



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITION NO. E001 OF 2021

DAVID AOKO WERE

PETITIONER

VERSUS

**INDEPENDENT, ELECTORAL AND
BOUNDARIES COMMISSION** **1ST**

RESPONDENT

JOHN KIPLANGAT KIRUI **2ND**

RESPONDENT

NABULINDO PETER OSCAR **3RD**

RESPONDENT/APPLICANT

AND

CLEOPHAS WAKHUNGU MALALA

INTERESTED PARTY

RULING

1. Before this Honourable Court for determination are two applications. The first is by the firm of Malalah & Company, Advocates for the 3rd respondent and the

Interested Party, dated 28th April 2025, and the second is by the petitioner, David Aoko Were, dated 18th February 2025. Both seek the review and setting aside of the ruling delivered by Hon. J.J. Masiga, PM, on 13th February 2025.

2. On the first application the firm of Malalah & Company advocates faulted the ruling by Hon. J.J. Masiga PM urging that it should be reviewed as there was an apparent and glaring error on the face of the record. They faulted the finding by the learned Magistrate that they had filed their Bill of costs without the instructions from the 3rd respondent and that it was irregular and unlawful as it was not backed up by any evidentiary support.
3. According to the applicant, the court file had been tampered with, and the notice appointing them as advocates of the 3rd respondent dated 13th April, 2021, had been removed from the court file. He further contends that at the time of the election petition, Hon. Justice Musyoka, had ordered the typing of the proceedings, which he alleges were also removed from

the court file, thereby concealing their involvement in the case on behalf of the 3rd respondent.

4. The applicant further alleges that the deliberate tampering of the court file materially influenced the ruling delivered by the learned Magistrate on 13th February 2025, resulting in a one-sided determination which has prejudiced them.
5. He asserts that upon discovery of this anomaly, he took immediate action by addressing a formal letter dated 3rd March 2025 to the learned Magistrate and Deputy Registrar. In that correspondence, he sought the rehearing and review of the impugned ruling of 13th February 2025 on the compelling and fresh ground of newly discovered evidence demonstrating that the court file had been tampered with, thereby concealing critical documentary proof of his firm's lawful instructions and representation of the 3rd respondent.
6. He contends that the learned Magistrate declined his plea to review the ruling in a letter dated 10th March 2025, despite the glaring error on the records and advised him to file an appeal against the same.

7. The applicant faulted the decision by the Deputy Registrar and the Magistrate for dismissing their claim for review or investigation of the illegal and unlawful removal of documents from the court file, despite them having adduced evidence that they had represented the 3rd respondent in the election petition and even cross-examined the petitioner on his behalf.
8. In response to the first application, Mr Osundwa Sakwa swore a replying affidavit dated 5th June 2025, in which he firmly denies each allegation levelled by the applicant. He avers that the application itself is a gross abuse of the process of this Honourable Court. The deponent avers that at all material times, the firm of Osundwa & Company Advocates was duly on record as the advocates acting for the 3rd respondent. He further states that Malalah & Company Advocates were, correspondingly, the advocates on record for the Interested Party and would at times hold their brief when they were not available.
9. Mr Osundwa contends that his firm remained continuously on record for the 3rd respondent throughout the proceedings. He asserts that the

applicant's firm only came on record to represent the Interested Party pursuant to a formal ruling delivered by the court on 22nd June 2021, and not for the 3rd respondent as alleged.

10. He denies receiving or seeing the notice of appointment of record for the applicant dated 13th April 2021, and denied the allegation that the notice was plucked from the court record. He avers that the applicant failed to prove that they had served all the other parties with the alleged notice. They further stated that all the documents on record, including the affidavits and submissions, showed that they, Osundwa & Company advocates, had served the responses in favour of the 3rd respondent.

11. Mr. Osundwa that the notice of appointment of advocates was a forgery prepared after the ruling by Hon. Masiga as it was presented after the delivery of the ruling and asserts that the only time that the applicant was on record for the 3rd respondent was when they held brief on their instructions and that at all material times, the applicant's firm represented the interested party and that at the defence hearing, the 3rd

respondent was represented by himself and the applicant Dr. Malala allowed to cross examine their client.

12. He denies the allegations that there was an error apparent on the face of the record and contends that the applicant only seeks to prejudice them by denying them their fruits of the judgment based on a fraudulent document. He prays that the court dismisses the application with costs, and they be allowed to proceed with the execution of the costs.
13. The application was canvassed by way of written submissions.

Applicant's Submissions

14. In their submissions dated 25th June 2025, they fault the decision of the trial magistrate, claiming that the decision dated 13th February 2025 was based on missing information, being the notice of appointment dated 13th April 2021 as advocates, which was not in the court's file, similar to the court's proceedings. They argued that they wrote several complaints to the court's administrator and the deputy registrar regarding the missing documents. Still, no action was taken to

remedy the mistake, and the court's error was not rectified, prompting them to file this application for review.

15. They rely on Section 80 of the Civil Procedure Act and Order 45 Rule in support of the application, as well as the principles laid out in the case of **Mbogo vs. Shah (1968) EA** and **Civil Appeal No. 2111 of 1996 National Bank vs. Ndugu Njau**.
16. They submit that the trial magistrate at the time of delivering the ruling dated 13th February 2025 was not privy to the notice of appointment of as advocates as well as the court's proceedings hence there was an error apparent on the face of the record which they had failed to acknowledge hence a mistake on their part claiming that the court had make an error in failure to consider the new evidence.
17. They pray that this court corrects the lower court error apparent on the face of the record for failure to consider the evidence that was taken away from the court file and allow their application to set aside the ruling.

18. The second application is dated 18th February 2025 by the petitioner who seeks stay of execution by the 3rd respondent's advocates and further that the court set aside and or review the Ruling by Hon. Masiga delivered on 13th February 2025 for failure to consider the regularization of their legal representative through a consent which led to the dismissal of their application dated 1st October 2024 on technicality and not on merit.
19. The applicant avers that they had sought a stay of execution dated 6th September 2024 by the 3rd respondent's advocate and that the orders of warrant of attachment dated 6th September 2024 and the proclamation notice dated 7th September 2024 by Mamuka Auctioneers be set aside and or annulled.
20. The applicant contends that the ruling of the learned Magistrate was fundamentally flawed and therefore amenable to review, on the basis that it disclosed an error apparent on the face of the record.
21. The applicant further asserts that the learned Magistrate had granted them leave to regularise their legal representation, a direction with which they duly

complied. In that regard, they aver that a consent executed between themselves and their former advocates, dated 9th December 2024, was filed and duly placed before the court. Notwithstanding this, the court dismissed their application dated 11th October 2024.

22. He contends that such dismissal exposed him to the real risk of irreparable loss, as the auctioneers were poised to proceed with execution. He prays that this court stay the execution against him, as the auctioneers are likely to execute and recover Kshs. 1,272,260/= from him pursuant to the warrants of attachment and the proclamation notice.

Petitioner's Submissions

23. The petitioner filed submissions dated 20th June 2025, in which a single issue was framed for determination, being whether, in light of an error apparent on the face of the record and in the interests of fairness, equity, and judicial integrity, this Court ought to review the ruling of Hon. J.J. Masiga delivered on 13th February 2025, so as not to prejudice the petitioner, particularly in relation to the impugned Certificate of Costs.

24. The petitioners align themselves with the 3rd respondent's request for review of the ruling by Hon. Masiga, maintaining that the dismissal of their application dated 11th October 2024 was premised on an error apparent on the face of the record. They contend that the learned Magistrate erred in finding that they failed to seek leave to effect a change of advocates in compliance with Order 9 Rule 9 of the Civil Procedure Rules, 2010.
25. It is their further position that leave to regularise legal representation had already been granted and that a consent to that effect had been duly executed and filed. They assert that the said consent was placed before the court prior to the determination of the application and was therefore overlooked. The petitioner contends that the error prejudiced them by denying them an opportunity to have their application heard on the merits and by further undermining the principle of substantive justice under Article 159(2) (d) of the Constitution.
26. The petitioner further claims to be unfairly caught in a professional dispute between Malalah & Company

Advocates and Osundwa & Company Advocates, both purporting to have represented the 3rd respondent, who both filed notice of appointment. They stated that they had been taxed by Malalah & Co. who had obtained a certificate of taxation for which they had already paid and that they should not be prejudiced again to pay the firm of Osundwa & Co. for the same costs as that would amount to double jeopardy and a violation of their rights under the Article 47 of Fair administration action and article 40 on rights to property.

27. They pray that the Court direct that the dispute as to which of the two law firms is entitled to the costs of the suit as against the 3rd respondent be resolved to shield them from prejudice. They maintain that they acted in reliance on the directions of the court and ought not to be penalised or exposed to a second and parallel execution process arising from an internal dispute between advocates.
28. Consequently, they urge that the application be allowed, the matter be reopened and determined on its merits, and appropriate safeguards be put in place to protect them from the double execution. In support of

this position, reliance is placed on the decision in **Kerara v. Gal Baking Service Limited (2025) KEHC 631.**

29. The petitioner further invoked section 3A of the Civil Procedure Act that grants the court power to make orders necessary to achieve justice and prevent abuse of the court's process to correct the error and prevent any further injustice.
30. They finally submit that no prejudice will be suffered if the court allows both the application for setting aside the impugned ruling in the interest of substantive justice.

Analysis and Determination

31. I have carefully considered the two applications before this Court, the rival affidavits, the detailed submissions by counsel, and the applicable law and authorities cited by the parties. Both the applications centre on this Court's jurisdiction under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010, to review and set aside the ruling delivered by Hon. J.J. Masiga, PM, on 13th February 2025.

32. The applicants contend that the impugned ruling is marred with errors apparent on the face of the record, warranting the exercise of this Court's revisory powers in the interests of justice
33. The power of this Court to grant a stay of execution is discretionary and is exercised to preserve the substratum of proceedings so that justice is not rendered illusory. This discretion must, however, be exercised judiciously and in accordance with settled principles.
34. The Court of Appeal in **Butt vs. Rent Restriction Tribunal [1982] KLR 417** set out the guiding principle that the purpose of a stay is to ensure that an appeal or review, if successful, is not rendered nugatory, and that where there is no overwhelming hindrance, a stay ought to be granted.
35. In the present matter, the record discloses a genuine and unresolved controversy as to which firm of advocates was properly on record for the 3rd respondent during the election petition proceedings, and by extension, which firm is lawfully entitled to the taxed costs.

36. The applicant's claim is based on an error apparent on the face of the record. The parameters of what constitutes an “error apparent on the face of the record” have been authoritatively settled by the Court of Appeal. In **National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)**, the Court held that a review is available where there is a clear and self-evident error which does not require elaborate argument to establish, but is not intended to enable a party to re-argue the case or to correct an erroneous decision on the merits.
37. In **Nyamogo & Nyamogo Advocates v Kogo [2001] 1 EA 173**, the Court of Appeal stated that an error apparent is manifest and obvious, and not one that can only be established by a long-drawn process of reasoning or where two opinions are possible.
38. I have scrutinised the court’s record. The applicant has raised serious integrity issues, alleging tampering with the court’s file and the removal of court records and proceedings. These allegations are grave and undermine the integrity of the judicial proceedings.
39. From the court record’s I note that the applicant, Mr. Malalah filed his application dated 28th May 2021 to be

enjoined as an interested party to the election petition and in a ruling dated 22nd June 2021 by Hon. Justice Musyoka allowed the application and throughout the court proceeding's the applicant Malalah & Company Advocates has been referred and served as appearing for the interested party.

40. I equally note that the firm of Osundwa & Company Advocates had been representing the 3rd respondent in the petition

41. The allegations by the applicant that the court file has been tampered with and some of the documents "plucked" from the file, in my view, are not matters that can be resolved within the narrow and limited jurisdiction of review or setting aside of a ruling. Such allegations require evidentiary support, possible calling of witnesses, and forensic scrutiny.

42. Contested factual issues cannot, by any stretch, amount to an "error apparent on the face of the record" as contemplated under Order 45. Such claims require cogent evidence, which may include forensic examination or witness testimony, and fall outside the scope of review. As held by the Court of Appeal in

Multipurpose Co-operative Society Ltd v Serser & 3 others [2023] KECA 441 (KLR), an alleged error that requires evidential probing or analysis of disputed facts does not qualify as apparent on the face of the record. It is a matter more appropriate for an appeal or a criminal investigation, not for review.

43. Mr. Osundwa, in his replying affidavit, has denied any involvement in the fraud, asserting that his firm was on record for the 3rd respondent, with the applicant's role limited to the Interested Party post the ruling of 22nd June 2021.
44. I have perused the court record and find that the applicant has not demonstrated service of the alleged notice on other parties in the petition, and the contention that the notice of his being appointed as the 3rd respondent's advocate being "plucked" from the file remains unsubstantiated at this stage. Further, the applicant states that he filed the disputed notice of appointment on 13th April 2021; however, he did not attach a court receipt evidencing payment and filing of the said notice of appointment with the court.

45. A court filing entails more than submitting a document. Proper filing requires payment of the prescribed court fees for which a receipt is issued in acknowledgement. The applicant cannot just wave a document in court, and expect that by reason of a stamp, the court would acknowledge it as having been duly filed. Suffice it to say that even if the court documents had been tampered with, the applicant ought to be in possession of the original receipt as proof of filing of the impugned notice of appointment. In **Paresh Kamlakar Naik & Another v. The Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 2 others [2017] KEHC 2760 [KLR]**, Hon. R. E. Aburili struck out a notice of motion due to failure by the applicant to prove payment for the same.
46. Further, the applicant did not submit proof of any retainer agreement with the 3rd respondent, expressly indicating that they had been instructed to come on record for them despite the court records indicating that the firm of Osundwa & Co advocates had drafted their pleadings, filed the requisite documents and even entered appearance on their behalf. In **Kamuti**

Waweru & Company Advocates v Shiven Dev Limited [2022] KEHC 1625 (KLR), the court held that there was no credible evidence of a retainer or of an advocate-client relationship, and struck out the bill of costs. The court reaffirmed the principle that the mere provision of legal services to an alleged client does not constitute a retainer.

47. In this case, the applicant did not provide any evidence that there was a retainer that crystallised him acting for with the 3rd respondent. I have addressed the issue of the notice of appointment extensively because of the applicant's allegations that the court's records were tampered with.
48. In the absence of a self-evident error, I find that the first application does not meet the threshold under Order 45. It borders on an attempt to re-litigate representation, which was evidently canvassed before the Magistrate. The learned Magistrate's finding that the Bill of Costs was filed without proper instructions was based on the material then on record.
49. Whether that conclusion was right or wrong is not for this Court to determine on review. As the Court of

Appeal cautioned in **National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)**, an erroneous conclusion of law or fact is a proper ground of appeal, not review. I am therefore unable to find that the applicant/3rd respondent has demonstrated an error apparent on the face of the record within the meaning of the law.

50. As regards the second application by the petitioner, David Aoko Were. The petitioner seeks review on the ground that the learned Magistrate overlooked a filed consent dated 9th December 2024, which regularised his legal representation pursuant to prior leave granted. This, he argues, led to the erroneous dismissal of his application dated 11th October 2024 on technical grounds, exposing him to execution for Kshs. 1,272,260/= and potential double jeopardy amid the advocates' dispute, which he avers will prejudice him.

51. Upon perusal of the record, I note that the consent was indeed filed by the firm of GNK & Associates LLP on 9th December 2024 and ought to have been considered by the trial Magistrate in his ruling. The Magistrate's finding of non-compliance with Order 9 Rule 9 of the Civil Procedure Rules appears to disregard this

document, which was in the file. This omission constitutes a patent error apparent on the face of the record, as it is discernible without recourse to external evidence or elaborate reasoning. In line with the Court of Appeal's guidance in **National Bank of Kenya Ltd v Njau (Supra)**, such a self-evident oversight warrants review to prevent manifest injustice.

52. Furthermore, the petitioner's sentiments underscore the overriding objective under Section 1A and 1B of the Civil Procedure Act, as well as Article 159(2)(d) of the Constitution, which mandates administration of justice without undue regard to technicalities. Dismissing the application on a technicality, despite compliance via the consent, offends substantive justice. The Court of Appeal in **Mbogo v Shah [1968] EA 93** affirmed that judicial discretion should be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake.

53. In **Benjoh Amalgamated Ltd & another v Kenya Commercial Bank Ltd [2014] KECA 872 (KLR)**, the Court of Appeal reaffirmed that review jurisdiction exists to prevent miscarriage of justice where a court

proceeds on a mistaken assumption of fact apparent from the record. I am satisfied that, to that extent indicated, the petitioner has demonstrated an error apparent on the face of the record warranting review.

54. To subject the petitioner to dual taxation for the same matter would violate Articles 40 and 47 of the Constitution, as rightly submitted. In **Amolo v Joseph & 2 others (Election Petition 5 of 2017) [2023] KEHC 17235 (KLR)**, the High Court emphasised equitable handling of costs in election petitions to prevent prejudice to innocent parties.
55. In conclusion, having weighed the submissions and applied the binding precedents from the Court of Appeal, I find the first application unmeritorious. The second application succeeds to the extent of reviewing the impugned ruling.
56. Accordingly, I make the following orders:
- (i) The first application, dated 28th April 2025, is hereby dismissed with costs to the respondents therein.
 - (ii) The second application, dated 18th February 2025, is allowed. The ruling of Hon. J.J. Masiga, PM, dated

13th February 2025, is hereby reviewed and set aside insofar as it dismissed the petitioner's application dated 11th October 2024 on technical grounds.

- (iii) There shall be a stay of execution of the warrants of attachment and proclamation arising from the impugned Certificate of Costs pending the hearing and determination of the petitioner's application on its merits
- (iv) The said application dated 11th October 2024 is remitted to Hon. V. Amboko, the Deputy Registrar for hearing and determination.
- (v) Each party shall bear its own costs of the application.

Dated, signed, and delivered at Kakamega, this 5th day of February 2026.

**A. C. BETT
JUDGE**

In the presence of:

Ms. Wambui holding brief for Mr. Nduati for the petitioner

No appearance for the applicant and the interested party

Ms. Sheunda holding brief for Mr. Osundwa for the 3rd
respondent

Court Assistant: Polycap

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