Mosonk v Changwony (Environment and Land Case 25 of 2015) [2025] KEELC 5428 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5428 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE 25 OF 2015

A OMBWAYO, J

JULY 17, 2025

BETWEEN

JUDITH CHERONO MOSONK .... DEFENDANT

AND

DICKSON KIPKEMBOI CHANGWONY .... PLAINTIFF

RULING

Brief Facts

1. The Defendants/Applicants filed the instant application dated 4th April, 2025 seeking the following orders:

    1. That this Honourable court be pleased to review its ruling given on 28th March, 2025 so as to vary and do away with the order for deposit of security for costs since the judgment of the court given on 30th January, 2025 did not award costs to any of the parties in the suit.

    2. That the costs of this application be borne by the Plaintiff/Respondent.

2. The Application was based on grounds set out and supported by the Affidavit sworn on 4th April, 2025 by Dickson Kipkemboi Kiplagat Changwony And Joyce Jepkemboi Toroitich. They state that on 28th March, 2025 the court gave its ruling which directed the parties to maintain the status quo in the matter pending hearing and determination of the appeal. They state that the court had earlier delivered its judgment on 30th January, 2025 where the court directed that each party should bear its own costs of the suit. They added that the court in its ruling of 28th March, 2025 ordered that they should deposit Kshs. 200,000/= in a joint account of advocates being security for costs pending the hearing and determination of the appeal. They state that there was a clear error on the face of the ruling necessitating review in regard to the issue of security for costs as it was at variance with the terms of the judgment which never awarded costs to any party. They state that the order to deposit Kshs. 200,000/= as security for costs on non-existent costs was an error on the face of the record. They further state

that the application was brought without unreasonable delay and that the mistake or error apparent on the face of the ruling could not have been discovered immediately at the time the ruling was made. They added that the Plaintiff/Respondent will not suffer any prejudice if the application is granted.

Response

3. The Plaintiff/Respondent filed her Replying Affidavit sworn on 27th June, 2025 where she averred that the application was an abuse of the court process and should be struck out with costs. She further averred that on 28th March, 2025 the court delivered its ruling where it ordered that the status quo be maintained pending the hearing and determination of the appeal. She averred that the court also directed the Defendants to deposit security for costs of Kshs. 200,000/=.

4. She averred that the power to order payment of security was discretionary and that it could not be said that the court exercised in error. She added that the security for costs served as her protection in the suit from the risk of incurring unrecoverable costs should the appeal fail. She also averred that the Defendants have not demonstrated any exceptional grounds to warrant review of the court's ruling. She urged the court to dismiss the application.

Submissions

5. Counsel for the Applicants filed his submissions dated 9th July, 2025 where he identified two issues for determination. The first issue was whether the Defendant's application for review has merit. He relied on Order 45 Rule (1) of the *Civil Procedure Rules* and Section 99 of the *Civil Procedure Act*. He submits that the court had powers to amend its judgment, decrees or orders so as to correct a mistake or omission in the decision. He further relied on Order 21 Rule 3(3) of the *Civil Procedure Rules* and submits that the order for security for costs made in the ruling was at variance with the terms of the judgment of 30th January, 2025 which never awarded costs to any party. He argues that an order for security for costs pending appeal can only be issued to serve the purpose of costs that has already been pronounced by court. He added that order for security for costs would not issue where no costs was awarded by the court. He relied on the case of *Narok County Government V Kibiniko Enterprises Ltd* [2023] KECA 1102 (KLR). He also submits that the court would also be mandated to review its own ruling to vary that order for deposit of security for costs on the premises of "any other sufficient reason". He relied on the cases of *Vallabhdas Karsandas Raniga V Mansukhlal Jivraj & Others* [1965] EA 700 (CAN) and *Sapra Studio V Kenya National Properties Limited (No 2)* (1985) KLR. He argues that an order for security for cost pending appeal is granted to ensure that the party awarded costs of the suit is not left without a reward if the appeal does not succeed. He relied on the case of *Patrick Ngeta Kimanzi V Marcus Mutua Muluvi & 2 Others* [2013] eKLR. It was his submission that an order on deposit for security for costs pending appeal was important in cases that related to money decrees or where there was an award for costs given to the successful litigant.

6. On the second issue for costs, he submits that that the application was merited and urged that court to order that costs of the application do abide the outcome of the intended appeal.

7. Counsel for the Respondents filed his submissions dated 27th June, 2025 where he identified two issues for determination. The first issue was whether the application for review was merited. He relied on Order 45 Rule 1(1) of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act* and while submitting in the negative, he argues that the error must be self-evident. He cited the case of *National Bank of Kenya V Ndungu Njau* Civil Appeal No. 2111 of 1996 and *Republic V Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. It was his submission that the court exercised its discretion when it made the order for payment of security and such discretion cannot be said to have been exercised in error. He relied on Order 26 of the *Civil Procedure Rules*. He cited the case

of *Johnson Muthama V Minister for Justice and Constitutional Affairs and Others* - Nairobi Petition No. 198 of 2011 and submits that payment of security for costs served to protect a party in the suit, shielding them from the risk of incurring costs which they may not be able to recover form the adverse party if the appeal was to fail. He also relied on the case of *Onyango & another V Omondi & 2 Others* [2025] KEELC 4597 (KLR). It was counsel's submission that the present application was devoid of merit and should be dismissed with costs.

8. The second issue on costs, he submits that the Applicants having failed to demonstrate the merit of their application, the Respondent should be awarded costs.

Analysis and Determination

9. This court has carefully considered the application and the main issue for determination is whether the application is merited.

10. The jurisdiction of this court for review of orders is provided for under Order 45 Rule 1 (1) of the *Civil Procedure Rules* which provides as follows:

> " 1. Application for review of decree or order
>
> (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."

11. It is this court's view that the basis of an application for review of an order is on the recovery of new and important matters or evidence which after due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the order was made. Further an application for review may also be made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

12. The Defendants/Applicants claim that this court in giving stay of execution orders on condition that security for costs of Kshs. 200,000/= be deposited in the advocates joint account was an error apparent on the face of record and the same ought to be reviewed. The Applicants contend that the earlier judgment of 30th January, 2025 did not award costs to any of the parties to warrant payment of security of costs. The Plaintiff/Respondent on the other hand contends that court exercised its discretion when it made the order for payment of security and such discretion did not amount to an error apparent

on the face of the record. The Respondents argue that the power to order payment of security was discretionary and that it could not be said that the court exercised in error.

13. In the Court of Appeal case in *Muyodi V Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243 the court held as follows:

> "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. There is 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. This laid down principle of law is indeed applicable in the matter before us."

14. Further in the case of [*Omote & another V Ogutu*](https://new.kenyalaw.org) (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) the court held as follows:

> "From the submissions made by the applicant, he believes he was the successful party and ought to have been awarded costs of the appeal. This is akin to asking the Court to sit on appeal of its decision and reverse it. The fact that a party believes that the Court should have reached a different conclusion or that the decision was erroneous are matters 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.
>
> 21. Similarly, the request herein entails a re-appraisal of the evidence and re-analyzing its decision to establish whether or not the applicant is entitled to costs- something which is beyond the scope of review jurisdiction.
>
> 22. Accordingly, the supposedly 'mistake or error apparent on the face of the record' is not a misstate or error in the sense of the law for which review may be granted." [Emphasis mine]

15. Also, in the case of *Republic V Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & another (Interested Party); Kingángá (Exparte)* (Miscellaneous Civil Application 59 & 63 of 2019 (Consolidated)) [2021] KEHC 298 (KLR) the court found that:

> In summary, in a civil proceeding, an application for review is entertained only on a ground mentioned in Order 45 Rule 1. A review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the Court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. An error apparent on the face of the record exists if of two or more views canvassed on the point it is possible to hold that the controversy can be said to admit of only one of them. If the view adopted by the Court in the original judgment is a

possible view having regard to what the record states, it is difficult to hold that there is an error apparent on the face of the record. Review of the earlier order cannot be done unless the Court is satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. An error which is not self- evident and has to be detected by a process of reasoning can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review." [Emphasis mine]

16. From the above cited authorities, it is this court's view that by the court having directed payment of security for costs does not amount to an error or mistake on the face of record. This is because the same was the court's exercise of its discretion in the conditions to be met in granting stay of execution pending appeal. It is my opinion that the alleged error by the Appellant required reasoning with regard to the aspect of grant of the security for costs thus departing from the normal position that the error should be apparent on the face of record. In view of the above, I find that the orders for review is not merited. Cost of the application to be borne by the Applicants. It is so ordered.

SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO

THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT ENVIRONMENT AND LAND COURT

DATE: 2025-07-17 12:45:40

Doc IDENTITY: 318066229284341552720822844 Tracking Number:OO7Y362025