



**Odera & 118 others v Homa Bay County Government & 2 others (Judicial Review E032 of 2024) [2025] KEELRC 920 (KLR) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 920 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
JUDICIAL REVIEW E032 OF 2024**

**JK GAKERI, J  
MARCH 24, 2025**

**BETWEEN**

**PETER OTIENO ODERA ..... 1<sup>ST</sup> APPLICANT  
REGINAL OWAKA OCHOLA ..... 2<sup>ND</sup> APPLICANT  
ANTONY GAYA TINDI & 116 OTHERS & 116 OTHERS & 116  
OTHERS ..... 3<sup>RD</sup> APPLICANT**

**AND**

**HOMA BAY COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT  
HOMA BAY COUNTY SERVICE BOARD ..... 2<sup>ND</sup> RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER, FINANCE HOMA BAY  
COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Before the court for determination is the applicant’s Notice of Motion dated 5<sup>th</sup> December, 2024 seeking Orders that: -
  1. The Honourable Court be pleased to review the Ruling delivered on 4<sup>th</sup> December 2024.
  2. The costs of this application be in the cause.
2. The Notice of Motion is expressed under Section 1A, 3A and 80 of the *Civil Procedure Act* Order 51 Rule 1 Order 45 rules (1) and (2) of the Civil Procedure Rules and Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024, and is based on the Supporting Affidavit of Peter Otiemo Odera sworn on 5<sup>th</sup> December, 2024 who deposes that Radido J dismissed the ex parte applicant’s suit because the sum said to be due was not certain and consequently the advocate and the office of the County Attorney made reconciliations of the calculations of monies paid and pending



- payments which informed ELRC JR No. 032 of 2024 and the court erroneously overlooked the reconciled calculations attached to the Chamber Summons application dated 30<sup>th</sup> September, 2024.
3. That attached to the Notice of Motion dated 5<sup>th</sup> September, 2024 were copies of correspondences dated 6<sup>th</sup> March, 2024, 15<sup>th</sup> March 2024, 21<sup>st</sup> May 2024, 3<sup>rd</sup> July, 2024, 21<sup>st</sup> August, 2024 and reconciled calculations dated 16<sup>th</sup> April, 2024.
  4. The affiant further deposes that the applicant's failed to inform the court that the respondents had made part payment to the applicants and all were done before the reconciliation on 16<sup>th</sup> May, 2024.
  5. Mr. Peter Otieno Odera deposes that there is an error apparent on the face of the record with the court should correct in the interest of justice.

### **Respondents Response.**

6. In its Grounds of Opposition dated 6<sup>th</sup> January, 2025, the respondents argue that the instant application is frivolous, vexations and an abuse of the court process as the Ruling made on 4<sup>th</sup> December, 2024 determined the matter in finality similar to Kisumu ELRC Judicial Review No.044 of 2023 and litigation must end.
7. The respondents further argue that there is no error apparent on the record nor discovery of new or fresh evidence to warrant the grant of the review application dated 5<sup>th</sup> December, 2024 and the court is functus officio and lacks jurisdiction to re-open the case.
8. The respondent argue that the issue raised in Kisumu ELRC JR No. E032 of 2024 are the same as those Kisumu ELRC JR No. E044 of 2023 against the same respondents and the instant application is for dismissal.

### **Applicants Submissions.**

9. As to whether the application meets the threshold for review counsel for the applicant relied on the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (Repealed) and the decision in Pancrast Swan Kenya Breweries Ltd [2014] eKLR, to urge that the court has power to review its decisions as provided by law and submit that in the instant case there is an error apparent on the face of the record as the applicant filed the subsequent suit after having resolved to reconcile the statements for the present suit and filed the ascertained amount but the court overlooked the calculations attached in support of the application.
10. Reliance was also made on the sentiments of the court in *Muyodi v Industrial & Commercial Development Corporation* [2006] EA 243 to underscore the essence of an "error apparent on the face of the record" to argue that the court failed to evaluate the evidence on record being proof of payment, reconciliation of accounts and correspondences between the parties.
11. Counsel submitted that the application herein meets the threshold for review of the previous Ruling.
12. As to whether the suit is *res judicata*, counsel cited the sentiments of the court in *John Florence Maritime Services Ltd & Another v Cabinet Secretary, Transparent and Infrastructure & 3 Others* [2021] eKLR, to highlight the elements of *Res Judicata* and submit that no conclusive decision was made on the issues and the court did not decide on the merits or demerits of the application.
13. Counsel submitted that in Kisumu ELRC JR No. E032 of 2024, there was discovery of new evidence after conclusion of Kisumu ELRC JR No. E044 of 2023 necessitating the new suit and the court failed to consider the new evidence.



14. Finally, it was submitted that the application before the court is not Res Judicata.

### **Respondent's submissions**

15. As to whether there is an error apparent on the face of the record counsel submitted that such an error does not require examination, scrutiny or elucidation of facts or law as held in Republic v Advocates Disciplinary Tribunal Ex Parte Apollo Mboya [2019] eKLR, and cited Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, 2010 to submit that the Application dated 5<sup>th</sup> December, 2024 had not raised any error apparent on the face of the record of the court.
16. Counsel submitted that the overlooked attachment of reconciled calculations lacked merit and the application raised similar issues considered in the Ruling delivered on 4<sup>th</sup> December, 2024.
17. That Kisumu ELRC JR No. E044 of 2023 and Kisumu ELRC JR No. E032 of 2024 sought to enforce Kisumu ELRC Cause No. 3 of 2018 which the Ex Parte applicants have not contested.
18. Reliance was made on the sentiments of the Court in Paul Mwaniki v National Health Insurance Fund Board of Management [2020] eKLR on res judicata counsel submitted that since the two applications raised similar issues, review of that position cannot arise.
19. Counsel submitted that the instant application and the case are res judicata as it seeks orders similar to those in Kisumu ELRC JR No. E 044 of 2023.
20. Reliance was further made on the sentiments of the court in Uhuru Highway Development Ltd V Central Bank of Kenya & 2 Others [1996] eKLR and Telkom Kenya Ltd V John Ochanda [2014] eKLR, to urge that the court is functus officio.
21. On costs, counsel submitted that they follow the event, though the court has discretion.

### **Analysis and determination**

22. The applicant seeks a review of the court's Ruling delivered on 4<sup>th</sup> December, 2024, which dismissed the applicant's Judicial Review Chamber Summons ELRC No. 032 of 2024 on the ground that it was Res Judicata Kisumu ELRC JR No. E044 of 2023 decided on 6<sup>th</sup> March, 2024 by Radido J.
23. In that earlier suit, the Radido J. dismissed the suit at the level of competency and on merits as paragraphs 12 and 32 of the Judgment delivered on 6<sup>th</sup> March, 2024 show.
24. The Notice of Motion dated 4<sup>th</sup> December, 2023 sought two orders, namely the Order of mandamus to compel the respondents to pay the sum of Kshs.38,309,412.80 and costs.
25. Equally, by the Chamber Summons dated 30<sup>th</sup> August, 2024, the ex parte applicant sought leave to file a substantive mention for the Order of mandamus against the respondents to release the sum of Kshs.40,304,792.04 together with costs and interest.
26. The court found that the parties had not agreed on the amount outstanding analogous to the suit before Radido J where the amount was still uncertain.
27. The court found the suit res judicata Kisumu ELRC No. E044 of 2023 and struck it out.
28. That is the ruling the court is being called upon to review on the premise that there is an error apparent on the face of the record.
29. The gravamen of the applicant's case is that the court overlooked the reconciled calculations in support of the Chamber Summons and the correspondences between the parties.



30. The respondents on the other hand argue that no error apparent on the face of the record had been demonstrated.
31. It is trite law that the court has statutory jurisdiction to review its judgments, awards, rulings or Orders under Section 80 of the [Civil Procedure Act](#) and Section 16 of the [Employment and Labour Relations Court Act](#).
32. The circumstances in which the court may do so are set out in the provisions of Rule 74 of Employment and Labour Relations Court (Procedure) Rules, 2024 which provides-
- (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
- (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
- (b) on account of some mistake or error apparent on the face of the record;
- (c) if the judgment or ruling requires clarification; or
- (d) for any other sufficient reason.
33. On timing of the application, the court is satisfied that it was filed promptly. See *Jaber Mohsen Ali and Another v Priscillah Boit & another* [2014] eKLR.
34. The applicant urges that the failure by the court to examine and consider the correspondences between the parties and the reconciled figures attached was an error apparent on the face.
35. Is failure to consider evidence relied upon by a party a mistake or error apparent on the face of the record?
36. It is trite law that an error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be establish. See *Paul Mwaniki v NHIF board of Management* (Supra), *David Oginga Ogutu* [2022] KEHC 16441 (KLR), *National Bank of Kenya Ltd v Ndungu Njau, Multi-choice (Kenya) Ltd v Wananchi Group (Kenya) Ltd & 2 Others* [2020] eKLR.
37. In *Chandrakhant Jushibhai Patel v R* [2004] ILR 218 it was held that an error stated to be apparent on the face of the record;
- ...must be such as can be seen by one who runs and reads, that is an obvious and patent mistake and not something which can be established by a long drawn process of reading on points which may be conceivably be two opinions”.
38. Finally, in *Muyodi v Industrial and Commercial Development Corporation* (Supra) the Court of Appeal stated:
- “In *Nyamongo & Nyamongo 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 record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two options, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long



drawn process of reasoning or on points where there may conceivably be two options 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, 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 *Paul Mwaniki v NHIF Board of Management (Supra)*, the court stated that;

“If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently, an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law”.

40. The court is in agreement with these sentiments.

Puzzlingly, the applicant has not identified the specific part of the Ruling delivered on 4<sup>th</sup> December, 2024 which is erroneous and where the alleged mistake or error is apparent bearing in mind that a mistake or error apparent on the face of the record must be *prima facie* evident.

41. Undoubtedly, the court saw the hand written computations and letters but did not come across any agreement, a fact which was apparent in the respective cases for the parties.

42. The reconciliation is what should have been placed before Radido J. but was not and the applicant was seeking a second bite at the cherry.

43. In its Judgment in *Kisumu ELRC JR No. E044 of 2023*, the court observed:

44. According to the respondents, the outstanding balance was in the region of Kshs.4,358,414.26.

45. In a brief rejoinder, the *ex parte* applicants contended that some of the payments cited by the respondents related to other legal proceedings.

46. The gravamen of the instant dispute would be resolved by a simple reconciliation of accounts between the parties.

47. The respondents have not denied owing the *ex parte* applicants but they question the balances claimed.

48. In the humble view of this court the resolution of such a dispute does not lend itself to an adjudication through the avenue of Judicial Review proceedings.

49. In other words, the court is not ready to exercise its discretion to grant an Order of Judicial Review to compel payment when the sums said to be due are not certain”.

50. Was the amount certain in *Kisumu ELRC JR No. E 032 of 2024*? The answer is in the negative which explains the finding that the suit was *res judicata* *Kisumu ELRC JR No. E044 of 2023*.

51. From the foregoing jurisprudence on what constitutes error apparent on the face of the record and analysis, it is the finding of this court that the applicant has failed to demonstrate that the Ruling delivered on 4<sup>th</sup> December, 2024 had a mistake or error apparent on the face of the record or any other ground envisioned by Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024.



52. Consequently, the applicants Notice of Motion dated 5<sup>th</sup> December, 2024 is for dismissal and it is accordingly dismissed with no Orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24<sup>TH</sup> DAY OF MARCH, 2025.**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

