

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT THIKA**  
**COMMERCIAL APPEAL NO. E003 OF 2023**

**JOSEPH MUGURO  
ND'UNGU.....APPELLANT/RESPONDENT**

**VERSUS**

**MARK MBUGUA  
MUIGAI.....RESPONDENT/APPLICANT**

**R U L I N G**

**Brief facts**

1. The application dated 11<sup>th</sup> August 2025 seeks for orders of review of the court's orders dated 17<sup>th</sup> July 2025 allowing the appeal filed outside the requisite statutory period without first seeking leave of the court as well as dismissing of the appeal on the grounds that it was filed illegally and without following the due process. The applicant further seeks for orders to restrain the respondent from withdrawing and/or applying for the release of the decretal sum deposited as security in court.

**Respondent's /Applicant's Case**

2. The applicant states that the judgment in the appeal was delivered on 17<sup>th</sup> July 2025 in the appellant's favour by directing that the matter be remitted back to the lower court for retrial. The applicant argues that the impugned

judgment has an error apparent on the face of the record as it only considered the issue of the appellant's counterclaim without considering that the appeal was filed outside the requisite statutory period of 30 days without first seeking the leave of the court. Further, the error on the impugned judgment is self evident as the appeal was filed after the appellant's application for review of judgment in Thika SCCCOMM E934 of 2022 was dismissed vide ruling delivered on 25<sup>th</sup> October 2023 contrary to **Section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules**. The applicant further argues that there was an error on the face of record as the learned Judge failed to consider his submissions on appeal.

**The Appellant/Respondent's Case.**

3. The respondent argues that the instant application is premised on two issues; his appeal was allowed outside the stipulated time without seeking leave of the court and that he did not have the right of appeal after the application for review of judgment was dismissed in the lower court, which cannot constitute an apparent error or omission for purposes of setting aside a judgment under **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules**. The issues require an elaborate argument to be established.
4. The respondent further argues that the issue that his appeal was admitted after the stipulated statutory time without the leave of the court has been raised very late in

the day for the reason that the applicant was represented by counsel when the substantive appeal was admitted and no objection was raised. Further, the applicant

has not shown how he was prejudiced by the appeal being admitted outside the statutory period.

5. The respondent states that the application for review of the judgment of the lower court was dismissed vide ruling dated 23<sup>rd</sup> October 2023 and he lodged the appeal on 21<sup>st</sup> November 2023 which was well within the thirty day period and hence there was no need to seek leave to file the appeal.
6. The respondent states that the applicant's argument that the court did not consider his submissions is an affront on the learned judge's discretion to frame issues for determination and cannot be a ground to review a judgment. The grounds relied upon in the instant application qualify to be grounds of appeal and not grounds of review.
7. Directions were issued that parties put in written submissions and the record shows that the applicant complied however the respondent had not filed his submissions by the time of writing this ruling.

### **The Applicant's Submissions.**

8. The applicant relies on **Order 45 of the Civil Procedure Rules** and the cases of **National Bank of Kenya Ltd vs**

**Ndungu Njau Civil Appeal No. 211 of 1996 (UR)** and **Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR** and submits that there is an error on the face of the record as the Honourable Judge failed to consider that the appellant had earlier

filed an application for review of the judgment in the Small Claims Court and the same had failed. Further, the appellant failed to seek leave of the court and proceeded to file the appeal after the lapse of the statutory period. The applicant further submits that he raised the said issues in his submissions but the Learned Judge failed to consider the said issues in the judgment.

9. The applicant further relies on **Section 80 of the Civil Procedure Act** and the cases of **Sadar Mohammed vs Charan Singh (1959) EA 1 793** and **Wangechi Kimita & Another vs Mutahi Wakabiru CA No. 80 of 1985 (unreported)** and submits that he has provided sufficient reasons to warrant the court to review the judgment delivered on 17<sup>th</sup> July 2025.

### **The Law**

### **Whether the orders sought for review are warranted**

10. The orders complained of are contained in the judgment of Judge Njoroge Benjamin K. on 17<sup>th</sup> July 2025 which allowed the appellant's appeal in its entirety. The honourable judge referred the matter back to the Small

Claims Court for retrial and directed that the suit be heard by another adjudicator other than the one who heard and determined the suit from which this appeal arose Thika SCCCOM E934 of 2022.

11. **Order 45 of the Civil Procedure Code** sets out the parameters for an application for review as follows:-

**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 order made 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 which he applies for the review.**

12. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some

mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

13. The applicant grounded his application on error apparent on the face of the record and sufficient reason. On the issue of any error apparent on the face of the record, the Court of Appeal in the case of **Muyodi vs Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:-

**In Nyamogo & Nyamogo vs Kogo (2001) EA 174 this Court said that an error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may be conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.**

14. Similarly in **National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996 (UR)** the Court of Appeal held:-

**“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. “**

15. Additionally in **Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR**

the court stated:-

**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 provisions of law cannot be a ground for review.**

16. The court went on to say:-

**The term ‘mistake or error apparent’ by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an**

**order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.**

17. Evidently, from the above, it is clear that the error ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. According to the applicant, the errors apparent on the face of the record are the appellant filed his appeal outside the statutory time without first seeking the leave of the court and the appellant did not have a right of appeal after the application for review was dismissed in the trial court. Further, the applicant raised the issues in his submissions but the Learned Judge failed to consider the said issues in his judgment. It is evident that the issues raised by the applicant are not errors apparent on the face of the record but would require elaborate arguments by both parties to be established. The said grounds as raised by

the applicant are grounds of appeal and not review as they are not self evident.

18. The applicant has raised the ground of 'for any other sufficient reason'. The phrase 'any other sufficient reason' was illuminated in the case of **Republic vs Cabinet Secretary for Interior and Co-ordination of National Government ex parte Abullahi Said [2019] eKLR:-**

**A court can review a judgment for any other sufficient reason. In the case of Sadar Mohammed vs Charan Singh & Another {1963} EA 557 it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter.) Mulla in the Code of Civil Procedure (writing on Order 47 Rule 1 of the Civil Procedure Code of India), the equivalent of our Order 45 Rule 1, states that the expression, 'any other sufficient reason' means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out.....would amount to an abuse of the liberty given to the tribunal under the Act to review its judgment.**

**I also find useful guidance in Tokesi Mombili & Others vs Simion Litsanga [2004] eKLR where the Court of Appeal held as follows:-**

**In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that**

**there was a mistake or error apparent on the face of the record or for any other sufficient reason.**

**Where the application is based on sufficient reason it is for the court to exercise its discretion.**

19. The applicant has argued that he has provided sufficient reasons to warrant review of the judgment. Other than the grounds he raised for error apparent on the face of the record, he has not raised any other issues and this court has already pointed out that the said issues would have been good grounds for appeal not for review. Thus, it is my considered view the said issues are not analogous to the reasons stipulated in Order 45 Rule 1 of the Civil Procedure Rules.

20. Based on the foregoing reasons, it is my considered view that the applicant has not met the threshold to warrant the orders sought for review. Accordingly, the application dated 11<sup>th</sup> August 2025 lacks merit and is hereby dismissed with costs to the appellant/respondent.

21. It is hereby so ordered.

***RULING DELIVERED VIRTUALLY, DATED AND SIGNED  
AT THIKA THIS 11<sup>TH</sup> DAY OF DECEMBER 2025.***

**F. MUCHEMI  
JUDGE**