.5.18 by the Court of Appeal. Contrary to the Objector's assertion therefore, the fact of the judgment was indeed placed before the Court. Further, in the proceedings before the Court of Appeal, the Plaintiff fully participated and was represented by Ms. Aoko, holding brief for Mr. Khagram. The record shows that the Objector was described as the managing director of the Plaintiff. It is thus not true that the Objector was not aware of the said judgment. In any event, in her ruling on the bill of costs dated 10.8.18, the taxing master indicated that the bill of costs emanates from the Court of Appeal judgment in Civil Appeal No. 26 of 2017.
6. The law relating review of orders is set out in Order 45 of the Civil Procedure Rules as follows:
 - (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.
7. The law allows an aggrieved party to apply for review of an order on the basis of recovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at the time the order was made. A mistake or error apparent on the face of the record is another ground upon which the Court can allow review of an order. The Court may also review an order for any other sufficient reason. The law further requires that an application for review, no matter the grounds, must be made without unreasonable delay.
8. Our Superior Courts have in numerous pronouncements stated what constitutes an error on the face of the record. The error must be evident on the face of the record and should not require an elaborate argument to be established. In the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR, the Court of Appeal had this to say:

“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."

9. An order for review is discretionary and an applicant must persuade the Court that it is deserving of such order by demonstrating the elements set out in the law. The Defendant takes issue with the fact that in arriving at its decision, the Court relied on the judgment of the High Court and not on that of the Court of Appeal which was placed on record and argues that this constitutes an error on the face of the record.
10. In the ruling on the bill of costs giving rise to the certificate of costs in question, the taxing master stated as follows:

“ Before court for Taxation is the Defendant’s Party and Party Bill of Costs dated 10.08.2018. The Bill emanates from the “Court of Appeal Judgment in Malindi Appeal No. 26 of 2017: Sun Sand Dunes Limited v Raiya Construction Limited delivered on 24.05.2018 which awarded the Appellants costs in the High Court.
11. It is manifest that the bill of costs and certificate of costs were informed by the decision of the Court of Appeal awarding costs to the Defendant in the High Court. It is also clear in the impugned ruling, that this Court relied on the decision of the Court of 7.3.17 in which each party was to bear own costs. To my mind, this is a self-evident error that does not require an elaborate argument to be established.
12. In light of the foregoing, I do find that the Application dated 21.8.24 has merit and is allowed on the following terms:
 - i. The certificate of costs dated 5.4.22 is hereby reinstated and the Objector’s application dated 4.6.24 stands dismissed with costs to the Defendant.
 - ii. The Defendant shall have the costs herein.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF NOVEMBER 2025

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M. THANDE

JUDGE

