



**Maseno University Sacco Society Limited v Kirui (Civil Appeal E355, E353 & E354 of 2023
(Consolidated)) [2026] KEHC 3023 (KLR) (Civ) (9 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E355, E353 & E354 OF 2023 (CONSOLIDATED)
AC MRIMA, J
MARCH 9, 2026**

BETWEEN

MASENO UNIVERSITY SACCO SOCIETY LIMITED APPLICANT

AND

LOI MUHUNJA KIRUI RESPONDENT

RULING

Background

1. The dispute before this Court arose from a surcharge order issued by the Commissioner for Co-operative Development against Loi Muhunja Kirui, the Respondent herein, a former official of Maseno University Sacco Society Limited, the Respondent hereinafter or alternatively referred to as 'the Sacco'.
2. The Respondent challenged the surcharge order before the Co-operative Tribunal in Tribunal Appeal No. 2 of 2019, which appeal was dismissed. Consequently, the Sacco instituted Tribunal Case No. 272 of 2019 under Section 75 of the *Co-operative Societies Act* to recover the surcharged sum of Kshs. 4,877,200/= as a civil debt. In the recovery suit, the Tribunal struck out the Respondent's defence and entered summary judgment in favour of the Sacco on 27th April 2023, holding that there is no defence to a Section 75 recovery suit once the Section 74 appeal process at the Tribunal has failed.
3. Aggrieved, the Respondent filed the substantive appeal herein. In a judgment delivered on 23rd July 2024, this Court allowed the appeal and set aside the Tribunal's summary judgment. The Court held, inter alia, that the surcharge order could not be summarily enforced while a further appeal challenging the surcharge (HCCA No. E303 of 2021) was pending determination before the High Court. The Sacco has now moved this Court seeking a review of that judgment.



The Application:

4. Through an application by way of Notice of Motion dated 19th September 2024, the Applicant sought the following orders:
 1. Spent.
 2. Spent.
 3. That the Order made on 23rd July, 2024 be reviewed and set aside.
 4. That the costs of this Application be provided for.
5. The application was supported by the Affidavit of Prof. Andrew Oduor, the Treasurer of the Sacco deposed to on 19th September 2024. It was his case that there are errors of law apparent on the face of the record in the impugned judgment. Specifically, he averred that the Court erred in Paragraph 33 by misapplying Section 75 of the *Co-operative Societies Act*, stating that it grants an aggrieved party an opportunity to appeal, whereas Section 75 provides that the surcharge order is a civil debt recoverable summarily.
6. Prof. Oduor further contended that the Court erred in holding that the recovery of surcharge money is suspended pending an appeal to the High Court, arguing that the Act provides for summary recovery once the Tribunal process under Section 74 is exhausted. He deposed that the judgment makes it impossible for the Society to recover funds misappropriated by officials and that it is just and fair to review the orders to operationalize Section 75 of the Act.

The Submissions

7. In its submissions dated 5th May 2025, the Applicant reiterated that the judgment contained fundamental errors on the face of the record, particularly in Paragraph 33, where the Court observed that Section 75 of the *Co-operative Societies Act* grants a party the right to appeal.
8. The Applicant submitted that a clear reading of Section 75 reveals it deals strictly with the summary recovery of surcharge as a civil debt and does not confer appellate jurisdiction, which is covered under Section 74. They argued that this error led the Court to the wrong conclusion in Paragraph 36 that the surcharge could not be enforced due to the pending High Court appeal.
9. Significantly, the Applicant brought to the Court's attention that the High Court Appeal No. E303 of 2022 (Richard Olendo & 2 Others -vs- Commissioner for Cooperative Development & Another), the pendency of which formed the basis of the stay in the impugned judgment, was heard and determined by Hon. Justice J.N. Njagi on 25th April 2025. [hereinafter referred to as 'the No. E303 of 2022 judgment']. That appeal was dismissed and the surcharge was upheld. The Applicant submitted that this development confirms the validity of the surcharge and constitutes sufficient reason to review the judgment to allow the fruit of the Tribunal's summary judgment to be realized.

The Respondent's case:

10. Loi Muhunja Kirui challenged the application through a Replying Affidavit sworn by Dr. Constantine Wasonga on 3rd April 2025. He deposed that the application is fatally defective and incompetent. He claimed that the grounds raised by the Applicant, specifically the disagreement with the Judge's interpretation of Section 75 of the *Co-operative Societies Act*, are grounds for appeal, not review.



11. Dr. Wasonga averred that it is not sufficient ground for review that another Judge could have taken a different view of the matter. He maintained that the Applicant failed to point out any patent error that stares one in the face without requiring detailed examination. He urged the Court to dismiss the application with costs to the Respondent.

The Submissions

12. In his written submissions dated 28th May 2025, the Respondent argued that the Applicant failed to meet the strict threshold for review under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. The Respondent submitted that for a review to be granted, the error must be self-evident and not one requiring elaborate argument to establish. He contended that the Applicant was merely re-arguing its case and attempting to disguise an appeal as a review application.
13. Relying on the case of Ribiru -vs- Mwaniki & 2 others [2024] KEHC 10417, the Respondent submitted that misconstruing a statute or proceeding on an incorrect exposition of the law constitutes a ground for appeal, not review. He asserted that the Judge's interpretation of Section 75 of the Co-operative Societies Act was a judicial finding that, even if erroneous, did not amount to an error apparent on the face of the record.
14. He urged the Court to dismiss the application as an abuse of Court process.

Analysis:

15. Having reconsidered the rival positions, the central issue for determination is whether the threshold for review has been met. A Court's jurisdiction to review its judgment is circumscribed by Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 provides as follows: -
 80. 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
16. Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -
 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.



17. The foregoing provisions have been the subject of interpretation by Courts. In *Republic -vs- Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR the Court set the principles to consider in the review of its own decisions. It was observed thus:
- i. A Court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPA. The grounds on which review can be sought are enumerated in Order 45 Rule 1.
18. In Civil Appeal No. 2111 of 1996, *National Bank of Kenya -vs- Ndungu Njau*, the Court of Appeal stated thus: -

.... 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 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 proceed on an incorrect expansion of the law.



19. In the said Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya case [supra], the Court considered the import of some mistake or error apparent on the face of the record as captured in Order 45 of the Civil Procedure Rules and rendered itself thus: -

.... Review is impermissible without a glaring omission, evident mistake or similar ominous error. An error which has to be established by a long-drawn 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. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by an order or review.

The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.

20. Coming back circumstances of the case, the Applicant's claim that there is a patent error apparent on the face of the record is rooted in Paragraph 33 of the impugned judgment. In the said paragraph the Judge rendered himself thus;

Section 75 of the *Co-operative Societies Act* grants any aggrieved party by order of the Commissioner to file an appeal to the Tribunal within thirty days...

...My understanding of Section 75(1) ... is that in the event that there is no appeal... the surcharge amount... become a civil debt recoverable summarily.

21. A textual examination of Section 75(1) of the *Co-operative Societies Act* states:

Subject to Section 74, an order made pursuant to Section 73... shall be filed with the Tribunal and shall, without prejudice to any other mode of recovery, be a civil debt recoverable summarily.

22. In this Court's assessment, the Learned Judge's [Hon. J. K Ng'arng'ar, J.] rendition of Section 75(1) as captured in paragraph 33 is not erroneous as advanced by the Applicant. It is in fact a holistic appreciation of Sections 73, 74 and 75 of the Cooperative *Societies Act*. But, even if in this Court's view the position is wrong, still that cannot be ground for review.

23. Having said so, the judgment in this appeal [No. E355 of 2023] which set aside the Tribunal's summary judgment was primarily anchored on the finding in paragraph 36 where the Court observed as follows: -

36. the Surcharge Order in my view cannot be enforced where the Appellant has not exhausted the appeal mechanisms... and in the instance case, there is an appeal pending determination before the High Court.

24. For clarity, the appeal referred to above was No. E303 of 2021 whose judgment was delivered on 25th April 2025 and the appeal was dismissed. The dismissal, therefore, paved the way for the execution of the surcharge order. In other words, the dismissal of the parallel appeal essentially removed the very legal impediment this Court relied upon (as captured in paragraph 36) to stay the enforcement.

25. In this Court's view, and looking at the entire review spectrum, the review application cannot stand on the ground of discovery of new and important matter or evidence since the judgment in No. E303 of 2021 had not been delivered on 23rd July 2024 when Hon. Ng'arng'ar, J delivered the judgment in the



instant appeal being No. E355 of 2023. Likewise, the ground for review on account of some mistake or error apparent on the face of the record is also inapplicable in this case for the reason that the Court in Appeal No. E355 of 2023 did not err in its judgment. However, going by the cumulative effect of the judgments in the two appeals, this Court finds that the Applicant demonstrated a sufficient reason to allow a review under Order 45 Rule 1 of the Civil Procedure Rules. The reason is that the decision in Appeal No. E303 of 2022 delivered on 25th April 2025 cleared the way to enforcement of the surcharge order and in line with the estoppel rendered in Appeal No. 355 of 2023 which in essence was an order to stay execution of the surcharge pending the outcome of the appeal in No. E303 of 2022.

26. Put differently, the continued existence of the judgment in Appeal No. 355 of 2023 which set aside the recovery was based solely on the pendency of the appeal in No. E303 of 2022 which was later dismissed. Therefore, to decline to allow execution of the surcharge order would perpetuate an injustice by preventing the Applicant from recovering funds that have been judicially confirmed as due. That is where this Court ought to come in and allow the review application.
27. In a nutshell, the dismissal of Appeal No. E303 of 2022 cleared the path for summary recovery under Section 75(1) of the Cooperative *Societies Act*.

Disposition:

28. Accordingly, the Notice of Motion dated 19th September 2024 is merited and the following final Orders hereby issue: -
 - (a) The Notice of Motion dated 19th September 2024 is allowed to the extent that the Judgment of this Court delivered on 23rd July 2024 in Civil Appeal No. E355 of 2023 (Consolidated) is hereby reviewed and set aside since that judgment was overtaken by the subsequent judgment in Civil Appeal No. E303 of 2022 [consolidated] delivered on 25th April 2025.
 - (b) Consequently, the judgment of the Co-operative Tribunal delivered on 27th April 2023 in Tribunal Case No. 272 of 2019, which entered summary judgment in favour of the Applicant, Maseno University Sacco Society Limited, is hereby reinstated and the Applicant is at liberty to levy execution.
 - (c) The Applicant shall have the costs of the application.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF MARCH, 2026.

A. C. MRIMA

JUDGE

Ruling - virtually delivered in the presence of

Miss Nyakundi, Learned Counsel for the Appellant/Applicant.

Mr. Gikange, Learned Counsel for the Respondent.

Michael/Amina – Court Assistants.

