



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gikonyo v Ndura & another (Civil Appeal 20 of 2016)  
[2025] KEHC 3987 (KLR) (28 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CIVIL APPEAL 20 OF 2016  
EM MURIITHI, J  
MARCH 28, 2025**

**BETWEEN**

**JOHN NJENGA GIKONYO ..... APPELLANT**

**AND**

**STEPHEN KINUTHIA NDURA ..... 1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 21<sup>st</sup> June, 2021 seeking the following orders:
  1. Spent.
  2. That this Court do grant stay of assessment of costs and stay execution of the decree and costs in this matter pending determination of this application. [This prayer is Spent having been granted by the Court (Muchemi J. on 24/6/2021)].
  3. This court do review its judgment and order that the applicant settles only half of the judgement and the 2<sup>nd</sup> Respondent do settle the other part of the judgement.
  4. Costs be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit of Stephen Kinuthia Ndura setting out the facts relied on. The applicant/1<sup>st</sup> Respondent case is that he was a witness in case in Wanguru Criminal Court Case No. 594 Of 2012 where the appellant herein was acquitted. That he filed a suit seeking damages for malicious prosecution being Wang'uru SPMCC 136 Of 2014 which was dismissed. That he then filed the present appeal where the court awarded him Ksh 400 000 as general damages and special damages of Ksh 70 000 against the respondents. That they were two respondents in this appeal and in the lower court. He urges this court to review the judgment



and order that he settles only half of the judgement and the 2<sup>nd</sup> respondent do settle the other part of the judgement.

3. That he filed a Notice of Appeal. That execution is imminent as he has already been served with a notice of taxation and a bill of costs and it is clear the appellant is pursuing him alone for settlement of the entire judgment.
4. Despite service on them on 21/2/2025 by the Appellant/Respondent's Counsel, as shown in Affidavit of Service sworn by Mr. Gitau Kahiga on 12/3/2025, of a hearing notice, Counsel for the Respondent/Applicant and the Respondent did not attend the hearing on 18/3/2025, and ruling was reserved.

### Issue

5. Whether the judgement review should be allowed.

### Analysis

6. The applicant seeks review of the judgment and order that he settles only half of the judgement and the 2<sup>nd</sup> respondent do settle the other part of the judgement. The High Court in Civil Appeal No. 20 of 2016 judgment dated 8<sup>th</sup> April, 2021 awarded Ksh 400 000 as general damages and special damages of Ksh 70 000 against the respondents.
7. Further, the applicant/1<sup>st</sup> respondent urges that he filed a Notice of Appeal on 22<sup>nd</sup> June, 2021, annexed as SNK 2, and that execution is imminent as he has already been served with a notice of taxation and a bill of costs and it is clear the appellant is pursuing him alone for settlement of the entire judgment.
8. The Respondent has not filed a Replying affidavit.
9. The review orders sought are premised on the provisions of Order 45 rules 1 and 2 of the [Civil Procedure Rules](#) and Section 80 of the [Civil Procedure Act](#). Section 80 of the [Civil Procedure Act](#), on Order 45 rules 1 and 2 are based provides: -
  - “ 80. Review  
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.”
10. The applicant seeks for the general and special damages to be split between the two respondents. This may be within the purview of review on account of errors in the computation of damages.
11. However, the applicant has filed a Notice of Appeal. This is contrary to Section 80 of the [Civil Procedure Act](#) that does not allow a person to benefit from both review and appeal. See [William Karani & 47 others v Wamalwa Kijana & 2 others](#) [1987] KECA 55 (KLR) where the Court discussed the provinces of appeal and review as follows:

“ Both section 80 and order XLIV commence by explaining the fundamental nature of review. It is to be a means of curing gross or obvious errors when an appeal is allowed by the Act,



from a decree or order, but no appeal has been preferred; and secondly in cases where no appeal is allowed at all. The broad division then is between the appeal procedure as the general method of curing errors, with its scope to deal with errors of evidential fact or law, or mixed fact and law, and the review procedure, to cure a narrower compass of defects, which cannot be allowed to stand in justice, simply because there is no appeal. From the nature of section 80 and order XLIV both procedures cannot be adopted at once. Hence, supposing that an appeal is allowed by the Act but has not been preferred, review may be taken, if appropriate. Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal. It would not be possible for example to pray for review because there was error on the face of the record, on the grounds that the court had no jurisdiction to pass the decree or order complained of, and then by an appeal complain of misdirections on the evidence. That would be an absurd use of the appeal process, because if the court had no jurisdiction, the misdirections on the evidence would, of course, be unimportant. The proper approach would be to put all the complaints into one appeal.”

### **Orders**

12. Accordingly, the Court finds the application dated 21/6/2021 is without merit and it is dismissed.
13. The stay in terms of Prayer No. 2 issued by the Court on 24/6/2021 is discharged.
14. The Respondent/Applicant will pay to the Appellant/Respondent the Costs of this application.
15. File closed.

Orders accordingly.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF MARCH 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. A. Thungu for the Applicant.

Mr. G. Kahiga for the Respondent.

