

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: LESIIT, OCHIENG & ALI-ARONI,

JJ.A.) CIVIL APPEAL NO. 276 OF 2019

BETWEEN

**JOSEPH KARIUKI NJOKA T/A
JOFOCO CONTRACTORS.....APPELLANT**

AND

ACTION AID INTERNATIONAL-KENYA.....RESPONDENT

*(Being an appeal from the Judgment of the High Court at
Embu (Muchemi, J.) delivered on 28th May 2018*

in

Misc. Appl. Case No. 03 of 2018)

JUDGMENT OF THE COURT

1. In an amended plaint dated 27th June 2017, the appellant sought payment of Kshs. 3,504,800 claimed as sums due and owing for work done. It was the appellant's case that on 22nd February 2013, he entered into a contract with the respondent to construct a pipeline for the supply of irrigation water to Mashamba Irrigation Project Makima, in Embu County. In a meeting held around May 2013 with project members, the appellant was asked to extend the pipeline by 5 kilometres to reach a densely populated area. Additionally, it was understood that the clearing of the pipeline (trenching lines) was to be carried out as part of the members'

participation in the project. **Winnie Birrir**, a staff

member from AAIK, along with the AAIK Project Manager, held several meetings with the area chief and project members to encourage their participation in the project. Their efforts were unsuccessful, forcing the appellant to carry out the works.

2. The appellant claimed further that he identified an omission in the bill of quantities regarding the work and reported it to the project manager/client as per the established procedures. However, he received no response from the project manager and proceeded to cover the costs himself. Additionally, he did not receive the drawings for the pump house and the project manager altered the masonry work specified in the bill of quantities for the pump house to concrete work and supervised the construction to completion without the necessary drawings. The partial payment already made for the pump house was for the concrete work rather than the masonry work.
3. The respondent filed a statement of defence dated 7th July 2015, denying that it owed the sums claimed for alleged extra work, nor were they aware of such a claim. It contended further that the appellant lacked the capacity to file the suit.
4. The matter then proceeded to a hearing. The appellant adduced evidence, mainly relying on his bundle of documents and was cross-examined. In the end, he closed his case. By a turn of events, while the defence case was pending hearing, the appellant filed an application dated 6th February 2018, in the High Court seeking orders that in an application dated 6th

January 2018, the appellant sort for orders that:

- a. *His case CMCC No. 139 of 2015 be withdrawn from Embu Chief Magistrate's Court and be transferred to the Principal Magistrate in Wanguru.*
 - b. *That upon transfer, the court gives directions as to how the case would proceed before the trial magistrate.*
 - c. *The respondent's counsel be investigated for forgery of document No. 16 on the defendant's list of documents.*
5. The application was premised on the grounds that: the trial magistrate appeared to be biased or compromised; the trial was not fair, and was apprehensive that any judgment made or given by the same magistrate would be unfair; the applicant was denied the opportunity to defend himself, argue his case, or be heard fairly during the hearing on 22nd January 2018.
6. Additional, he stated that the Chief Magistrate obstructed efforts to express his views and provide verbal testimonies; who mocked him; making him bear the burden of proof and yet he did not know the law; the appellant was given less than 5 minutes to present his case limited to stating the project name and the amount of money he was claiming from the respondent; yet the respondent was given more than an hour to present his defense.
7. The application was opposed by way of a notice of preliminary objection dated 9th March 2018; the application was brought against Hon. Gicheru who is not a party to the proceedings;

the court cannot grant orders against a person who are not parties to the case, as this would be both unjustified and unlawful; the court lacked the jurisdiction to entertain the application which

the trial court should have addressed; the application lacked merit and constituted an abuse of the court process; the application was unjustified, intended to harass the respondent, and was based on baseless and unsubstantiated allegations by the appellant and the application was legally unsound and ought to be struck out with costs.

8. By a ruling delivered on 18th July 2018, the court (Muchemi, J.) made a finding that the appellant had failed to prove the allegation of bias against the trial magistrate; he sought to transfer the case to a particular court without giving reasons in a bid to forum shop for a court; that there was no proof provided to support the allegation that the respondent's counsel had committed an act of forgery, thus dismissing the application with costs.
9. The above ruling of the court invited the application dated 10th August 2018, where the appellant sought for review of paragraphs 26, 28, 29, 30 and 31 of the ruling of 18th July 2018, on grounds that the applicant had discovered new and important material facts which at the time of prosecuting the earlier application were neither in his possession nor within his knowledge; that the respondent had the said material but concealed the same from the court; he is likely to be prejudiced as a result of the court not having the discovered evidence; and there is an error apparent on the face of the record; he will be prejudiced since the court based its findings on matters that were not properly presented and it was in the interest of justice for the appellant to be fairly and fully

heard; further there are reasons

to warrant the review of the order; that no appeal had been preferred against the ruling; and the application was made without unreasonable delay.

10. In response, the respondent filed grounds of opposition on 19th October 2018, and a replying affidavit dated 10th October 2018, urging that the matter was *res judicata*; the application was an abuse of the court process, mischievous, vexatious and; an afterthought; intended to annoy the respondent and its advocates; granting the application would be akin to the court sitting on appeal of its own decision; court proceedings must come to an end; and there is no new evidence or material that the appellant had brought which had not been articulated in the already dismissed application.
11. In its ruling dated the 28th of May 2018, the learned Judge was of the view that the appellant had not demonstrated any new and important matter he alluded to in the application; the documents being referred to were in the list of the respondent's documents filed in court since 2015 and therefore in the court file at the time the application was being heard. Furthermore, the court was of the view that the registry may have been responsible for the error on the court stamp and ought not to be blamed on the respondent. Regarding the issue of bias by the magistrate, the court found that nothing new or significant had been presented to it.
12. It is the above ruling that precipitated this appeal based on eighteen (18) grounds of appeal in his memorandum of

appeal

dated 7th October 2019. The grounds are repetitive, and we summarised the same as follow: the learned Judge contravened the constitutional mandate given to the Department of Criminal Investigation (DCI) to investigate complaints; violated the appellant's rights by not allowing the DCI to proceed with a recorded fraud complaint under OB/32/09/10/18; by failing to consider 12 grounds of fraud highlighted on document No. 16; by blaming the registry for the error on the date on the stamp appearing on document No. 16; by failing to establish that the appellant was denied an opportunity to give his evidence in-chief; and by failing to find that the trial magistrate was hostile and intimidated the appellant.

13. The appellant filed submissions dated 11th August 2023, stating that there was discovery of new evidence and that there was an error apparent on the face of the record as stated on both the notice of motion and supporting affidavit. In support of this contention, he referred to the case of **Chandrakhant Joshibhai Patel vs. R [2004] TLR, 218**, where the court held that an error apparent on the face of the record must be such that can be seen; that which is obvious and does not require an elaborate process to be noted.
14. Regarding the discovery of new evidence, he cited the case of **Pancras T. Swai vs. Kenya Breweries Limited [2014] eKLR, Turbo Highway Eldoret Limited vs. Synergy Industrial Credit Limited [2016] KEHC 8599 (KLR) and D. J. Lowe & Company Limited vs. Banque Indosuez**

[1998] eKLR. He fell

short of demonstrating the new evidence he discovered, which was far-fetched even after exercising due diligence.

15. On whether or not the High Court erred in dismissing the application, the appellant submitted that the court failed to consider the substantial evidence and grounds adduced in support of the application.
16. Learned counsel for the respondent filed submissions dated 29th August 2023, faulting the appellant's appeal for raising new matters and facts that were not part of the application dated 10th August 2018, the subject of this appeal. Further counsel argued that the record of appeal, dated 10th October 2019, was submitted and served beyond the time frame stipulated by the Court of Appeal Rules. The appellant filed his notice of appeal on 17th June 2019, and subsequently filed the record of appeal on 11th October 2019, exceeding the statutory period defined in the Rules. Furthermore, the appellant did not apply for or obtain a certificate of delay, which would have allowed for the late filing of the record of appeal outside the time.
17. On whether the appellant's application dated 10th August 2018, met the necessary criteria for review, counsel referred to the case of ***National Bank of Kenya Limited vs. Ndungu Njau [1997] KECA 71 (KLR)***, where the court held that a review may be granted when the court finds it necessary to correct an obvious error or omission by the court. Such errors or omissions must be self-evident and

should not require an elaborate argument to establish. In support of the argument that it is not enough to

review a decision based on the premise that another Judge would have held a different view, or the Judge proceeded on a wrong assumption, counsel cited the case of **Mbogo and Another vs. Shah [1968] EA 93 at 96.**

18. This being a first appeal, it is our duty to consider, evaluate and analyse the evidence on record and reach our own independent conclusion in the matter. This approach was adopted in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR,** where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held that:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. Having considered the record, submissions by rival parties, case law cited, and the law, we find that the only issue turning on this appeal is whether the application for review before the

Judge met the necessary threshold. Whether or not the appeal was filed timeously is not an issue before us; it is a preliminary issue that

counsel for the respondent ought to have dealt with before the appeal was set down for hearing in line with **Rules 85 & 86** of this Court's Rules.

20. We take note that in the grounds of appeal the appellant introduced matters that are strange to the issues before us and which did not form part of the initial application or even the application for review. The respondent's counsel decried how difficult it was for him to navigate the appeal due to the introduction of new issues. We agree with his sentiments and shall confine ourselves to the grounds concerning the application for review.

21. **Order 45(1) 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.
(Emphasize ours)

22. The principles to be considered in an application for review are well settled and have been repeatedly cited by this Court in various of its authorities. In ***Njaanake vs. Wamwea (Civil Appeal E452 of 2022) [2024] KECA 437 (KLR)***, the court reiterated the provision of the Civil Procedure Rules by stating:

“The grounds upon which a court should review its findings are enunciated in the provisions of Order 45 of the Civil Procedure Rules, 2010. These are: discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge or could not be produced by the applicant 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. The application should be made without unreasonable delay.”

23. In ***D. J. Lowe & Company Limited vs. Banque Indosuez [1998] KECA 108 (KLR)***, this Court restated the position by stating:

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

24. The judge found that the appellant had not demonstrated any new and important matters that he came across after her ruling, and which he could not have seen even with due diligence.

Learned Judge in her decision cited this Court's decision, which we pay heed to, in **Evans Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006**, where the court noted the holding in Stephen Githua Kimani vs. Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR, where it was stated:

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate the existence of new evidence which he could not get even after the exercise of due diligence.”

25. Considering the record before us, we agree with the judge that at the point of seeking the review, the appellant had no new material he presented or drew to the attention of the court. He referred to documents that have been part of the court record long before the application and the ruling that he sought to review.
26. The appellant further claimed that there was an error apparent on the face of the record. Yet he failed to demonstrate the error. We have reviewed the ruling and have been unable to identify any error that may have occurred on the face of the record. In **Muyodi vs. Industrial & Commercial Development Corporation & Anor [2006] 1 EA 243**, this Court held that:

“For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or

evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he

had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.

27. In the end, we do not fault the ruling of the judge. We agree that the appellant’s application for review fell short of the standards set by **Order 45(1) of the Civil Procedure Rules**. As a consequence, the appeal is dismissed with costs.

28. Following the untimely death of the **Hon. Mr. Justice Fred Ochieng**, before the delivery of this ruling, and there being concurrence by the remaining members of the bench, this judgment is delivered under **Rule 34(4) of the Court of Appeal Rules**.

Dated and delivered at Nyeri this 28th day of November, 2025.

J. LESIIT

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JUDGE OF APPEAL

F. OCHIENG

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**JUDGE OF
APPEAL ALI-
ARONI**

JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed
DEPUTY REGISTRAR