

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND COURT AT KAKAMEGA**

**ELCA NO. E026 OF 2023**

**CHARLES MAPESA MANYASA (Suing**

**As personal representative of the**

**estate of the late BARNABAS**

**MAPESA**

**ESHITEMI)**

**.....APPELLANT/APPLICANT**

**VERSUS**

**JOHN MAPESA..... 1<sup>ST</sup>**

**RESPONDENT**

**DAVID MAHERO.....2<sup>ND</sup>**

**RESPONDENT**

**RULING**

**Introduction**

1. Before court is a notice of motion dated 14<sup>th</sup> July 2025 filed by the appellant seeking the following orders;

**a) Spent**

**b) That this Honourable court be pleased to review, set side, vacate, vary or discharge**

**orders made on 23. 06.2025 and any other consequential orders arising therefrom.**

**c) That upon granted prayer 2 herein, this court be pleased to reinstate the instant appeal for hearing and determination on merit.**

**d) That the costs of this application be provided for.**

2. The application is predicated on the supporting affidavit sworn by the appellant dated 14<sup>th</sup> July 2025. The applicant's case is that he complied with directions for this appeal until 23<sup>rd</sup> June 2025, when the appeal was struck out with costs on account of filing affidavit of service on 23<sup>rd</sup> June 2025 which was later than 60 days from 12<sup>th</sup> March 2025. That at the time the court was striking out his appeal, he had filed Record of appeal and submissions and what was pending was service of the same on the respondent's counsel. That no prejudice will be occasioned on the respondents if orders sought are granted. That what happened was a human error and blunder which is bound to happen from time to time, and that it was not deliberate and that the court has unfettered discretion to grant orders sought.

3. There was no response to the application.

**Analysis and determination.**

4. The court has carefully considered the application together with the supporting affidavit. The issue that arise for the court's determination is whether the applicant has met the threshold for grant of orders of review.

5. The law that governs review of court decisions is provided for in Section 80 of the Civil Procedure Act and Order 45(1) of the Civil Procedure Rules.

Section 80 of the Civil Procedure Act 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.**

Order 45 Rule 1 for 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 a review of judgment to the court which passed the decree 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 on which he applies for the review.**

6. Therefore, for an applicant to succeed in seeking orders of review, he/she ought to demonstrate that;

**(a) That there is discovery of new and important matter or evidence, which was not in his knowledge or could not be produced by him after exercise of due diligence; or**

**(b) That there is a mistake or error apparent on the face of the record; or**

**(c) That there is a sufficient reason; and**

**(d) An application for review must be made without unreasonable delay.**

7. In the case of **Evan Bwire vs. Andrew Aginda Civil Appeal No. 147 of 2006** the Court of Appeal stated as follows;

**“An application for review will only be allowed on strong grounds particularly if its effect will amount to reopening the application or case afresh.”**

8. In the case of **Nyamogo & Nyamogo vs. Kogo [2001] EA 170**; the court discussed the issue of an error apparent on the face of the record, as follows;

**“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a 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 spares 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 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. Again, if a new adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”**

9. In determining a review application, the court should also consider if there is sufficient reason to review its earlier decision. In the case of **Sadar Mohamed vs. Charan Singh & Another [1959] EA 793**, it was stated as follows;

**“Any other sufficient reason for the purposes of review refers to the grounds analogous to the other two (for example error apparent on the face of the record and discovery of new and important matter).”**

10. In the instant case, the applicant sought to review orders made by this court on 23<sup>rd</sup> June 2025 because, according to him, there was a human error which resulted in the applicant and his advocate not complying with previous court orders. The applicant referred to noncompliance with court orders as a blunder which is bound to happen from time to time, arguing that the same was inadvertent and not deliberate.

11. From the record, the appeal herein was filed on 23<sup>rd</sup> October 2023. On 25<sup>th</sup> September 2024 when this matter came up for mention, Mr. Mondia, counsel for the appellant sought 60 days to file and serve Record of

appeal and submissions, which prayer was allowed. The matter was then fixed for mention on 14<sup>th</sup> January 2025.

12. On 14<sup>th</sup> January 2025, Mr. Mondia informed court that he did not serve the respondent with notice to attend court that date and sought 30 days, which the court granted and fixed the matter for directions on 12<sup>th</sup> March 2025. Come that date, there was no evidence of service and therefore the court gave the appellant a last chance to serve Record of appeal and submissions and file evidence of service in 60 days.

13. Among the orders made on 12<sup>th</sup> March 2025, was an order that in default of filing and serving record of appeal and submissions within 60 days, the appeal shall stand struck out. The matter was then fixed for mention on 23<sup>rd</sup> June 2025. On the said date, the appellant had not complied with the orders of 23<sup>rd</sup> March 2025. The appellant refers to his act as a blunder that is bound to happen from time to time because it is human error.

14. While this court does not expect or demand perfection from the appellant who is human, it expects

respect for, and compliance with court orders. Blunders happen, people forget, they get sick and sometimes are unable to do what the court directed them to do.

15. However, in the instant case, the consistency with which the appellant and his counsel were unwilling to comply with court orders issued in this matter is not a human error as alleged, but points to the flagrant disregard for court orders and precious judicial time. This appeal was filed in 2023, yet two years down the line, coupled with over five mentions, with the court continuously extending time and imploring the appellant to file and serve the record of appeal and submissions in vain, this is not a matter that can be described as human error. It is a deliberate act by the appellant and his counsel to waste precious judicial time with contempt.

16. The orders of 12<sup>th</sup> March 2025 where the appellant was granted 60 days to file and serve Record of appeal and submissions had a default clause, that noncompliance will result in the appeal being struck out. Despite the default clause, there was no compliance and no single reason has been given by the appellant for failure to file

and serve Record of appeal and submissions in this matter. That cannot be rewarded with an order of review.

17. In the premises, I find no reason whatsoever, for reviewing the orders of 23<sup>rd</sup> June 2025. Therefore, I find and hold that the application dated 14<sup>th</sup> July 2025 lacks merit and the same is hereby dismissed. I make no order as to costs.

18. It is so ordered

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 25<sup>TH</sup> DAY OF FEBUARY, 2026**

**A. NYUKURI  
JUDGE**

**In the presence of;**

Mr. Mondia for the appellant

No appearance for the respondent

Court Assistant: Delphine