



**Republic v Resident Magistrate - Honourable LG Ruhu Mwingi Law Courts
& 2 others; Officer Commanding Police Station Mwingi Police Station &
another (Interested Parties); Kalungu (Exparte Applicant) (Judicial Review
E008 of 2022) [2025] KEELC 849 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
JUDICIAL REVIEW E008 OF 2022**

**LG KIMANI, J
FEBRUARY 27, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

**RESIDENT MAGISTRATE - HONOURABLE LG RUHU MWINGI LAW
COURTS 1ST RESPONDENT**

**MWINGI SAND HARVESTING CO-OPERATIVE SOCIETY
LIMITED 2ND RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

**OFFICER COMMANDING POLICE STATION MWINGI POLICE
STATION INTERESTED PARTY**

**SAND TRANSPORTERS AND ENVIRONMENTAL CONSERVATION
GROUP INTERESTED PARTY**

AND

PETER KALUNGU EXPARTE APPLICANT

RULING

1. The 1st and 3rd Respondents in the substantive Notice of Motion herein being the Resident Magistrate-Honourable I.G Ruhu Mwingi Law Courts and the Attorney General filed the Notice of Motion dated 28th March 2024 seeking the following orders:



1. Spent
 2. That there be a stay of execution of the judgment of 8th March 2023 against the Applicants.
 3. That pending the determination of the application herein, the Respondents be and hereby restrained either by themselves, their agents, servants or anybody acting on his behalf from executing the judgment of 8th March 2023 for the award of costs against the applicants.
 4. That this Honourable Court be pleased to review the terms of the judgment of 8th March 2023 and issue orders and directions as may appear to the Court to be just and convenient.
 5. THAT the costs of this application be in the cause.
2. The application is supported by the affidavit of Ngira Lynn. The grounds in support of the application are that a Judicial Review application was filed before this court on 8th August 2022 seeking orders of Certiorari to call for and remove and to quash the proceedings, records and orders of the Resident Magistrate-Mwingi Law Courts dated 16.6.2022 issued by Honourable I.G Ruhu. The application further sought orders of prohibition against the Resident Magistrate-Mwingi Law Courts, the Officer Commanding Station-Mwingi Police Station and Mwingi Sand Harvesting Co-operative Society Ltd. from implementing and/or enforcing the orders issued by the Resident Magistrate-Mwingi Law Courts Honourable I.G Ruhu dated 16.6.2022. The Ex parte applicant further sought costs of the Notice of Motion.
 3. Judgment was delivered by the Court and orders granted in favour of the Ex parte applicant in the said motion. Costs of the suit were granted to the ex-parte applicant against all the respondents.
 4. The Applicants contend that the 1st Applicant is a judicial officer who was acting in his capacity as a Magistrate in Mwingi Law Courts. They further contend that the 2nd Applicant was only enjoined to oversee the implementation and the enforcement of the court orders.
 5. The Applicants contend that the award of costs against them is detrimental since the 1st Applicant is protected under Article 160(5) of *the Constitution* because he was lawfully performing his judicial functions when the miscellaneous application No.5 of 2022 was brought before him for determination in Mwingi Law Courts.
 6. Further, the 2nd Applicant, the Attorney General should not have been condemned to pay costs by reason of being enjoined in the suit to oversee the enforcement of Court orders.
 7. The Applicants state that it is in the interests of justice that the orders made are reviewed to the extent of costs and all consequential orders emanating from it. They claim that they stand to suffer substantial and irreparable loss in the event that the Respondents enforce the orders of costs against them as granted by this court.

The 1st Respondent's Grounds of Opposition.

8. The 1st Respondent filed Grounds of Opposition dated 9th April 2024 stating that the court is functus officio having pronounced itself that judicial review is available to the ex parte applicant as a fundamental right against the respondents. They stated that the issues raised in this application clothed as an "apparent error" in the judgment of the court, are matters of law, which ought to have been appealed against.
9. They further claim that the application is an afterthought having not contested earlier the issue of joinder in the suit. The applicants further did not cite their rights under Article 160(5) of *the*



Constitution, on liability, the award of costs, or during the taxation of costs, therefore, it should not be an issue of review during the execution.

10. The Respondents also state that the execution proceedings undertaken are not personal against the judicial officer, or any of the officers in the suit, but against the attorney general, following the Government Proceedings Act. The Respondents further stated that there has been an inordinate delay in bringing up the application for consideration after the judgment.

Applicant's Submissions

11. Senior State Counsel for the Applicants submitted on two issues for determination; whether the judgment dated 8th March 2023 has an error apparent on the face of the record warranting review, and whether the Applicant is entitled to orders of stay of execution of the judgment dated 8th March 2023 pending review.
12. On the 1st issue, Counsel submitted that the threshold set for review under Order 45 of the Civil Procedure Rules requires that even though an appeal is allowed none has been preferred.
13. In this case, it was submitted that the Applicants seek review on the grounds that the judgment dated 8th March 2023 had an error apparent on the face of the record. They placed reliance on the case of *Muyodi vs Industrial and Commercial Development Corporation & another*(2006)1 EA 243 where the Court of Appeal described an error apparent on the face of the record stating that the error cannot be defined precisely or exhaustively but must be left to be determined judicially on the facts of each case.
14. Counsel submits that the 2nd Applicant the Attorney General herein was to enforce a court order and should therefore not be condemned to pay costs.
15. For the 1st Applicant, it was submitted that he issued orders dated 16th June 2022 in the course of the exercise of his duties as a judicial officer at Mwingi Law Courts. For this reason, the 1st Applicant is protected under Article 160(5) of the Constitution and Section 6 of the Judicature Act CAP 8 Laws of Kenya from any liability during the performance of a judicial function and therefore should not be condemned to pay costs.
16. The Applicants cited the cases of: *Samuel Ngerечи & 3 others v. Senior Principal Magistrate Narok. T Gesora & another*; *Joseph Kipkoech Ngerечи(interested party)*(2020)eKLR and *Maina Gitonga v. Catherine Nyawira Maina & Another*(2015)eKLR.
17. It was submitted that the judgment dated 8th March 2023 is in contravention of the Judicial Service Code of Conduct and Ethics as well as the Bangalore Principles, specifically the principle of the independence of the judiciary and judicial officers.
18. Submitting on the prayer for stay of execution, Senior State Counsel invoked the overriding objective of the Court in Sections 1A and IB of the Civil Procedure Act submitting that the applicants will suffer substantial loss unless an order for stay of execution is issued and that the application has been made without unreasonable delay following the case of *James Wangalwa & another v. Agnes Naliaka Cheseto*(2012)eKLR.

1st Respondent/Ex parte Applicant's Submissions

19. Counsel for the 1st Respondent submitted that the orders sought in the substantive Notice of Motion dated 8th August 2022 were not against the judicial officer in his personal capacity and did not seek personal liability against him. It was submitted that the judgment is not a personal liability as per Sections 4 and 17 of the Government Proceedings Act.



20. It is Counsel's submission that the applicants have not demonstrated any apparent error on the face of the judgment of the court that is capable of review as under Order 45 of the Civil Procedure Rules and relied on various cases: Executive Committee Chelimo Plot Owners Welfare Group & 288 others v. Langat Joel & 4 others(sued as the Management Committee of Chelimo Squatters) (2018)eKLR; Stephen Gathua Kimani v. Wanjira Waruingi t/a Providence auctioneers(2016)eKLR and Peter Mwangi Macharia v. Alphaxard Warotho Komu & 2 others(2019)eKLR.
21. The 1st Respondent's view is that the applicants did not raise the issues raised in this application during the hearing of the substantive motion and raising the issues at this stage amounts to attempting to appeal against the determination before the very same court. Counsel stated that if the applicants' complaint is that the court made an unconstitutional judgment or determination; this is a substantive question or issue of law that ought to be the subject of an appeal.
22. Counsel for the Respondents also submits that no order for costs against any officer is issued in his personal capacity as per Section 21 of the Government Proceedings Act and that these costs are payable through the Exchequer.

Analysis and Determination

23. The Applicants in the instant application seek review of the Court's judgment dated 8th March 2023. In the said judgment, this Court found merit in the ex-parte applicant's application and issued an order of certiorari and prohibition in relation to the proceedings, records and orders of the Resident Magistrate-Mwingi Law Courts dated 16.6.2022 issued by Hon. I.G Ruhu (Resident Magistrate) in Misc. Application No.5 of 2022.
24. The Applicants herein contend that the award of costs was erroneous as the 1st Applicant is a judicial officer who was acting in the said capacity when he made the orders as a Magistrate in Mwingi Law Courts. They further contend that the 2nd Applicant was only enjoined to oversee the implementation and the enforcement of the court orders, the Applicants' view is that it is in the interests of justice that the said order is reviewed to the extent of costs and all consequential orders emanating from it.
25. The statutory provisions that govern orders of review are Section 80 of the Civil Procedure Act CAP 21 and Order 45 of the Civil Procedure Rules, 2010. Section 80 of the Act provides that:

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.
26. Order 45 Rule 1 of the Civil Procedure Rules (2010) provides that:

“ 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.”

27. The conditions necessary for grant of orders of review have been widely elaborated by the Courts. In the case of Francis Njoroge v Stephen Maina Kamore [2018] eKLR the Court held that:

“Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay.”

28. The principles guiding this court in determining whether or not to review a decision on the ground that there is an error apparent on the face of the record were restated by the Court of Appeal in National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR that:

“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 a 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 proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.”

29. The Applicants placed reliance on Article 160(5) of the Constitution, which provides that:

“A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

30. Similarly, Section 6 of the Judicature Act CAP 8 laws of Kenya provides that:

“No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it.”



31. The Applicants relied on the holding in the case of Samuel K. Ngerechi & 3 others v Senior Principal Magistrate Narok T. Gesora & another; Joseph Kipkoech Ngerechi (Interested Party) [2020] eKLR where it was found that:

“The preliminary objection on point raised by the 1st Respondent is to effect that the same offends the provisions of Article 160 (5) of *the Constitution* of Kenya 2010 in so far as a member of the judiciary or Judicial Officer in the performance of his duties shall not be liable in any suit. From the petition and the submissions, it is clear that the Honourable Tito Gesora was only included as a party to the petition pursuant to orders he had issued and the taking of proceedings before his court. Matter which he undertook in pursuance of the function of his office as a judicial officer and in lieu of the above I find that the function of the 1st respondent is only protected under the provisions of Article 160 (5) of *the Constitution* of Kenya and therefore his inclusion as respondent in the petition is untenable.”

32. The 1st Respondent in opposing the application herein submitted that the Applicants did not raise the issue of Article 160(5) of *the Constitution*, on liability of a judicial officer. They also did not raise the issue at the time of taxing the bill of costs and they contend that the issue should not be raised during execution. Counsel further submitted that the suit itself and the execution proceedings undertaken are not personal against the judicial officer, or any of the officers in the suit, but against the attorney general, in accordance with the *Government Proceedings Act*.

33. However, it is noted that the heading of the substantive application mentions the name of the person holding the office of Resident Magistrate Mwingi Law Courts as the 1st Respondent.

34. The court agrees with the submissions of the Applicants that a judicial officer cannot be personally liable or sued due to an action he officially undertook. A judicial officer is immune to liability while undertaking his official duty whether his decision is correct or otherwise. The Court of Appeal reiterated this point in the case of Bellevue Development Company Ltd vs Francis Gikonyo & 7 Others [2018] eKLR where it stated inter alia;

“Being of that persuasion, I cannot accept, less still lend approval to the appellant's ill-advised path of dragging the Judges into court by way of litigation against them in their personal capacities for their rulings delivered in the course and the context of their lawful discharge of their judicial functions.”

35. As was mentioned earlier, upon hearing the substantive application, the Court made substantive orders of certiorari and prohibition and awarded costs to the ex parte applicant against the Respondents/ Applicants herein. It is noted that the Applicants do not seek to review and/or set aside the findings of the court as relates to the substantive orders issued. They only oppose the award of costs of the suit. The Court awarded costs in its discretion and the award followed the event as is the general rule under Section 27 of the *Civil Procedure Act* where a winning party is entitled to costs and the Court did at the time not see any reason to order otherwise. Section 27 of the *Civil Procedure Act* states that;

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any



action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

36. The Court notes that the question of whether or not the 1st Applicant was not sued in his personal capacity is not contested. The 1st Respondent herein admits in the grounds of objection filed and in submissions that indeed the suit as initially filed was against the 1st Respondent as an office and/or position of the Resident Magistrate Mwingi law courts. Counsel for the 1st Respondent concedes that liability was not personal to the person holding the said office. He further conceded that costs of the suit were not being recovered from the Magistrate in his personal capacity.
37. The court is of the view that despite the concession by the Respondent, the protection availed under Article 160 (5) of *the Constitution* and Section 6 of the *Judicature Act* is absolute since the judicial Officer in this case was acting in good faith in the lawful performance of a judicial function and thus ought not to have been found liable to pay costs of the suit.
38. In this case the court finds relevance in the Court of Appeal decision in *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243 in determining whether or not to review the court's decision on the ground that there is an error apparent on the face of the record at page 246:

“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.”

39. In the present case the Court finds that the error in awarding costs against the judicial Officer is an error on a substantial point of law that stares one in the face, and there could reasonably be no two opinions. In the Court's view a clear case of error apparent on the face of the record has been made out.
40. The Applicants also contend that the 2nd Applicant, the Attorney General, ought not to have been condemned to pay costs since the office was joined to oversee the implementation and enforcement of court orders. The 1st Respondent contends that under sections 4 and 17 of the *Government Proceedings Act* CAP 40, government officials and bodies are not held personally liable for costs. Section 17 thereof provides as follows:

“In any civil proceedings or arbitration to which the Government is a party, the costs of and incidental to the proceedings shall be awarded in the same manner and on the same principles as in cases between subjects, and the court or arbitrator shall have power to make an order for the payment of costs by or to the Government accordingly: Provided that—

- i. in the case of proceedings to which by reason of any written law or otherwise the Attorney-General, a Government department or any officer of



the Government as such is authorised to be made a party, the court or arbitrator shall have regard to the nature of the proceedings and the character and the circumstances in which the Attorney- General, the department or officer of the Government appears, and may in the exercise of its or his discretion order any other party to the proceedings to pay the costs of the Attorney-General, department or officer, whatever may be the result of the proceedings; and

41. In the present case the Court has found that there was an error apparent on the face of the record in condemning the 1st Applicant to pay costs of the suit. In the same vein the 2nd Applicant ought not to have been condemned to pay costs of the suit having been joined in this suit for purposes of representation of the Respondents in the suit and for purposes of execution of the orders of the court. The Court thus finds that the order for payment of costs by the 2nd Applicant is also subject to review.
42. The court thus finds merit in the application dated 28th March 2024 and the same is allowed in the following terms;
 1. The judgment of the court dated 8th March 2023 be and is hereby reviewed and set aside only to the extent of order number 3 on the award of costs of to the exparte applicant against the Respondents.
 2. The said order shall be replaced by an order that there shall be no order as to costs of the suit.
 3. There shall be no order as to costs of this application.

RULING READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF FEBRUARY 2025.

In the presence of:

No appearance for the Applicant.

No appearance for Respondents.

Court assistant: Kendi.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

