Kenya Postel directories Limited v D Yellow Pages Publishing & Marketing Limited & another (Civil Appeal 562 of 2019) [2026] KECA 105 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 105 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 562 OF 2019

DK MUSINGA, JM NGUGI & GV ODUNGA, JJA

JANUARY 30, 2026

BETWEEN

KENYA POSTEL DIRECTORIES LIMITED ..... APPELLANT

AND

D YELLOW PAGES PUBLISHING & MARKETING LIMITED .... 1ST RESPONDENT

TELKOM KENYA LIMITED ..... 2ND RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Onguto, J.) dated 1st November, 2017 in HCCC No. 1261 of 2002)

JUDGMENT

1. This appeal arises from a ruling of the High Court (Onguto, J.) delivered on 1st November, 2017, by which the learned Judge dismissed the appellant's application seeking review of earlier orders made by Farah Amin, J. on 2nd March, 2016 dismissing the appellant's suit for want of prosecution.

2. The litigation between the parties has a long and chequered history. The appellant instituted Nairobi High Court Civil Case No. 1261 of 2002 in December, 2002 alleging copyright infringement and seeking injunctive relief, damages, an account of profits, and ancillary orders against the 1st respondent. The 1st respondent responded by filing a defence and counterclaim in April, 2003. In the counter-claim, the 1st respondent herein joined the 2nd respondent as a 2nd defendant to the counter-claim. Over the years, the matter was listed for hearing on several occasions but was adjourned repeatedly, largely on account of incomplete pre-trial processes and non-compliance with procedural directions.

3. Following prolonged inactivity, the 1st respondent moved the High Court by an application dated 30th April, 2015 seeking dismissal of the appellant's suit for want of prosecution. That application, together with a similar one filed by the 2nd respondent, was heard by Farah Amin, J., who, on 2nd March, 2016,

exercised her discretion to dismiss the appellant's suit, citing inordinate delay, non-compliance with pre-trial requirements, and prejudice to the respondents.

4. Notably, the appellant did not appeal against that decision. Instead, on 26th May, 2016, the appellant filed its own application dated 25th May, 2016 seeking dismissal of the 1st respondent's counterclaim for want of prosecution. That application, together with a related application by the 2nd respondent, was heard by Farah Amin, J., who, in a ruling delivered on 20th April, 2017, declined to dismiss the counterclaim, holding that the respondent had taken steps within the relevant period and that the strict requirements of Order 17 had not been met.

5. Again, notably, the appellant did not appeal against the decision of 20th April, 2017. Instead, the appellant filed a further application dated 27th June, 2017 seeking review of the orders of 2nd March, 2016. The gravamen of that application was that the learned Judge had issued contradictory decisions on similar facts and that the dismissal of the (original) suit but retention of the counterclaim disclosed bias and unequal treatment.

6. That review application came before Onguto, J., following the transfer of Farah Amin, J. After considering the matter, the learned Judge dismissed the application, holding, inter alia, that allegations of bias could not constitute an error apparent on the face of the record; that bias, if established, could only justify review before a court of last resort; and that, in any event, the application was barred by principles of finality and issue estoppel.

7. It is that ruling, dated 1st November, 2017, which provoked the present appeal.

8. At the plenary hearing before us on 12th November, 2025, the appellant was represented by Mr. Otieno, learned counsel, holding brief for Mr. Oyatsi. The 1st respondent was represented by Ms. Dave, learned counsel, while Mr. Mwendwa, holding brief for Ms. Karimi, appeared for the 2nd respondent but indicated that the 2nd respondent did not wish to actively participate in the appeal. Counsel for the appellant and the 1st respondent elected to wholly rely on their written submissions.

9. The memorandum of appeal challenges the ruling of Onguto, J. principally on the grounds that the learned Judge erred in holding that bias could not found a review before a non-final court; misapplied the test for error apparent on the face of the record; failed to vindicate the appellant's right to equal treatment under Articles 10, 27, and 159 of *the Constitution*; and wrongly declined to exercise the review jurisdiction to correct what the appellant characterizes as a glaring judicial inconsistency.

10. In expounding the grounds, the appellant submitted that the learned Judge, having carefully reviewed the procedural history of the dispute and juxtaposed the dismissal of the appellant's suit for want of prosecution on 2nd March, 2016 with the refusal, on 20th April, 2017, to dismiss the respondent's counterclaim on a similar application, expressly acknowledged the apparent tension between the two outcomes. Counsel placed particular emphasis on the learned Judge's rhetorical query which was posed in the course of reflecting on the perceived inconsistency: "How possibly may one arrive at two decisions on the same issue?" According to the appellant, that question was not merely rhetorical but amounted to a judicial recognition that the same court, dealing with the same parties and broadly similar allegations of inordinate delay, had applied divergent standards. On that basis, the appellant argued that the learned Judge was bound to conclude that a glaring error, apparent on the face of the record, had occurred and that review was the only mechanism through which that error, and the resulting injustice, could be corrected.

11. The respondents opposed the appeal, contending that the learned Judge correctly appreciated the narrow scope of review jurisdiction under Order 45 of the Civil Procedure Rules; properly distinguished between appeal and review; and rightly declined to entertain an allegation of bias through

a collateral review application when the appellant had a clear and unexhausted right of appeal. The respondents further submitted that the two impugned decisions were context-specific applications of discretion under Order 17 of the Civil Procedure Rules and were not legally identical.

12. It is common ground that the impugned decision was an exercise of judicial discretion. The applicable standard is, therefore, settled. As an appellate court, we are slow to interfere with the exercise of discretion by a trial judge. We may do so only where the trial court misdirected itself in law, misapprehended the facts, took into account irrelevant considerations, failed to take into account relevant considerations, or where the decision is plainly wrong (see Mbogo v Shah [1968] EA 93; United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA 898). Our review in this appeal is, therefore, anchored on the abuse-of-discretion standard.

13. Against that standard, the central issues for our determination are whether the learned Judge misdirected himself on the scope of review under section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules; whether bias or alleged inconsistency constituted an error apparent on the face of the record or "any other sufficient reason"; and whether the learned Judge wrongly declined to intervene on constitutional grounds.

14. The principles governing review are well settled. Review is not an appeal in disguise. It is available only on discovery of new and important matter; error apparent on the face of the record; or any other sufficient reason. An error apparent on the face of the record must be self-evident and not one that requires elaborate argument or a re-evaluation of contested issues (see Muyodi v Industrial and Commercial Development Corporation & Another [2006] 1 EA 243; National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR).

15. Allegations of bias, by their very nature, invite a contextual and fact-sensitive inquiry. As the learned Judge correctly observed, they do not ordinarily "stare one in the face." Apparent bias is assessed through the objective lens of a fair-minded and informed observer and requires a careful balancing of all relevant circumstances (see Standard Chartered Financial Services Ltd v Manchester Outfitters (Suiting Division) Ltd [2016] eKLR) citing with approval Porter v Magill [2002] 2 AC 357).

16. We are satisfied that the learned Judge did not err in holding that bias does not constitute an error apparent on the face of the record for purposes of review jurisdiction. Nor did he misdirect himself in holding that, outside the residual jurisdiction of a court of last resort, bias is ordinarily a matter for appeal rather than review. That position is firmly grounded in precedent, including Benjoh Amalgamated Ltd v Kenya Commercial Bank Ltd [2014] eKLR.

17. We also agree with the learned Judge that the appellant's grievance, at its core, was with the merits and consistency of the discretionary decisions made by Farah Amin, J. Those grievances were eminently appealable. The appellant, however, made a deliberate strategic choice not to appeal either the ruling of 2nd March, 2016 or that of 20th April, 2017. Having elected that path, the appellant cannot properly invoke review as a surrogate appellate process. The law draws a deliberate and principled distinction between appeal and review. That distinction serves important systemic values, including finality, certainty, and institutional comity between courts of coordinate jurisdiction. To permit review in circumstances where an appeal lay but was consciously not pursued would be to collapse that distinction and undermine the architecture of civil procedure.

18. We have also considered, with the seriousness it deserves, the appellant's attempt to reframe the dispute in constitutional terms. There is no question that constitutional values permeate all judicial decision-making. However, not every procedural grievance can be elevated into a constitutional controversy — particularly where a party deliberately bypasses the appellate avenue provided by law and later seeks refuge in constitutional language.

19. Consequently, the attempt by the appellant to constitutionalize the dispute does not alter that conclusion. While Articles 10, 27, and 159 articulate foundational values of equality, fairness, and justice, they do not dissolve the well-established boundaries between appeal and review, nor do they license a party to bypass available appellate remedies. As the Supreme Court emphasized in Raila Odinga & Others v Independent Electoral and Boundaries Commission & Others [2013] eKLR, constitutional adjudication does not exist in a vacuum and must be exercised within structured procedural frameworks. The appellant had an avenue open to it — an appeal against the impugned rulings of Farah Amin, J. — but elected not to pursue it. The recourse of a party alleging bias, latent error or error in reasoning by a court is not in the same court's review jurisdiction; it is in the higher court's appellate jurisdiction.

20. Finally, we find no basis upon which to fault the learned Judge's invocation of finality and issue estoppel. Litigation must come to an end, and review jurisdiction must not be expanded to undermine that principle. Differently put, we are not persuaded that the learned Judge misdirected himself in concluding that the matter could not be reopened yet again through review.

21. In the result, we are not persuaded that the learned Judge misdirected himself in law, took into account irrelevant considerations, failed to consider relevant ones, or arrived at a plainly wrong decision. The threshold for appellate interference with the learned Judge's exercise of his discretion has not been met.

22. Accordingly, this appeal fails and is hereby dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2026.

D. K. MUSINGA, (PRESIDENT)

..... JUDGE OF APPEAL

JOEL NGUGI

..... JUDGE OF APPEAL

G. V. ODUNGA

..... JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR