Virchand Virpal & Sons Limited v NIC Bank Limited (Civil Case E636 'B' of 2009 & 419 of 2010 (Consolidated)) [2025] KEHC 11557 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E636 'B' OF 2009 & 419 OF 2010 (CONSOLIDATED)

PM MULWA, J

JULY 31, 2025

BETWEEN

VIRCHAND VIRPAL & SONS LIMITED ..... PLAINTIFF

AND

NIC BANK LIMITED ..... DEFENDANT

RULING

1. The Plaintiff filed the Notice of Motion dated 22nd July 2024 seeking review of the decree and/or orders granted on 25th June 2024. The following reasons are enumerated in the body of the application as being sufficient to warrant review:

    i. The learned judge having held that the correct trigger date was the date provided by the defendant, being 31st July 2008, the resulting loss suffered by the plaintiff would accordingly be the loss borne out by the plaintiff's expert report produced in court computed on 31st July 2008.

    ii. Indeed, by the plaintiff's expert report computation as of 31st July, 2008, the loss suffered by the plaintiff was kshs. 1,270,260.00 as representing the amount that would have been retained by the plaintiff had the defendant sold the shares 5 days after 31st July 2008.

    iii. The plaintiff clearly stated the date when the sale took place long after the trigger, contrary to the conclusion by the court that no such date was given.

    iv. With the specific loss suffered by the plaintiff as at the date furnished by the defendant, the conclusion that the plaintiff failed to compute its loss is an error that ought to be reviewed.

2. The application is supported by the affidavit of the Plaintiff's director Sunil Chandulal Shah sworn on 22nd July 2024 wherein he deposes that the final judgment and/or decree appears to be a radical

departure from the interim judgment, and that it failed to consider the clear computation of the Plaintiff's loss at the point of trigger which is clearly set out in the Plaintiff's expert report. It is further averred that the judgment/decree having held that the trigger point for the sale of the shares was on 31st July 2008 as computed by the Defendant itself, it defies logic that the court failed to pin the Defendant to the resulting loss as at 31st July 2008 which loss is Kshs. 1,270,260.00.

3. The application was opposed through a replying affidavit sworn on 3rd October 2024 by Christine Wahome, a legal counsel with the Defendant. She deposed that reasons advanced by the Plaintiff in support of the application do not qualify as an apparent error as envisaged by Order 45 of the Civil Procedure Rules. She further deposed that an appeal would have been the proper forum as opposed to a review application, which it is argued, lacks in merit and discloses no grounds for grant of the orders sought.

4. The application was canvassed by way of written submissions which counsel for the respective parties highlighted.

Analysis and determination

5. I have considered the application, the grounds, the affidavits and submissions. The issue for determination is whether the applicant has met the legal threshold for review of the judgment and/decree made on 28th June 2024.

6. The Court has the power to review an order or decree under Section 80 of the *Civil Procedure Act*. The discretion to grant review is fettered by the grounds set out under Order 45 Rule 1 of the Civil Procedure Rules as follows:

> (1) Any person considering himself aggrieved—
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> (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."

7. The Court of Appeal in Nyamogo & Nyamogo Advocates v Kogo [2001] EA 173 stated 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.

8. The Defendant submits that there is no new issue or error apparent in the application herein to warrant a review of orders and that the orders issued on 17th January 2024 can only be appealed at the Court of Appeal.

9. The Plaintiff's application is premised on the ground that the Defendant was in default and duty bound to sell the credit shares. And that the only issue was the extent of its liability, and that was the figure mistakenly left out by the learned judge.

10. The record shows that the Court delivered a judgment on 26th June 2020 and observed that the evidence adduced by either party was no conclusive on the issue of when the 60% trigger was reached. As a consequence, the court allowed the parties to engage an expert on this issue or file a common report which would form the basis of the final orders.

11. In her final orders, the learned judge noted that parties did not agree on a common approach and ended up filing two reports which revealed variances in the shares pledged to the Defendant and respective prices as at 31st July 2008. The matter was then concluded on the strength of the evidence then on record.

12. To my mind, the grounds put forth by the Plaintiff do not warrant a review. There is no discovery of new and important matter or evidence or error apparent on the face of the record. Further, the grounds advanced are also not sufficient reasons for a review as they are not obvious and self-evident. Either party has its own perspective of the 60% trigger date and that is a point of argument, and not an error apparent.

13. In the upshot, the application dated 26th January 2024 is not merited and is hereby dismissed with costs to the Defendant.

    It is so ordered.

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

PETER M. MULWA

JUDGE

In the presence of:

Ms. Mutiso h/b for Mr. Odera for Plaintiff

Ms. Mburu for Defendant

Court Assistant: Carlos