



REPUBLIC OF KENYA



**First Assurance Co. Ltd v Beko (Civil Appeal E332 of 2021)
[2025] KEHC 11420 (KLR) (Civ) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11420 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E332 OF 2021**

JN MULWA, J

JULY 31, 2025

BETWEEN

FIRST ASSURANCE CO. LTD APPLICANT

AND

SHOKO MOLU BEKO RESPONDENT

RULING

1. Before the Court for determination is the motion filed by First Assurance Co. Ltd (hereafter the Applicant) dated 26/09/2024 as against Shoku Molu Beko (hereafter the Respondent) seeking inter alia -:
 - a. Spent.
 - b. That this Honorable Court be pleased to review, vary and or clarify the judgment of Lady Justice A. N Ongeru dated 23/02/2024.
 - c. That the cost of the application be provided for.
2. The motion is brought pursuant to Section 1A, 1B, 3A & 80 of the *Civil Procedure Act* (CPA), Order 45 Rule 1 & 2 of *Civil Procedure Rules* (CPR) and on grounds on the face of the and are amplified in the support affidavit dated 26/09/2024 sworn by Sophie Omolo.
3. The gist of the Applicant's deposition is that vide the judgment on appeal, this Court set aside the trial Court's award on loss of user and substituted it with an award of Kshs. 5,000.000/- being the pre-accident value of the Respondent's motor vehicle; that once a vehicle has been written off the only compensation is the pre-accident value less salvage value, as assessed.



4. It is further averred that the Court in its judgment failed to address the issue of the salvage whereas the Respondent is only entitled to compensation of the differential amount between the vehicle's pre-accident value and the salvage value. For the said reasons, the Applicant contends that sufficient reasons have been advanced to warrant a review of the judgment.
5. Despite service and accordance of many opportunities, the Respondent failed and or opted not to file a response to the Applicant's motion.
6. The Court has duly considered the Applicant's affidavit in support of the motion and postulates that the issues for determination concern-:
 - a. Whether the Court ought to review, vary and or clarify the judgment of this Court delivered on 23/02/2024?
 - b. Who ought to bear the costs of the motion?
Whether the Court ought to review, vary and or clarify the judgment of this Court delivered on 23/02/2024?
7. The Applicant's motion invokes inter alia the provisions of Section 3A of the CPA as well as Order 45 Rule 1 & 2 of the CPR. The former provision, specifically reserves the inherent power of the court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court as judiciously addressed in the Court of appeal case in Rose Njoki King'au & Another v Shaba Trustees Limited & Another [2018] eKLR and requires no restatement.
8. By dint of Order 45 of the CPR as read with Section 80 of the CPA this Court is empowered to review its orders or judgments and make such orders as it may think fit, on conditions thereto to being: - (a) "Discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) For any other sufficient reason and (d) that the Application has to be made without unreasonable delay".
9. The purport of Order 45 of the CPR has been the subject of numerous decisions within our jurisdiction meanwhile it has since been settled that the provision involves exercise of judicial discretion as observed in Jason Ondabu t/a Ondabu & Company Advocates & 2 Others v Shop One Hundred Limited [2020] eKLR.
10. At the outset, it is evident that the Applicant's motion is unopposed perceivably either by design or default on the part of the Respondent given that there was proper service. Nonetheless, as earlier noted, an application for review involves the exercise of judicial discretion on the premise of established principles. The absence of a replying affidavit by the Respondent does not necessarily give free rein to the Applicant.
11. The Supreme Court in Koncellah v Sunkuli & 2 others [2018] KESC 58 (KLR) while addressing itself in part on a parties failure to file a response stated that- ;

"A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. Absence of this foundational pleading, the replying affidavit, it follows that even the written submissions purportedly filed by the 1st respondent ... are of no effect. It is not meritorious, and the prayers may be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed



application, the court will as a matter of course grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application be granted.”

12. That said, by the grounds amplified in support of the motion, the Applicant seeks to invoke this Court’s discretion to review its judgment rendered on 23/02/2024 on the premise of mistake or error apparent on the face of the record. An application for review specifically premised on Order 45(1)(b) of the *CPR* must appertain an error or omission self-evident and ought not require an elaborate argument to be established as addressed by the Court of Appeal in *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR and *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others* [2020] eKLR.
13. The judgment of this Court sought to be reviewed was delivered on 23/02/2024 (Ongeri J). The Applicant filed the instant motion in excess of seven (7) months, with no explanation for the long period.
14. Nevertheless, I have taken the liberty of reviewing the Court judgment. What was for consideration by this Court on appeal was derived from the Applicants grounds of appeal as itemized in its Memorandum of Appeal dated 08/06/2021. This Court duly captured the Applicant’s grounds of appeal and contemporaneously considered the respective parties’ submissions in its judgment.
15. Manifestly, neither the grounds of appeal nor the respective parties’ submissions canvassed the issue of the salvage value being a deductible from the pre-accident value. Thus, it can reasonably be stated that the salvage question was not an issue that was tendered for consideration before the appellate Court.
16. This Court has considered the issues presented by the rival parties with a view to capture the alleged apparent error on the face of the record, which I have already stated was not an issue presented on appeal before the court and or canvassed before it for consideration.
17. In *National Bank of Kenya* (*supra*), the Court of Appeal had this to say regarding a review arising from a mistake or error apparent on the face of the record:-

“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 sufficient grounds 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.” (Emphasis added)
18. In *Nyamogo and Nyamogo Advocates v. Kogo* [2001] 1 E.A. 173 the Court of Appeal had earlier defined an error apparent on the face of the record as follows:-

“An error apparent on the face of the record cannot be defined precisely and 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 a 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.”

19. Therefore, on the foundation of the Applicant’s motion can it reasonably be stated that there is an error apparent on the face of the record to warrant a review of this Court’s decision rendered on 23/02/2024? Unreservedly, the answer to the forestated is that the Applicant’s quest for review is rejected.
20. By the instant motion the Applicant is tacitly asking this Court to re-open the appeal and render a determination on an issue obviously not canvassed and or presented before the Appellate Court for determination. Such an attempt must be frowned upon.
21. Consequently, the Applicant’s motion dated 26/09/2024 is found to lack merit. It is dismissed with no orders as to costs for reasons earlier noted in this ruling.

Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY, 2025

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JANET MULWA.

JUDGE

