



**Gitau v Mbugua (Civil Suit 546 of 2010) [2025] KEHC 7626 (KLR) (Civ) (27 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7626 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CIVIL**  
**CIVIL SUIT 546 OF 2010**  
**SN MUTUKU, J**  
**MAY 27, 2025**

**BETWEEN**

**JACINTA WANGARI GITAU ..... DECREE HOLDER**

**AND**

**HON SIMON NG'ANG'A MBUGUA ..... DEBTOR**

**RULING**

1. Hon. Simon Ng'ang'a Mbugua (the Applicant) has brought the Notice of Motion dated 3<sup>rd</sup> February 2025 (the Application) against Jacinta Wangari Gitau (the Respondent). The Application is supported by the grounds stated on the face of it and in his Supporting Affidavit sworn on the same date. The Applicant is seeking stay of execution of the Decree of this Honourable Court dated 11<sup>th</sup> December 2024 and an order to review, vary and/or set aside the judgment delivered by Honourable (Mr. Justice J.N. Njagi) on the same date.
2. He has deposed that in the judgment was delivered on 11<sup>th</sup> December 2024, awarding the Defendant general damages in the sum of Kshs. 2,000,000/- and aggravated damages to the tune of Kshs. 500,000/- in respect of a claim founded on defamation; that one of the primary factors which guided the court's decision is that the contents of a published letter dated 2<sup>nd</sup> November 2010, relied on by the Respondent in supporting her claim for defamation, were uncontroverted.
3. The Applicant has stated that there is an error apparent on the face of the said decision and which would warrant a review. That, the Respondent's case did not meet the evidentiary threshold of proof, and yet the court hearing the matter did not subject the evidence adduced by the Respondent to the required evidentiary test.
4. It is equally the Applicant's assertion that the defamatory letter related to ongoing proceedings namely Election Petition No. 35 of 2008 (Ibrahim Ahmed v Simon Mbugua), which proceedings constituted a matter of public interest, thereby causing the publication an absolute privilege. That, the said letter



was neither addressed to the Respondent nor published by any of the local media houses and that the letter essentially constituted a complaint over the appointment of the Judge who presided over the Election Petition proceedings.

5. It was further deposed that the impugned defamatory letter was obtained illegally and in violation of Constitutional provisions. That in addition, the print media publications relied on by the learned Judge in determining the present suit, are of no probative value and made no reference whatsoever to the Respondent. That it was similarly not demonstrated that the impugned letter injured the Respondent's reputation.
6. It is therefore the Applicant's case that the ingredients for defamation having not been proved in the present suit, the Respondent was not entitled to any award of damages and that sufficient grounds have been established to warrant a review and setting aside of the judgment herein.

### **Replying Affidavit**

7. The Respondent has opposed this Application through a Replying Affidavit sworn on 21<sup>st</sup> March 2025 in which the Respondent has stated, inter alia, that the Applicant has not met the threshold for a review under Order 45 of the Civil Procedure Rules (CPR) and that he has not demonstrated the purported error apparent on the face of the record.
8. The Respondent has further stated that during the course of the suit proceedings, the Applicant's advocate sought numerous adjournments and even so, the Applicant did not adopt his witness statement or adduce any evidence for that matter. The Respondent terms the instant Motion as a delay tactic, intended to deny her the fruits of her judgment.
9. The Respondent has equally stated that the instant Motion is aimed at re-opening the case and raising similar issues as those considered in the matter, yet the suit has already been determined. That the Applicant has a right of appeal in any event.
10. The Respondent has denied the assertion that the impugned letter falls under absolute privilege and stated that the said letter was in fact published in the Star Newspaper on 4<sup>th</sup> November 2010, contrary to the Applicant's assertions.
11. The Respondent urges this court to dismiss the Application with co

### **Written Submissions**

12. The Motion was canvassed by way of written submissions. In his submissions, the Applicant relied on *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] KECA 894 (KLR); Order 45, Rule 1 of the CPR and Section 80 of the *Civil Procedure Act* (CPA). He reiterated his earlier averments that there is a mistake/error apparent on the face of the record, which element was elaborated in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR) 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.”

13. The Applicant pointed out that the apparent on the face of the record is found in the learned Judge's failure to appreciate that the impugned letter constituted part of the Election Petition proceedings and was therefore covered by absolute privilege; that the learned Judge deviated from legal principles in his



analysis and interpretation of the defamatory words contained in the letter; and that the learned Judge similarly failed to take into account the fact that the Respondent had not demonstrated the manner in which the impugned letter lowered her reputation in the eyes of right thinking members of society.

14. The Applicant submitted that the Respondent did not make a case for defamation and was therefore not entitled to any of the awards made by the learned Judge. He relied on the case of *SMW v ZWM* [2015] eKLR where the court set out the relevant principles applicable in the tort of defamation. He submitted that the impugned letter was not defamatory of the Respondent and made no particular reference to the Respondent and therefore the claim for defamation was not proved to the required standard.

15. The Respondent, in his submissions, referred to Order 45 CPR, Section 80 CPA and Parliamentary Service Commission v Wambora & 36 others [2018] KESC 74 (KLR) where the Supreme Court laid out the following principles for consideration in an application for review:

“Consequently, drawing from the case law above, particularly *Mbogo and Another v Shah*, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a Limited Bench of this Court.
  - ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
  - iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
  - iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
  - v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
  - vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
    - a. as a result a wrong decision was arrived at; or
    - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”
16. The Respondent contends that the instant Motion has not established the elements for review but it is merely a means for the Applicant to re-argue his case before a court of concurrent jurisdiction and that no self-evident error apparent on the face of the record has been established. The Respondent relied, inter alia, on the case of *National Bank of Kenya Limited v Ndungu Njau* (cited above). It is contended that the Applicant’s conduct contravenes the overriding objective of the CPA under Sections 1A and 1B, which objective is aimed at ensuring the expeditious disposal of cases while avoiding multiplicity of proceedings and therefore it should be dismissed with costs.



## Analysis and Determination

17. I have considered the application and the grounds supporting the same, as well as the Replying Affidavit in opposition to the application. I have also considered the arguments of the parties through their respective submissions. The order sought to be reviewed is contained in the judgment delivered by Honourable Mr. Justice J.N. Njagi on 11<sup>th</sup> December 2024.
18. The guiding principles in an application for review are found under Section 80 of the CPA and Order 45 of the CPR. Order 45 Rule 1 of the CPR 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.”
19. An applicant seeking review must satisfy the court of the following in order to succeed in obtaining an order of review:
- a. That there is discovery of new and important matter or evidence, 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,
  - b. That there is some mistake or error apparent on the face of the record, or
  - c. That there is any other sufficient reason.
20. The Applicant in this instant application is basing it on the principle of ‘error apparent on the face of the record.’ In reference to the case of *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243, the Court of Appeal defined what ‘an error apparent on the face of the record’ means when the court stated 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.”

21. The Court of Appeal restated the above principle in *National Bank of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR) as follows:

“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. Misconstruing a statute or other provision of law cannot be a ground for review.”

22. The Applicant has flagged what he terms as an error apparent on the face of the record to be the alleged failure of the learned Judge to take into account the fact that the impugned letter constituted absolute privilege and deviating from the relevant legal principles in his analysis and interpretation of the words contained in the letter, as well as failing to consider that the defamatory ingredient of the impugned letter had not been established by the Respondent.
23. The question is whether the alleged error apparent on the face of the record as claimed by the Applicant meets the threshold set above?
24. To my mind, the alleged error is not self-evident. It will require elaborate arguments to be established. It is my considered view that the Applicant is attempting to re-open and re-argue the case which will lead to the court to re-examine and re-analyse the pleadings, material and evidence tendered at the trial. It is a well-settled legal principle that this court cannot sit on appeal against a decision rendered either by itself or by a court of concurrent jurisdiction. Such an applicant is better placed in raising an appeal instead of an application for review.
25. After my careful consideration of the arguments in support and in opposition to the application, it is my view that the Applicant has not met the threshold of demonstrating that there is an error apparent on the face of the record, or any of the other elements set out under Section 80 CPA and Order 45, Rule 1 CPR to warrant the grant of the orders of review he is seeking.
26. Consequently, the Notice of Motion dated 3<sup>rd</sup> February 2025 is hereby dismissed with costs for want of merit. It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF MAY 2025.**

**S. N. MUTUKU**

**JUDGE**

In the presence of:

Mr. Shikanda for Mr. Osundwa for the Judgment Debtor/Applicant

Mr. Mathenge for Judgment Creditor/Respondent

