



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO.E012 OF 2024

CLERWELL INVESTMENTS LTD.....APPELLANT

VERSUS

BEST ADVENTURES SAFARIS LTD.....

.....RESPONDENT

(Being an Appeal from the Ruling /Order of Hon. G. Sagero, Senior Principal Magistrate in Narok delivered on 24th June 2024 in Narok CMELC NO.36 OF 2018)

JUDGMENT

1. The suit from the subordinate court emanated from a claim of **breach of Contract** wherein the Appellant herein as the Plaintiff before the trial court claimed that the Defendant, now Respondent herein had breached contract for sale and purchase of land parcel No. **Cis Mara/ Koiyaki/ Dagururueti/4297**.
2. The above referred sale Agreement was concluded on **5th July 2017**, and the Vendor (Appellant herein) had agreed to sell to the purchaser (Respondent herein) the said suit property for **ksh 11, 000,000/=**. The terms of the said sale agreement are that; the Defendant (Respondent) was to pay **ksh 7,000,000/=** as deposit, and the balance of **ksh 4,000,000/=** within 30 days of execution of the sale

agreement, and the completion date for the performance of parties obligations under the agreement was on **5th of August 2017.**

3. However, from the proceedings from the trial court, the purchaser(Respondent) did not pay the agreed purchase price on the agreed time, but the suit land was transferred to it. Due to the said breach of contract, the vendor(Appellant) herein filed the suit before Narok Chief Magistrates Court being **Narok CMELC No 36 of 2018.**
4. After the trial before the trial court, the court entered Judgment on **28th July 2021**, wherein the court concluded;

“In my conclusion, the Defendant is in breach of contract. I grant the Plaintiff’s prayers as follows;-

a). Liquidated damages of ksh 2,500,000/=;

b). Interest on (a) above at court’s rate from the date of judgment until payment in full;

(c). Costs of the suit are in favour of the Plaintiff(Appellant) herein.

5. The Appellant herein as the Plaintiff was aggrieved by the final holding and finding that the ***Interest on liquidated damages*** of ***ksh 2,500, 000/=*** should be from the date of Judgment until payment in full.

6. Due to the above dissatisfaction that *interest to accrue from the date of judgment until payment in full*, the Appellant herein as the Plaintiff/Applicant filed **Notice of Motion Application** dated **31st May 2023**, wherein it sought for these orders;

i) That the court be pleased to review and / or vary the terms of the Judgment dated 28th July 2021, more specifically that interest should run from the date of filing of the instant suit;

ii) That costs of the application be provided for.

7. The above application was opposed by the Defendant(Respondent herein) vide the Replying Affidavit of **Stephen Ochieng Odour**, who averred that he had been advised by his advocate on record that from the Judgment of the trial court, there is *no error apparent on the face of record on the award of ksh 2,500, 000/=*, since the trial court awarded **damages** upon conclusion of the trial, and the right to those damages did not accrue until they were assessed and therefore interest could only apply from the date of Judgment.

8. The above application was canvassed by way of written submissions, wherein the Appellant (as applicant) filed the submissions dated **20th November 2023**, through **Sheth & Wathigo Advocates**, and urged the court to allow the said application for Review. The applicant quoted several decided cases to support its application, and also relied on

Section 26 of the **Civil Procedure Act**, on the issue of interest.

9. The Defendant(Respondent) filed its submissions on **25th April 2024**, through **Owino & Co. Advocates** and urged the court to dismiss the said Application with costs. Several decided cases were also relied upon and the provisions of **Section 26** of the **Civil Procedure Act**, was also quoted.
10. With the above argument for and against the application for review, the trial court on **24th June 2024**, delivered its ruling and dismissed the Applicant(Appellant's) Application, with costs to the Defendant (Respondent herein).
11. In its findings, the trial court in para 15 of the ruling held.
“From the Submissions made by the learned counsel for the Plaintiff/Applicant, he believes that interest should be calculated from the date the suit was filed. The court in its awarding of the orders to the Plaintiff, was clear on the operative orders in favour of the Plaintiff. What the Plaintiff/Applicant is asking, is the court to sit on appeal of its decision and reverse it. The fact that a party believes that the court should have awarded interest since the suit was filed was erroneous is a matter fit for appeal rather than review which is limited in scope. Notably also, courts have held that; “the process of reasoning cannot be treated as an error apparent on the face of the record

***justifying the exercise of the power of review”.
And that; “an erroneous order/decision cannot
be corrected in the guise of exercise of the
power of review.”***

12. Further in para 18 of the said ruling, the trial court held;
***“while I place reliance on the above cited
authorities, I am of the view that the court has
discretion in awarding the interest as it deemed ,
and it is not mandatory that the interest runs from
the time the suit was filed. ...”***

13. The Appellant as the Applicant in the above cited case was
aggrieved by the above determination of the trial court,
and filed this Appeal vide the ***Memorandum of Appeal***
dated ***5th July 2024***, on the following Grounds; -

***i) That the learned magistrate erred in law
and fact in failing to award the appellant
interest from the date of the suit in the
depository part of the Judgment even after
clearly finding the same to be justified in
page 9 of his Judgment and ultimately in
failing to utilize his review jurisdiction
when the appellant herein invoked the
same and accorded the learned magistrate
the opportunity to correct manifest error
on the face of the Judgment dated the 28th
July 2021 in so far as the period of interest
is concerned.***

- ii) That the learned magistrate erred in law and fact in failing to appreciate the principles governing Review of Judgment or orders and proceeded to impose his own opinion rather than appreciating the trial court's intent at the time of delivery of the said Judgment thereby erroneously sitting on appeal from the trial court's Judgment.**
- iii) That the learned Magistrate erred in law and fact in holding that the appellant had failed to satisfy the requirements for review of Judgment despite clear evidence on record on the manifest error on record.**
- iv) That the learned trial magistrate erred in law and in principle in failing to appreciate the helpful appellant's written submissions and authorities attached thereto, thereby reaching erroneous finding on the subject application for review.**

14. Consequently, the Appellant urged the court to find as follows;

- i) That the ruling/ order of the trial court dated 24th June 2024, be reviewed and/ or set aside, and in its place be substituted with a ruling allowing the appellant's application for review on the award of**

interest in the judgement of the lower court dated 28th July 2021;

ii) That costs of the appeal be borne by the Respondent.

15. This court has set the background of the case, but it is noteworthy that in response to the Appeal, the Respondent herein had filed a ***Notice of Preliminary Objection*** averring that the Appeal was defective for offending the express provisions of ***Section 16A*** of the ***ELC Act***, and that the said defect could not be cured by ***Section 18*** of the ***Civil Procedure Act***. However, the court dismissed the said ***Preliminary Objection*** on ***26th June 2025***, and directed that the Appeal be prosecuted and determined on merit.

16. The Appeal was canvassed by way of written submissions. The Appellant filed its submissions dated ***27th August 2025***, through ***Sheth & Wathigo Advocates*** and urged the court to allow the appeal. The Appellant set out one issue for determination being;

i. Whether or not the Appeal is merited.

17. It was the Appellant's submissions that this Appeal is merited, as the application before the trial court fitted under the purview of ***Section 80*** of the ***Civil Procedure Act***, as the said section of the law allows a person who is aggrieved by a decree of the court to apply for a review of the Judgement to the court which passed the said decree or made the order, and the court may make such orders it thinks fit to grant.

18. The Appellant also relied on **Order 45 Rule 1** of the **Civil Procedure Rules** and the case of **Mputhia vs M'Miriti (Civil Appeal No E088 OF 2024(2025) KEHC 756(KLR) (23RD January 2025) Ruling**, wherein the court held that some mistake or error apparent on the face of record is a sufficient reason and/ or ground to invoke the court to allow review of its own Judgment.
19. It was further submitted that the Appellant's application before the trial court was on account of the said error, and failure by the trial court to allow the said application on allegation that the same amounted to inviting the court to sit on its own appeal was an error or was a wrong observation. The said *error was apparent on the face of the record*.
20. He further submitted that the trial court did not explain or justify the discrepancy between the body of the judgement and the conclusion on the issue of interest, and thus there was no justifiable reasons on why the trial court failed to review the said ruling, to create tandem between the reasoning and the conclusion.
21. The Appellant reproduced the holding of the trial court on page 9 of the trial Court's Judgment, where the court held; ***"the Plaintiff having acknowledged receipt of ksh 8,500,000/=, it is simple mathematics that the balance stands at ksh 2,500,000/= . It is only fair and just that the defendant pays the entire balance of ksh 2,500,000/= plus interest at courts rates.***

Interest to be calculated from the time the case was first filed in court.”

22. It was its further submissions that from the above holding of the trial court, it is patently clear that the trial court expressly intended to have the said interest calculated from the date of filing the suit, which is within the applicable law. Therefore, the trial court’s judgment of **28th July 2021**, was coupled by an *error apparent on the face of record*, which could only be corrected by a review. Failure by the trial court to review the said error was also an error on the part of the trial court, which should be corrected.
23. The appellant relied on various decided cases being; ***Kipchumba vs BOG Tambach Teachers Training College(Civil Appeal No 100 of 2019)(2023) KECA 802(KLR)(30th June 2023) eklr; Mukisa Biscuits Manufacturing Company vs West End Distributors Ltd(1970) EA 469***, which was quoted in the case of ***Alba Petroleum Ltd vs Total Marketing Kenya Ltd(2019) eklr***; where the court held;

*“the principle that emerges is that where a person is entitled to a liquidated amount or specific goods and had been deprived of them through the wrongful act of another person should be **awarded interest from the date of filing suit.**”*

24. With the above submissions, the Appellant urged the court to allow the instant Appeal, and **review** the Judgment of the trial court on the issue of interest.
25. The Respondent filed its written submissions dated **6th October 2025**, through **Owino & Co Advocates** and urged the court to dismiss the instant Appeal in its entirety.
26. The Respondent set out two issues for determination;
- i) Whether the trial court failed to exercise its discretion properly in declining to review the judgement on the basis of alleged error apparent on the face of record;**
 - ii) Who should bear the costs of this appeal;**
27. On whether the trial court failed to exercise his discretion properly in declining to review the Judgment on the basis of alleged error apparent on the face of record, it was submitted that the trial court did not err, as the law is very clear on review. It relied on **section 80 of Civil Procedure Act** and **Order 45 Rule 1 of Civil Procedure Rules**, which provide that review may be invoked where; **there is discovery of new and important evidence not within the applicant's knowledge; there is mistake or error apparent on the face of record; there is any other sufficient reason; the applicant approaches the court without delay;**

28. Further, that though the Appellant approached the court on the basis that there is an **error apparent on the face of record**, the **mere dissatisfaction** with the conclusion of a Judgment or the **exercise of the court's discretion** cannot be termed as error apparent on the face of the record. That the alleged inconsistency was part of judicial reasoning, not a clerical or mathematical error, and the said inconsistency does not amount to an apparent error on the face of the record.
29. It was further submitted that if the trial court exercised its discretion in one way or another, the proper recourse is an appeal and not **review**. Reliance was sought on various decided cases being; **Nyamogo & Nyamogo Advocates vs Kogo (2001) EA 173; Rvs Advocates Disciplinary Tribunal Ex parte Appollo Mboya (2019) eklr; National Bank of Kenya Ltd vs Ndungu Njau (1997) eklr; Francis Origo & Another vs Jacob Kumali Mungala (2005) KECA 356(KLR).**
30. Further, the Respondent submitted that there was no self-evident error or contradiction as the said Judgment of the trial court shows that the trial court consciously exercised its discretion to award interest from the date of the Judgment, and not from the date of filing of the suit.
31. The Respondent also relied on **section 26** of the **Civil Procedure Act**, and the case of **Nzombe & Another vs Chenje (Civil Appeal 78 of 2022)(2023) KEHC 27564(17th November 2023)(Judgment)**, and submitted that the trial court correctly exercised its discretion by directing

that interest should run from the date of Judgment to payment in full. Further, that the alleged inconsistency on **pages 9** and **10** of the said Judgment does not amount to an **error apparent** on the face of record, but simply a matter of judicial discretion and reasoning reflected in the final order of the trial court.

32. Ultimately, the Respondent submitted that the interest should start running from the date of Judgment, and not from the date of filing the suit, as the assessed damages was non-liquidated and only became ascertainable upon the Judgment, and hence the interest cannot accrue from date of filing. It was also submitted that the trial court correctly exercised its discretion, and there was no error apparent on the face of record raised by the Appellant to warrant the invocation of **Section 80** of the **Civil Procedure Act**, and **Order 45 Rule 1** of the **Civil Procedure Rules**.
33. The above are the arguments for and against the instant Appeal which this court has carefully considered. The court has considered the **Memo of Appeal**, the available evidence before the trial court as contained in the **Record of Appeal**, the rival written submissions and the relevant provisions of law and finds as follows;
34. This is a first Appeal, and as provided by the law, the court in its appellate jurisdiction has the mandate **to re-evaluate, re-analyse, re-consider and re-assess** the evidence as tendered before the trial court, and then come

up with its own independent conclusion. See **Section 78** of the **Civil Procedure Act**.

35. The court will rely on the case of **Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123**, where the Court held; -

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

36. Further, in the case of **Abok James Odera T/A A.J. Odera & Associates -Vs- John Patrick Machira T/A Machira & Co. Advocates [2013] eKlr** the court held; -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

37. In the case of **Peters v Sunday Post Ltd [1958] EA 424 (Court of Appeal for Eastern Africa)** the court held; -

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

38. Being guided as above, this court will now re-analyse and re-consider the available evidence, before the trial court and comes up with its own independent conclusion. However, this court will not upset the trial court’s findings just because it has been moved in an appeal, or would have held differently. See the case of ***Mbogo vs Shah (1968) EA 93***, where the court held that;-

...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

39. The Appeal herein is basically on the failure of the trial court to review the Judgment of the trial court dated **28th July 2021**, on the issue of interest to run from the date of filing the suit. The Appellant alleged and submitted that

there is ***error apparent on the face of record*** since from the body of the Judgment on page 9, the trial court held as follows; *“the plaintiff having acknowledged receipt of ksh 8,500,000/= it is simple mathematics that the balance stands at ksh 2,500,000/=. it is only fair and just that the defendant pays the entire balance of ksh 2,500,000/= plus interest at court rates. Interest to be calculated from the time the case was first filed in court”*

40. It was submitted that the error arose because in its conclusion, the trial court held in ***Order No.(b) that interest on a) above at court rates from the date of judgement until payment in full.***
41. Indeed, there is a contradiction on the two holdings of the court. In the analysis, the court held that Interest to run from the *time the case was first filed in court*, and in the final analysis the court held that interest to run from the date of the judgment till payment in full. Was his a typographical error? Did the court depart from its earlier analysis? This was not explained anywhere in the trial Court’s judgement, and indeed there is an *error apparent on the face of record*.
42. When confronted with an application for review, dated **31st May 2023**, the trial court observed in paragraph 15 as follows;
- “what the plaintiff /Applicant is asking, is this court to sit on appeal of its own decision, and reverse it..... the process of reasoning cannot be treated as an error apparent on the face of***

record , justifying the exercise of the power of review.”

43. However, it is clear that the trial court before coming to the issue of costs, had already determined that the Plaintiff(Appellant) was entitled to payment of the entire balance of the purchase price which was ***ksh 2,500,000/=*** from the date the suit was first filed in court. It is only at the concluding section that the interest was indicated to run from the date of judgement to payment in full. That was indeed *an error apparent on the face of record*, and the application fell under the purview of ***Section 80*** of the ***Civil Procedure Act*** and ***Order 45 rule 1*** of the ***Civil Procedure Rules***.
44. By being asked to review the issue of interest or clarify, the trial court was not being asked to sit on its own appeal. The application dated ***31st May 2023***, was correctly filed in court for review.
45. Having observed as above, is this appeal merited?
46. It is trite that a ruling from the subordinate court denying a review of Judgment is appealable to the superior, Court, ELC being one of such superior court. Such an appeal focuses on whether the trial court erred in law by refusing to review, based on the grounds stated in the applicable law such as new evidence or ***errors apparent on the face of the record***. See ***Order 43 Rule 1 of the Civil Procedure Rules*** which provides; ***(1) An appeal shall***

lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—

(x) Order 45, rule 3 (application for review);

47. The grounds for review of a Judgment are set out in **Section 80** of the **Civil Procedure Act** and **Order 45 Rule 1** of **Civil Procedure Rules**, which this court will not reproduce herein. The parties herein have relied on those two provisions of law in their submissions.

48. In the case of **Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR**, the Court held as follows;

“12. Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.”

49. Further, the Court of Appeal in the case of ***Pancras T. Swai v Kenya Breweries Limited [2014] eKLR*** held: -

“Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.”... As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.”

50. As pointed out earlier, the power to review Judgment and order of the court is provided under ***section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules*** and it is clear under these provisions, the court may review its orders where it is satisfied on either one of these grounds. First, *that there is discovery of new and important evidence which was not available at the time of the hearing despite the exercise of due diligence*. Such evidence must be credible, material to the case, and not merely confirmatory of what was already presented. (***See Francis Origo & Another v Jacob Kumali Mungala [2005] eKLR***).

51. Further, a review may also be granted where the court is satisfied that ***there is a mistake or error apparent on the face of the record***. Such an error must be self-evident, not requiring extensive argument to establish. ***(See Nyamogo & Nyamogo Advocates v Kago [2001] eKLR)***. Lastly, a court may grant review for any other sufficient reason.
52. In this Appeal, the Appellant had sought review of a judgement on the issue of interest, but in its ruling the trial court declined to review the said issue and held that to do so was tantamount to sitting on its own appeal. In its decision, the trial court further noted that the fact that a party believes that the court should have awarded interest since the suit was filed was erroneous is a matter fit for appeal, rather than review, which is limited in scope.
53. The Appeal herein is that the trial court in its ruling of failed to appreciate the principles applicable in an application for review, and for finding that the application was not merited, and dismissing the same. The court has observed and noted that the trial court had considered the application for review and found that what the appellant had sought was fit for appeal and not review.
54. However, this court has found and held that the conclusion of the analysis of the judgment was that the Plaintiff(Appellant) was entitled to interest from the first time the suit was filed. On the final disposition, the interest was indicated to run from the date of the Judgment.

55. The sum of **ksh 2,500,000/=** was not General damages, but payment of the balance of the purchase price. This balance was well known from the date of filing the suit, since the Defendant had only paid **Ksh 8.5 Million**, and the purchase price was **ksh 11Million**. Therefore, this court finds and holds that this is a case that falls under the purview of **Section 26** of the **Civil Procedure Act**, and the interest should run from the date of filing the suit. That could have been the intention of the trial court as stated on page 9 of the impugned Judgment.
56. Courts do order interest to be paid from the date of filing the suit when it is dealing with money issues. However, the court has a wide discretion and can award interest from the period of filing the suit to payment in full as provided by **Section 26** of the **Civil Procedure Act**. The interest from the date of filing of the suit is awarded where the amount is certain (liquidated). The amount of **Ksh.2,500,000/=** was the balance of the purchase price and was certain. See the case of **Francis Mwanza Mulwa vs Afrison Export Imports Ltd & Another, Milimani HCCC No.444 of 2011** and **Fredrick Mageria Githunji vs Charles Mwangi Murithi, Nyeri HCCC Civil Appeal No. 52 of 2018**.
57. Relying on various authorities cited by the parties herein this court is guided by the decision of the Court of Appeal in the case of **Kipchumba vs BOG Tambach Teachers Training College(supra)** as quoted by the Appellant, and finds that the interest of **ksh 2,500,000/=** should be calculated from the first time the suit was filed, as held by

the trial court on page 9 of its Judgment dated **28th July 2021**, until payment in view.

58. Since there was an error apparent on the face of record, this court in its appellate jurisdiction after re-considering the available evidence as contained in the **Record of Appeal**, and the **Memo of Appeal** dated **5th October 2024**, finds that the Application dated **31st May 2023**, was merited for review as sought.
59. For the above reasons, the Ruling and/or Order of the trial court dated **24th June 2024** be and is hereby reviewed and/ or set aside, and it is substituted with an order of allowing the Appellant's application for review on the award of interest in the judgment of the trial court **dated 28th July 2021**. The interest will be calculated from the date of first filing of the suit, as held by the trial court on page 9 of its Judgment.
60. The holding on page 10 of the said Judgment, specifically **Order No (b)** is found to be an error apparent on the face of record.
61. Further, the Appellant is entitled to costs of this appeal, to be borne by the Respondent. In a nutshell, the Appellant's Appeal dated **5th October 2024**, is allowed entirely in terms of prayers **Nos 1 and 2** of the **Memo of Appeal**.

Appeal allowed accordingly.

Dated, signed, and delivered virtually at Narok this 24th Day of March 2026

**L. Gacheru
Judge**

Delivered online in the presence of

Elijah Meyoki - Court Assistant

Mr. Muthui holding brief for Mr. Mureithi for Appellant

Mr. Owino for the Respondent

**L. Gacheru
Judge**