**Warui v Thimbui (Suing as Legal Representatives of the Estate of Rachel Wambui Ngari - Deceased) (Civil Appeal E005 of 2022) [2025] KEHC 7582 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7582 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NANYUKI**

**CIVIL APPEAL E005 OF 2022**

**AK NDUNG'U, J**

**MAY 29, 2025**

**BETWEEN**

**SUSAN WANGECHI WARUI ..... APPLICANT**

**AND**

**BERNARD NGARI THIMBUI (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF RACHEL WAMBUI NGARI - DECEASED) ..... RESPONDENT**

**RULING**

1. This ruling resolves the application by way of Notice of Motion dated 12/02/2025 seeking review of this court's judgment dated 20/11/2024.

2. The application is based on the grounds on the face thereof and is supported by an affidavit of Susan Wangechi Warui, the Applicant. She deposed that the appeal was commenced by a memorandum of appeal dated 25/04/2022 where four grounds of appeal were raised and more specifically, ground number 2 raised the issue of dependency ratio that was adopted by the trial court. That in the judgment of this court delivered on 20/11/2024, the court abandoned the issue of dependency ratio and other grounds raised in the memorandum of appeal by stating that the Appellant's concern was only on loss of dependency. Therefore, the court failed to address the issue of dependency ratio raised in the memorandum of appeal which was an error since no ground of appeal was ever abandoned. She prayed that the issue be considered.

3. The Respondent filed a replying affidavit dated 18/02/2025 sworn by Robert Muturi Kimunya, counsel for the Respondent. He deposed that the application has no merit and the application is an appeal disguised as an application for review. That there is no apparent error on the face of the judgment as the court determined all the issues. That the Appellant never made any submissions on the issue of dependency ratio but only dwelt on earnings and it was incumbent upon her to demonstrate in her appeal how the trial court erred in arriving at the dependency ratio of ½ and having remained quiet on the issue, she cannot allege mistake on the part of the court.

4. The application was canvassed by way of written submissions. In her submissions, the Applicant has argued that the issue of dependency ratio was raised in the Appellant's submissions paragraph *6*(a) where she listed her first issue for determination as whether the trial court erred in adopting a multiplicand of 25,190/- and a dependency ratio of ½. That the issue was never abandoned and the same was challenged in her memorandum of appeal and submissions. Therefore, there is an error apparent on the face of the record since the court did not pronounce itself on the issue of dependency ratio despite the fact that the same was pleaded and submitted on.

5. The rest of her submissions was as to whether the trial court erred in adopting the dependency ratio of ½. She urged the court to review the judgment and substitute the dependency ratio with 1/3 guided by the cases quoted her submissions.

6. In rejoinder, the respondent has maintained that the application is an appeal disguised as a review application on account that the alleged error is not arithmetic, typographical or any other discernible error as what the Applicant is challenging is this court's finding on dependency ratio. That the Applicant is telling the court to sit down and rewrite the judgment and get the issue of dependency ratio right. That the issue goes to the core of the decision of the court and can only be addressed through an appeal against the judgment but not through an application for review. That the Applicant is dissatisfied by the finding of this court and this is a dissatisfaction that can only be cured by an appeal to the right court. Thus, there is no error apparent on the face of the order of this court.

7. He submitted that the Applicant never made any arguments against the dependency ratio during the hearing of the appeal. That instead of addressing whether her application has met the threshold for review, she has submitted in details on dependency ratio as if the appeal is being heard afresh and her arguments in the submissions have been introduced for the first time to try and persuade the court a second time. That the introduction of new authorities and arguments in support of a lesser dependency ratio shows that the application is an appeal in disguise and the Applicant hopes for the court to sit on appeal of its own judgment. That the application is suspicious since the time for filing appeal has already lapsed.

8. I have considered the Applicants' application, the response by the Respondent and the submissions by the parties.

9. The High Court has a power of review, but such power must be exercised within the framework of Section 80, *Civil Procedure Act* and Order 45 Rule 1, *Civil Procedure Rules*. Section 80 of the Act provides 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.

10. Order 45 Rule 1 of the *Civil Procedure Rules* provides as follows:-

> " 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."

11. The Court of Appeal in *National Bank Of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR) stated thus;

> "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..."

12. The matter was also addressed extensively in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation* [2020] KECA 633 (KLR) where the Court of Appeal held that;

> "I adopt those views as they mirror what happened in the appeal before us, where the Judge arrived at her determination on the basis of the law and evidence before her. If, in the appellant's opinion the conclusions were erroneous, it could only appeal. It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, *Indian Civil Procedure Code*, 14th Edition pg 2335-36 as follows:
>
> > "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error 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 reasoning on points on which there may conceivably be two opinions [*State of Gujarat v Consumer Education & Research Centre* (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [*Chhajju Ram v Neki* [1922] 3 Lah. 127]... (emphasis added)

13. Mativo J in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] KEHC 6379 (KLR) quoted *Thungabhadra Industries Ltd. v Govt. of A.P.*117 where the court stated thus;

> " There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterized as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out."

14. The error complained of by the Applicant is that the court in its judgement delivered on 20/11/2024 failed to consider the issue of dependency ratio on account that the same was not raised in their submissions yet the same was raised. It is further urged that the court abandoned the other issues raised in the memorandum of appeal.

15. I have considered the application, the rival submissions by the parties, and, most importantly the record and judgement of the court in the subject appeal. Of determination is whether the Applicant has established the legal threshold for the grant of an order of review and, if in the affirmative, what orders should issue.

16. From a cursory reading of the judgement of the court, it is clear that the court considered the Applicant's memorandum of appeal and the submissions filed. Though the Appellant had raised the issue of dependency ratio in the memorandum of appeal, no submissions were canvassed to fault the trial court's finding on the applied ratio.

17. In an appeal, it is the submissions put forth that support a ground of appeal and such submissions must be clear on the position taken by an Appellant. A ground of appeal by itself is just a pleading that must be supported by legal and factual arguments to prove the err allegedly made by the lower court. In the absence of such submissions, the pleading remains just that, an allegation which is not proved. This court could not have determined whether the ratio as adopted by the trial court was correct or not if there were no reasons advanced as to why the same was incorrect as argued in this appeal.

18. Further, if the court reached a wrong finding that on the material before it the subject ground was abandoned, the remedy to an aggrieved party does not lie in a review application.

19. In that regard, I associate myself with the holding of Kuloba J (as he then was) in *Lakesteel Supplies v Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 stated:

> " The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the *Civil Procedure Rules*. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends

> of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made."

20. On the facts available, the court made a decision on merit, one that is not subject to review as there is no error apparent on the face of the record. The application before court has no merit and is dismissed.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF MAY 2025.**

**A.K. NDUNG'U**

**JUDGE**