REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCOMMA NO. E130 OF 2023

PHILLIP MUSUNDI……..…….....…...…….……APPELLANT

-VERSUS-

BENTAL SERVICES LIMITED.....….RESPONDENT

(Being an appeal from the Ruling of the learned Chief Magistrate Hon. Wendy K. Micheni, delivered on 9th June 2023 in CMCC No. 7388 of 2015 at the Chief Magistrate's Court at Milimani Commercial Courts).

JUDGMENT.

(This Judgment has been amended at page 17 on the Court's own motion, under the provisions of Section 99 of the Civil Procedure Act, wherein the word "*Ruling*" has been replaced with the word "*Judgment*").

1. The plaintiff (respondent) filed a suit in the lower Court vide a plaint dated 10th December 2015, seeking Judgment against the defendant (appellant) in special damages of Kshs.1,950,000/= together with interest at 15% per month from April 2014 until payment in full, as well as costs and interest. The respondent's claim was that on or about 29th September 2014, it advanced to the appellant a loan of Kshs.1,950,000/= at the appellant's request, on terms that the amount would be repaid with interest at 15% per month in four (4) equal monthly instalments of Kshs.487,500/=. The respondent claimed that the said loan was secured by four (4) post-dated cheques issued by the appellant, but the appellant requested the respondent not to present the cheques for payment and instead undertook to repay the loan directly, but failed to honour the said commitment. The respondent asserted that despite issuing a demand and a notice of intention

to sue, the appellant declined or neglected to settle the outstanding sum, necessitating the institution of the suit.

2. From the record, it is evident that the appellant did not enter appearance or file a defence in the lower Court, resulting in the entry of default Judgment in favour of the respondent on 18th March 2016 as prayed in the plaint. That Judgment was later set aside by consent and the appellant was granted fourteen (14) days to file a defence. The appellant however failed to comply within the stipulated period, leading to the entry of a second default Judgment on 2nd July 2018. A decree and Certificate of Costs were subsequently issued on 7th December 2018. Thereafter, the respondent filed a Notice to Show Cause dated 8th December 2022, requiring the appellant to appear before the Court on 23rd January 2023 to show cause why execution should not issue.

3. Before the said Notice to Show Cause could be heard, the appellant filed a Notice of Motion application dated 20th January 2023 seeking orders for *inter alia,* that the Court reviews and/or varies the Judgment entered against him on 2nd July 2018. The appellant averred that a default Judgment was entered against him requiring payment of the principal sum of Kshs.1,950,000/= together with interest at 15% per month from April 2014 until payment in full. He contended that this results in an oppressive and unconscionable amount far exceeding the principal sum.

4. He further averred that enforcing such a rate would violate the provisions of Section 44A of the Banking Act on the *in duplum rule*. The appellant claimed that his failure to file a defence and to follow up on the matter was caused by prolonged ill health, including a cardiac condition for which he has been in and out of hospital since 2014. He further deposed that due to his medical condition, advanced age and the disruptions occasioned by the COVID-19 Pandemic, he

lost contact with his former Advocate and was unable to participate in the proceedings.

5. In opposition to the said application, the respondent filed a replying affidavit sworn on 20th February 2023 by Mr. Henry Tanui, a Director of the respondent company. Mr. Tanui averred that the appellant failed to file a defence to the respondent's claim within the prescribed timelines, resulting in a default Judgment on 18th March 2016, which was later set aside by consent and again failed to file a defence thereafter, leading to a second default Judgment on 2nd July 2018. He stated that a decree and Certificate of Costs were thereafter issued on 7th December 2018. The respondent asserted that the appellant has taken no steps for over four (4) years to appeal or seek review of the said Judgment and only filed the application dated 20th January 2023 to delay execution and frustrate the Notice to Show Cause.

6. Mr. Tanui deposed that the grounds advanced do not meet the requirements of Order 45 of the Civil Procedure Rules for review. He contended that the alleged illegality of the interest rate does not constitute an error apparent on the face of the record but is instead a ground for appeal. He further contended that Section 44A of the Banking Act on the *in duplum rule* is inapplicable, as the respondent is not a bank or financial institution and the interest was freely negotiated between the parties in line with the principle of freedom of contract. He asserted that the alleged health issues are unsubstantiated and that the claim by the appellant of having lost touch with his former Counsel lacks proof.

7. In a Ruling delivered by the Trial Court on 9th June 2023, the appellant's application dated 20th January 2023 was dismissed with costs to the respondent for being without merits.

8. Being dissatisfied with the said Ruling, the appellant filed a Memorandum of Appeal dated 16th June 2023 which was subsequently amended on 20th March 2025 raising the following Grounds of Appeal -

    i) The learned Magistrate erred in law and in dismissing the Notice of Motion dated 20th January 2023 in total disregard of the issues of law and fact raised therein (sic);
    ii) The learned Magistrate erred in law and fact by ignoring the fact that there was a sufficient reason and or purpose to review the Judgment entered on 2nd December, 2018;
    iii) The learned Magistrate erred in law and fact as the Ruling was against the weight of evidence adduced by the defendant/applicant which facts were justifiable, substantive and overwhelming as provided for in law;
    iv) The learned Magistrate erred in law and fact by totally ignoring and not taking into consideration the submissions of the appellant;
    v) The learned Magistrate erred in law and fact by failing to take into consideration the High Court decisions cited by the appellant which authorities are binding on the lower Court as to the amount of interest to be charged on a facility despite the legal status of the entity in question;
    vi) The learned Magistrate erred in law and fact by failing to find that a violation of the *in duplum rule* in calculation of interest by the respondent was sufficient reason for the Honourable Court to set aside or review its Judgment in default and decretal amounts awarded thereunder;

vii) The learned Magistrate erred in law and fact by failing to find that the interest rates as charged by the respondent were unconscionable, oppressive and an illegality on the face of the law;

viii) The learned Magistrate erred in law and fact in failing to acknowledge that there was an error apparent on the face of the record in terms of the quantum of the interest awarded in the impugned Judgment;

ix) The learned Magistrate erred in law and fact by failing to appreciate that there was an error on the record as to the actual amount borrowed to warrant the review of the impugned Judgment;

x) The learned Magistrate erred in law and fact by punishing the appellant for the mistakes of his former Advocates who failed to adequately represent him and file necessary documents in Court in his defence thus warranting the second impugned interlocutory Judgment; and

xi) The learned Magistrate erred in law and fact by condemning the appellant unheard thus violating the appellant's constitutional right to a fair hearing which ought not to be limited under any circumstances.

9. The appellant's prayer is for this Court to allow the Appeal with costs, set aside the Ruling of the lower Court delivered on 9th June 2023 and for the application dated 20th January 2023 to be allowed in its entirety, and that he pays the respondent interest in conformity with the *in duplum rule*.

10. This Appeal was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of KWEW Advocates LLP on 26th May

2025, whereas the respondent's submissions were filed on 15th July 2025 by the law firm of P.K. Mbabu & Company Advocates.

11. Mr. Wabuge, learned Counsel for the appellant submitted that the appellant's application disclosed sufficient grounds under Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. He argued that the Judgment under review sanctioned an oppressive and unconscionable interest rate of 15% per month, resulting in a decree of Kshs.17,160,000/= from an alleged loan of Kshs.1,950,000/=. He relied on the Court of Appeal case of **Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited** [2014] KECA 319 (KLR), and the case of **Mugure & 2 others v Higher Education Loans Board** [2022] KEHC 11951 (KLR), and submitted that charging of interest that far exceeds the principal amount violates public policy and the *in duplum rule*. Counsel argued that the interest imposed and the resultant decree constituted a glaring and self-evident error on the face of the record that required no elaborate legal reasoning to detect.

12. Mr. Wabuge cited the Court of Appeal case of **Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 others** [2015] KECA 674 (KLR), and contended that the circumstances leading to the entry of the impugned interlocutory Judgment arose from the inaction and negligence of his former Advocate, who failed to file a defence even after the first default Judgment was set aside by consent. He urged this Court not to punish the appellant for his Counsel's mistake.

13. Mr. Wabuge contended that the Trial Court failed to interrogate the material dispute regarding the actual amount borrowed, noting that the appellant's position that he borrowed Kshs.300,000/= and not Kshs.1,950,000/= as claimed. He argued that the said omission resulted in the endorsement of an

erroneous decree and constituted a further sufficient basis for review. He asserted that the Trial Court's failure to examine the fairness of the transaction enabled unjust enrichment, contrary to the appellant's consumer rights under Articles 43 & 46 of the Constitution.

14. Mr. Muuo, learned Counsel for the respondent submitted that the Record of Appeal filed by the appellant does not include the Order against which the Appeal is preferred. He relied on the case of **Akile & another v Mugo** [2024] KEHC 6538 (KLR), and argued that the Order appealed from is a mandatory document that must be part of the Record of Appeal pursuant to the provisions of Order 42 Rule 13(4)(f) and Order 43 Rule 2 of the Civil Procedure Rules, 2010. He asserted that the omission to file the Order renders the appellant's Appeal incompetent and liable to be struck out forthwith as it is not a mere technicality but goes to the root of the Appeal and affects jurisdiction.

15. Mr. Muuo submitted that the Court's jurisdiction and scope of review are governed by Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. Counsel cited the cases of **Mbogo & another v Shah** [1968] EA 93 and **United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd** [1985] EA, and submitted that the appellant has not demonstrated that the Trial Court improperly exercised its discretion to warrant the setting aside of the Ruling delivered on 9th June 2023, instead, he asserted that the Trial Court applied the correct principles. Counsel stated that the appellant's review application was based on an alleged error apparent on the face of the record, and sufficient reasons.

16. The respondent's Counsel counteracted the appellant's Counsel's submissions that the interest rate of 15% per month awarded in the Judgment by the Trial

Court was unconscionable and contrary to the Banking Act and the *in duplum rule* by asserting that said Court correctly found that the foregoing did not constitute an error apparent on the face of the record. Counsel cited the Court of Appeal case of **National Bank Of Kenya Limited v Ndungu Njau** [1997] KECA 71 (KLR), and asserted that an error apparent on the face of the record must be self-evident and not require an elaborate argument. He referred to the Court of Appeal case of **Francis Origo & another v Jacob Kumali Mungala** [2005] KECA 356 (KLR) and submitted that a Judgment that violates the law is a ground for Appeal, not review, otherwise the Court would sit on Appeal over its own findings, which is impermissible.

17. Mr. Muuo relied on the cases of **Momentum Credit Limited v Kabuiya** [2022] KEHC 13705 (KLR) and **Salene Credit Limited v Karanja & another** [2025] KEHC 5183 (KLR), and argued that the appellant's reliance on the Banking Act and the *in duplum rule* was misguided, as Section 44A of the Act applies exclusively to banks, financial institutions, and mortgage finance companies, categories to which the respondent does not belong. He further argued that the appellant did not produce any evidence to show that the respondent falls within the definitions set out under Section 2 of the Banking Act.

ANALYSIS AND DETERMINATION.

18. This being the 1st appellate Court, I have a duty to analyze and re-evaluate the evidence adduced before the lower Court and reach my own independent conclusion. See **Williamsons Diamonds Ltd v Brown** [1970] EA 1 and **Ramji Ratna and Company Limited v Wood Products (Kenya) Limited**, Civil Appeal No. 117 of 2001.

19. I have re-examined the Record of Appeal and given due consideration to the written submissions by the parties' respective Counsel. The issues that arise for determination are –

    i) **Whether the instant appeal is incompetent for failure to include in the Record of Appeal the Order against which the appeal is preferred; and**
    ii) **Whether the appeal herein is merited.**

Whether the instant appeal is incompetent for failure to include in the Record of Appeal the order against which the Appeal is preferred.

20. The respondent's Counsel submitted that the instant Appeal is incompetent and fatally defective since the appellant did not include in the Record of Appeal the Order against which this Appeal is preferred, contrary to the provisions of Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010, which states that –

> ***Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say -***
>
> ***a) the memorandum of appeal;***
> ***b) the pleadings;***
> ***c) the notes of the trial magistrate made at the hearing;***
> ***d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;***
> ***e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;***
> ***f) <u>the Judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:</u>***

Provided that -

i) a translation into English shall be provided of any document not in that language;

ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

21. The Court in the case of **Nyota Tissue Products v Charles Wanga Wanga & 4 others** [2020] KEHC 6207 (KLR), in addressing the import of the foregoing provisions held that –

> ***The rule applicable to the appeals to the High Court makes provision under Order 42 rule 13 (f) of the Civil Procedure Rules for the filing of a copy of the "Judgment, order or decree appealed from" and does not make it mandatory to attach the Judgment and the decree. The Record of Appeal herein attached the Judgment of the trial court according to the requirements of Order 42 rule 13 (4) (f) of the Civil Procedure Rules, and in my respectful view, I would agree with the Court in Silver Bullet Bus case on the point, that it would be too draconian to strike out the appeal in these circumstances.***

22. An order is extracted from a Court's Ruling. Whereas a Ruling sets out the Court's reasoning and determination on the issues before it, it is not the formal instrument for execution or further procedural steps. After a Ruling is delivered, the successful party extracts an Order, which constitutes the operative and formal expression of the Court's decision as contemplated under Section 2 of the Civil Procedure Act which defines an Order as hereunder –

> ***"order" means the formal expression of any decision of a court which is not a decree, and includes a rule nisi;***

23. Upon perusal of the Record of Appeal filed in this suit by the appellant, it is evident that document No. 22 is a certified copy of the Ruling delivered by the Trial Court on 9th June 2023, which appears at pages 104 to 110 of the said Record of Appeal. It is not in contest that the said Ruling dismissed the appellant's application dated 20th January 2023. This Court finds that the appellant's failure to attach the extracted Order does not render the Appeal herein incompetent for non-compliance with Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010. This is because the Ruling from which the Order was extracted from is already included in the Record of Appeal, thereby enabling the Court to fully appreciate the decision challenged on Appeal.

24. In the circumstances, this Court finds that this Appeal is neither incompetent nor fatally defective, as the appellant has sufficiently complied with Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010, by including in the Record of Appeal the Ruling delivered by the Trial Court on 9th June 2023, which forms the subject of this Appeal.

If the instant appeal is merited.

25. The Ruling delivered on 9th June 2023 concerned the appellant's application dated 20th January 2023, in which the appellant sought a review and/or variation of the Judgment entered against him on 2nd July 2018. A Court's power to review its own decision is not exercised in a vacuum, it is a discretionary jurisdiction that must be invoked and applied strictly within the confines of Section 80 of the Civil Procedure Act, Cap 21, and Order 45 Rule 1 of the Civil Procedure Rules, 2010, which provide 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.

Order 45 Rule 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 review of judgement 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.

26. The Court in the case of **Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others** [2021] KEHC 4068 (KLR), in dismissing an application for review held that -

> ***…section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review 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.***

27. The appellant's application seeking review of the interlocutory Judgment entered on 2nd July 2018 was premised on the grounds of an alleged error apparent on the face of the record and alternatively, on the basis of any other sufficient cause. It is now well settled that an error apparent on the face of the record must be obvious, self-evident, and incapable of generating prolonged or elaborate argument.

28. The Record of Appeal shows that the interest rate of 15% per month was expressly pleaded in the plaint, remained unchallenged due to the absence of a defence and was consequently awarded as prayed. In urging review on the basis

of an alleged error apparent on the face of the record, the appellant's Counsel argued that the impugned Judgment sanctioned an oppressive and unconscionable interest rate of 15% which inflated the claimed loan of Kshs.1,950,000/= into a decree of Kshs.17,160,000/=. He contended that such a rate contravened public policy and the *in duplum rule* under Section 44A of the Banking Act and therefore constituted a glaring and self-evident error warranting a review of the impugned Judgment.

29. The appellant's Counsel contended that Section 44A of the Banking Act applies to both banking and non-banking institutions, whereas the respondent argued that its application is limited strictly to banking institutions. From the submissions of both Counsel, it is apparent that two divergent schools of thought exist regarding the scope of Section 44A of the Banking Act. To support his position that the provision extends to non-banking entities, the appellant's Counsel cited High Court decisions such as **Mugure & 2 others v Higher Education Loans Board** (supra). The respondent's Counsel on the other hand, relied on authorities including **Momentum Credit Limited v Kabuiya** (supra) to advance the contrary position.

30. The question of what amounts to an error apparent on the face of the record has been extensively litigated over time. In the case of **Ganijee Glass Mart Ltd (In Receivership), Pan African Glass Industries Ltd (In Receivership) & Ijaz Hussein Ganijee v First American Bank (K) Ltd, Andrew Douglas Gregory & Abdul Zahir Sheikh** [2010] KEHC 3458 (KLR), the Court cited the finding by the Court of Appeal in **Muyodi v Industrial and Commercial Development Corporation & another** [2006] 1 EA 243 at page 246, where it was held as hereunder -

> ***In Nyamogo and 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. <u>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 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.</u> This laid down principle of law is indeed applicable in the matter before us.***

31. This Court finds that there conceivably could be two opinions on whether Section 44A of the Banking Act applies to both banking and non-banking institutions. Consequently, the Court rejects the appellant's assertion that the impugned Judgment endorsed an oppressive interest rate of 15% per month, allegedly inflating the loan of Kshs.1,950,000/= to Kshs.17,160,000/=, in contravention of public policy and the *in duplum rule* under Section 44A of the Banking Act, thereby amounting to an error apparent on the face of the record. This Court holds that such issues are best addressed on Appeal, not through an application for review, therefore they do not constitute an error apparent on the face of the record.

32. This Court agrees with the Trial Court's finding that there was no error apparent on the face of the record to warrant a review of the interlocutory Judgment entered against the appellant on 2nd July 2018.

33. The appellant further invoked the ground of any other sufficient reason in seeking a review of the impugned Judgment. He contended that the interlocutory Judgment stemmed from the negligence of his former Advocate, who failed to file a defence even after the initial default Judgment had been set aside, as well as from his own ill health, advanced age, and the disruptions caused by the COVID-19 Pandemic. The appellant additionally argued that the Trial Court did not adequately examine the question of the actual amount allegedly borrowed, which he maintained was Kshs.300,000/=, thereby endorsing an inaccurate decree and enabling unjust enrichment contrary to Articles 43 and 46 of the Constitution.

34. On perusal of the annexures attached to the appellant's affidavit in support of the application dated 20th January 2023, it is evident that the only documents tendered to substantiate his claims of ill health and advanced age which are said to have hindered his ability to maintain contact with his Advocates and to follow the Trial Court proceedings, are an appointment slip from Aga Khan University Hospital for a scheduled visit on 24th January 2023, and a discharge summary indicating that he was admitted on 2nd April 2015 and discharged on 4th April 2015.

35. In my view, the evidence presented is insufficient to support the appellant's assertion that illness prevented him from maintaining contact with his Advocates or following the proceedings before the Trial Court. Moreover, the medical documents produced do not show that the appellant was incapacitated to an extent that would have hindered his ability to communicate with Counsel

or monitor the progress of his case. Additionally, the Record of Appeal contains no proof that the appellant made any effort to follow up the matter with his former Advocates. The Covid-19 Pandemic does not account for the period between 2018 and early 2020. Courts have consistently held that although mistakes by Counsel may be excused in exceptional circumstances, a litigant is still required to demonstrate diligence, which has not been done by the appellant in this case.

36. This Court as such finds that the appellant's inaction for over four (4) years was both inordinate and unjustified, as rightly determined by the Trial Magistrate in her Ruling delivered on 9th June 2023. In the premise, this Court finds that the Trial Magistrate correctly found that the appellant had not demonstrated any sufficient reason to warrant a review of the impugned Judgment.

37. It is trite law that the Court's power to review its own decisions is discretionary and an appellate Court will only intervene where that discretion has been exercised arbitrarily, on the wrong principles, or in a manner that results in an unjust outcome.

38. Having examined the Record of Appeal, I am satisfied that the Trial Magistrate properly considered the issues before her, applied the correct legal principles and reached a well-reasoned determination. There is therefore no basis for interfering with the Ruling delivered on 9th June 2023.

39. For the reasons highlighted in this Ruling, I find that the Appeal herein is devoid of merits. It is hereby dismissed with costs to the respondent.

It is so ordered.

DELIVERED, DATED and **SIGNED** at **NAIROBI** on this **7th** day of **November 2025. Judgment delivered through Microsoft Teams Online Platform.**

<u>AMENDED</u> AT NAIROBI ON THIS 1ST DAY OF APRIL, 2026.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Simiyu for the appellant

Mr. Muuo for the respondent

Ms B. Wokabi – Court Assistant.