

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CIVIL CASE NO. 9 OF 2016**

**ZEDKA TECHNICAL SERVICES LTD.....PLAINTIFF-DECREE  
HOLDER**

**VERSUS**

**COUNTY GOVERNMENT OF UASIN GISHU.....1<sup>ST</sup>  
DEFENDANT**

**THE COUNTY SECRETARY (UASIN GISHU).....2<sup>ND</sup>  
DEFENDANT**

**COUNTY PUBLIC SERVICE (UASIN GISHU).....3<sup>RD</sup>  
DEFENDANT**

**MINISTRY OF ROADS, TRANSPORT &  
PUBLIC WORKS (UASIN GISHU).....4<sup>TH</sup>  
DEFENDANT**

**RULING**

1. I delivered a Judgment in this matter on 9/05/2025, in which I made final orders as follows:

*“48. The upshot of my findings above is that I rule and order as follows:*

*i) It is declared that in light of the partial Judgment entered in favour of the Plaintiff under the Ruling made by Ogembo J herein and dated 2/10/2018, the remaining awardable prayers herein were already subsumed in the said Judgment and in the circumstances, there is nothing more for this Court to determine in this case save for the prayers for interest and costs.*

*ii) Regarding the portion of the Judgment awarded at the sum of Kshs 11,437,700/- already subsumed in the said Ruling dated 2/10/2018 as aforesaid, I additionally award to the Plaintiff, interest thereon to be calculated at the contractual rate of 3% per day above the Central Bank prevailing base lending rates as from the date of the said 1<sup>st</sup> Certificate of Payment, namely, 15/02/2016.*

*(iii) I also award costs of this suit to the Plaintiff.”*

2. There are now two different post-Judgment Applications for determination herein, both filed by the 1<sup>st</sup>-3<sup>rd</sup> Defendants-Judgment Debtors, and both dated 26/06/2025. While the first Application seeks Review of my said Judgment dated 9/05/2025, the second seeks Review of the said earlier Ruling rendered by the late **Ogembo J** on 2/10/2018 whereof an interlocutory partial Judgment was entered for the sum of Kshs 29,437,700/- being a portion

of the amount of Kshs Kshs 98,246,240.60/- prayed for in the Plaint. It was agreed that the Applications, being related, be determined in this one Ruling.

3. In the 1<sup>st</sup> Application, the prayers sought are as follows:

**(a) [.....] Spent**

**(b) This Honourable Court be pleased to review the Ruling issued on 2<sup>nd</sup> October 2018 which directed that the 1<sup>st</sup> Defendant/Applicant pay the Plaintiff the sum of 29,437,700/= (.....) being payment for 30% works done as per the contract dated 25<sup>th</sup> June 2015.**

**(c) The Court do review the Ruling issued on 11<sup>th</sup> October 2018 to the effect that the Plaintiff/Respondent is entitled to payment of Kshs 11,437,700/= only being payment for 7% works done as per the contract dated 25<sup>th</sup> June 2015 between the Plaintiff and the 1<sup>st</sup> Defendant.**

**(d) The Plaintiff/Respondent be and is hereby directed to immediately refund to the 1<sup>st</sup> Defendant the sum of Kshs 18,000.00 from the sum of Kshs 29,437,700/= paid by the 1<sup>st</sup> Defendant.**

**(e) Costs of this Application be borne by the Plaintiff/Respondent.**

4. The Application is supported by the Affidavit sworn by one **Philip Meli** said to be the 1<sup>st</sup> Defendant's County Secretary. He deponed that in the Ruling rendered on 2/10/2018 the Court directed the 1<sup>st</sup> Defendant to pay to the Plaintiff the sum of Kshs 29,437,700/- as payment for 30% works carried out in respect to the contract dated 25/06/2015 entered into by the Plaintiff and the Defendant for construction works. He pointed out that after the case eventually proceeded for trial, the Court in its said Judgement found that the Plaintiff had only proved completion of 7% of the works, and not 30% as alleged, and as such, it was only entitled to receive the sum of Kshs 11,437,700/-, and not Kshs 29,437,700/- as had been earlier awarded. He contended that the Inspection and Acceptance Certificate showing that only 7% of the works had been completed was only produced at the trial, and thus was not earlier availed to the Court to enable it make a proper determination, and that the same having now come into light, is therefore new and important material warranting Review of the Ruling rendered on 2/10/2018 by the late **Ogembo J.** He deponed further that at the time of the Judgment delivered on 9/05/2015, the entire sum of Kshs 29,437,700/- had already been paid to the Plaintiff in compliance with the earlier Ruling. He urged that the additional

sum of Kshs 18,000,000/- already paid for alleged work done was not therefore proved and is thus a waste of public resources, and that the payment was not based on any Certificates but on payment requests made by the Plaintiff. In the end, he urged that the Application has been brought timeously.

5. In the 2<sup>nd</sup> Application, the remaining prayers are now as follows:

**“(c) This Honourable Court be and is hereby pleased to review the Judgment issued on 9<sup>th</sup> May 2025 which directed that the Plaintiff is entitled to interest on the Judgment award of Kshs 11,437,700/= to be calculated at the rate of 3% per day above the Central Bank prevailing base lending rates as from 15<sup>th</sup> February 2016 and review of the award of costs granted to the Plaintiff.**

**(d) The Court be pleased to review the Judgment delivered on 9<sup>th</sup> May 2025 aforesaid with an order that the Plaintiff is entitled to interest on the Judgment award of Kshs 11,437,700/= to be calculated at the rate of 3% per day above the Central bank prevailing base lending rates as from 15<sup>th</sup> February 2016 and review of the award of costs granted to the Plaintiff**

**(e) In the alternative, the Court do make an order that no interest is payable and no interest is due to the Plaintiff.**

**(f) Order (iii) of the Judgment be reviewed to the effect that costs of the suit be borne by the Plaintiff.**

**(g) Costs of this Application be borne by the Plaintiff/Respondent.”**

6. In the Supporting Affidavit, again sworn by the said **Philip Meli**, he urged that the interest of 3% per day above the Central Bank base lending rate from 15/02/2016, apart from being inordinately high and excessive, is also unsupported by pleadings and the contract. He deponed that the award is clearly a mistake on the face of the record as the contract and the Plaintiff’s claim were based on interest calculated *per annum*, and not *per day*, and as such, the award is unconscionable. He urged further that as per the contract, the parties agreed to rely on the Central Bank of Kenya (CBK) base lending rate with an addition of 3%, that the current rate for the CBK is 10% per annum and it is therefore implied that the rate applicable at present is 13% *per annum*, and not *per day*. He pointed that applying the 3% per day rate translates into a decretal sum of Kshs 4.8 Billion at present which is unreasonable, and offends the principles of administration of justice.

7. The Defendant, in opposing the two Applications, relied on the unnecessarily lengthy 70-paragraph composite Replying Affidavit sworn by **Martin Chemonges Siwa**, said to be the Plaintiff's director, too lengthy for such straight-forward Applications as the two before Court. I have time and again wondered why Advocates, supposedly trained in the art and skill of legal drafting still find it difficult to observe the principle of brevity and come up with short, precise and straight to the point pleadings, rather than these verbose documents full of mere repetitions, arguments of law and unnecessary content, and even shockingly, sometimes, case law and authorities. These lengthy pleadings are proof that Advocates still experience difficulty in sieving through pleadings to identify issues that arise for determination, thus the difficulty to limit their pleadings to only what is relevant. It is also proof that Advocates are still finding difficulty in distinguishing between what should be contained in an Affidavit from what should only be left for final Submissions. To most Advocates, it still seems, wrongly of course, that an Affidavit and Submissions refer to the same pleading, and are thus interchangeable phrases. Apart from being annoyingly irritating considering the volume of work Judicial Officers already handle, for such lengthy pleadings, the reader most often loses focus at a very early stage of reading or midway, long before completing it. On the issue of need for brevity in drafting pleadings, Advocates should read the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR**, the case of **William Koross v. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013**, the case of **Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR**) and **Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR**, and also the case of case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR**.
8. Be that as it may, trying as much as possible to summarise the very lengthy Affidavit, **Mr. Chemonges** deponed basically that the Defendant did not file any response to the Application which gave rise to the Ruling rendered by the late **Ogembo J** on 2/10/2018 whereof the Court ordered the Defendant to pay to the Plaintiff the sum of Kshs 29,437,700/- as an interlocutory partial Judgment. He also pointed out that the Defendant subsequently applied for Review of the order, which Application was dismissed, and the Defendant then also appealed to the Court of Appeal, which Appeal was also dismissed. He deponed that even after all this, and even after taking out Notices to Show Cause against them, the Defendants still refused to pay, forcing the Plaintiff to seek execution by way of filing Judicial Review proceedings for the writ of Mandamus, and that only then did the Defendants pay out of fear of issuance of a warrant of arrest against its County Secretary. He thus contended that it would be unfair to order for a refund of any amount, and also observed that the Plaintiff has not filed any Appeal against the Judgment rendered on 9/05/2025,

which was well-written and sound. He asserted that the Defendant intends to re-open the case for purposes of making fresh arguments, that the Judgment did not contain any error apparent on the face of the record, and that what the Plaintiff is seeking is for the Court to rewrite the contract entered into by the parties. He contended further that contrary to the Defendants' contention, the Plaintiff did, at **paragraph (f)** of the Plaintiff, make the 3% interest above CBK rates prayer, and also urged that the *in duplum* rule stipulated under **Section 44** of the **Banking Act** (which argument however, I note, has not even been raised by the Defendants) does not apply in this case as the provision only regulates commercial borrowing from banks or micro-financial institutions. He further urged that the Court of Appeal, having already dismissed the Defendant's Appeal in respect to the order rendered on 11/10/2018, the option of Review against the same order is no longer available to the Defendants.

9. The parties then filed written Submissions. The Appellant's Submissions is dated 28/07/2025. The Respondent however filed (inadvertently I believe, but also a sign of carelessness) Submissions dated 16/08/2025, which however respond to an old, earlier Application dated 6/04/2025 relating to setting aside of a Notice to Show Cause, which is not the subject of this Ruling.
10. In his consolidated Submissions to the 2 Applications, Counsel for the Defendants, apart from citing case law, basically repeated and restated the matters already captured in the Defendants' Affidavits referred to above.

#### **Determination**

11. The issue that arises for determination herein is **"whether this Court should review the Ruling rendered herein on 12/04/2024, and the subsequent Judgment dated 9/05/2025."**
12. The relief of Review is governed by **Section 80** of the **Civil Procedure Act**, which provides as follows:

**"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. Order 45(1) of the Civil Procedure Rules then provides that:

“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 made the order without unreasonable delay.”

14. Order 45 therefore recognizes for 3 circumstances under which an order for review can be made. The first is where there has been “*discovery of new and important matter or evidence*”, the second is where there has been “*a mistake or error apparent on the face of the record*”, and the third is “*for any other sufficient reason*”. The 1<sup>st</sup>-3<sup>rd</sup> Defendants have come under the ground “*mistake or error apparent on the face of the record*”. The question therefore is whether they have successfully brought themselves within that ground.

15. The phrase “*an error apparent on the face of the record*”, was described by the Court of Appeal, in the case of **Muyodi -v- Industrial and Commercial Development Corporation & Another (2006) 1 EA 243**, in the following terms:

“... in *Nyamogo & Nyamogo -v- Kogo (2001) EA 174* this Court said that an error apparent 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 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 ...”

16. The phrase was also described in the Tanzanian case of **Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218** as one that:

“..... must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions.’

17. There is also the case of **National Bank of Kenya Limited v Ndungu Njau [1997] eKLR**, where the Court of Appeal had the following 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.

In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise, we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

18. It is therefore clear that “*an error apparent on the face of record*” must be one that is obvious to the eye, and self-evident. It must be one which when considered, would not yield two results, and does not require to be established by way of elaborate arguments.

19. In this case, the first item that the 1<sup>st</sup>-3<sup>rd</sup> Defendants want the Court to review is the interlocutory partial Judgment of Kshs 29,437,700/- entered by way of the Ruling rendered **Eldoret High Court Civil Case No. 9 of 2016**

by the late **Ogembo J** on 2/10/2018. The ground alleged is that by dint of my subsequent Judgment dated 9/05/2015, it has now become apparent that the interlocutory award was made in error, this Court having now subsequently found in the Judgment that the Plaintiff was only entitled to the lesser aggregate sum of Kshs 11,437,700/-. According to the 1<sup>st</sup>-3<sup>rd</sup> Defendants therefore, having since paid the whole amount of Kshs 29,437,700/-, they are now entitled to a refund of the difference of Kshs 18,000,000/- paid to the Plaintiff.

20. I straight away decline to entertain this prayer. In my said Judgment I expressly stated as follows:

*“44. Having said as above, it is clear that although I have held that the Plaintiff did not place material before this Court to enable this Court make a determination on the further claim for Kshs 18,000,000/- made under the 2<sup>nd</sup> Request for Payment, since as aforesaid, Ogembo J, by his said Ruling dated 2/10/2018, already entered a partial Judgment herein for the sum of Kshs 29,437,700/- which figure clearly subsumed this further claim for Kshs 18,000,000/-, my observations on the this further claim of Kshs 18,000,000/- would be of no effect. [Emphasis mine]*

21. My choice of the underlined words was deliberate, and not out of nothing. It was reasoned and intended. I deliberately therefore did not make any order thereon. It is not in dispute that the Defendants did not defend the Application that gave rise to the Ruling rendered by **Ogembo J** on 2/10/2018 whereof the interlocutory Judgment for the sum of Kshs 29,437,700/- was entered. The Defendants later unsuccessfully applied for Review of that Ruling, and later also unsuccessfully sought to Appeal against it. The striking out of the Appeal by the Court of Appeal thus sealed any avenue by the Defendants to challenge the decision. It was upon the Defendants to defend the Application that gave rise to the Ruling rendered by **Ogembo J** on 2/10/2018 and bring to the Court’s attention evidence that only 7%, and not 30% of the works, had been completed. Even at the trial before me, the Defendants never sought any refund of the amounts paid out. The fact that I made the subject observations in the Judgment as aforesaid does not in any way absolve the Defendants of their failure to defend the Application and did not in any way open a new opportunity for them to belatedly re-ignite their challenge to the order of 2/10/2018.

22. Much water has also now passed under the bridge since upon the Defendant’s failure to pay the award, the Plaintiff initiated Judicial Review proceedings geared towards eventual arrest of the 1<sup>st</sup> Defendant’s County Secretary and his committal to prison, and pursuant to those proceedings, the Defendants paid up in full. To belatedly now make an order for refund as

prayed by the Defendants would amount to re-opening already determined matters, the impugned having been made in 2018, 7 years ago. Further, the 1<sup>st</sup> Certificate of Payment dated 15/02/2016 and the Progress Report dated 4/05/2016 relied on by the Court in making the above observation were also both produced at the trial by the same Defendants and the same cannot therefore amount to “**discovery of new ..... evidence which, after the exercise of due diligence, was not within**” the Defendant’s “**knowledge or could not be produced**” by them “**at the time when**” the order of 2/10/2018 was passed or made, as stipulated in **Rule 1 of Order 45 of the Civil Procedure Rules (supra)**.

23. The second item sought by the Defendants to be Reviewed is the award made in my Judgment dated 9/05/2025 whereof I awarded interest at 3% “**per day**” above the Central Bank prevailing base lending rate. This, I agree, is a valid prayer. I say so because in the Plaintiff, the Plaintiff’s prayer at paragraph (f) was as follows:

“**a) An order compelling the Defendants to pay to the Plaintiff the total contract price of Kshs 98,246,240.60/- .....**

.....

**f) Interest on (a) above at the rate of 3% above the Central Bank Rate”**

24. The relationship entered into by the parties was governed by the Agreement dated 25/06/2015, in which the issue of Payment Certificates is addressed in **Clause 23** thereof. Sub-Clause **23.3** then provided as follows:

“**23.3 Payments shall be adjusted for deductions for retention. The Employer shall pay the Contractor the amounts certified by the Project Manager within 30 days of the date of issue of each certificate. If the Employer makes a late payment, the Contractor shall be paid simple interest on the late payment in the next payment. Interest shall be calculated on the basis of number of days delayed at a rate three percentage points above the Central Bank of Kenya’s average rate for the bases lending prevailing as of the first day the payment becomes overdue.**” [Underlining mine]

25. It is therefore clear that the Plaintiff neither sought interest to be computed “**per day**”, nor did the contract provide for interest to be computed “**per day**”. It is clearly the repeated use of the word “**days**” in **sub-section 23.3** that confused the Court into erroneously awarding interest “**per day**”. This was clearly an error apparent on the face of the record, and the Defendants did well to bring it to the Court’s attention at the earliest opportunity. The

mistake is not an erroneous decision, but a clear error apparent on the face of the record. It is not an error on a substantial point of law, but one that stares one in the face, and there can be no other reasonable interpretation in respect to the issue of interest “*per day*”. It is also not such an error that needs to be established by way of an elaborate or a long-drawn process of reasoning, or on technical arguments, but one that is self-evident, obvious and patent. Correcting the error will not therefore amount to this Court sitting on appeal on its own Judgment. This Court must now therefore do the right thing by correcting its erroneous and unintended order directing the interest to be computed “*per day*”, and substitute the same with an order directing computation of interest “*per annum*”, which is how the parties intended their relationship to be governed.

### **Final Orders**

26. The upshot of my findings above is that while one of the 1<sup>st</sup>-3<sup>rd</sup> Defendants’ Applications, both dated 25/06/2025, fails, the other succeeds, with the result that I make orders as follows:

- i) The Judgment delivered herein and dated 9/05/2025 is hereby reviewed only to the extent that the order directing interest on the Judgment sum payable to the Plaintiff to be calculated “*per day*” is hereby corrected to an order directing such interest to be calculated “*per annum*”.
- ii) Consequently, the said Judgment delivered herein and dated 9/05/2025, is hereby reviewed only to the extent that **paragraph 46(ii)** thereof presently reading that interest on the Judgment sum of Kshs 11,437,700/- payable by the Defendants to the Plaintiff is “*to be calculated at the rate of 3% per day above the Central Bank prevailing base lending rates as from the date of the 1<sup>st</sup> Certificate of payment, namely, 15/02/2016*”, is hereby corrected to read that that such interest is “*to be calculated at the rate of 3% per annum above the Central Bank prevailing base lending rates as from the date of the 1<sup>st</sup> Certificate of payment, namely, 15/02/2016*”.
- iii) For the avoidance of doubt therefore, only the words “*per day*” appearing at **paragraph 46(ii)** of the Judgment are now substituted with the words “*per annum*”.
- iv) As one of the 1<sup>st</sup>-3<sup>rd</sup> Defendants’ two Applications, both dated 25/06/2025, has succeeded, and the other has failed, each party shall bear its own costs thereof.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 30<sup>TH</sup> DAY OF JANUARY 2026

.....  
WANANDA JOHN R. ANURO  
JUDGE

**Delivered in the presence of:**

**Mr. Nasongo h/b Mr. Yego for the 1<sup>st</sup>-3<sup>rd</sup> Defendants-Judgment Debtors**

**Ms. Luseria for the Plaintiff-Decree Holder**

**Court Assistant: Brian Kimathi**