



**Saham Assurance Co. Ltd v Shimoli (Civil Suit 2 of 2018)  
[2022] KEHC 14372 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14372 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL SUIT 2 OF 2018  
WK KORIR, J  
OCTOBER 27, 2022**

**BETWEEN**

**SAHAM ASSURANCE CO. LTD ..... PLAINTIFF**

**AND**

**PAUL MUSEE SHIMOLI ..... RESPONDENT**

**RULING**

1. This ruling answers the Plaintiff's application dated March 4, 2022 brought under Article 159 (2) (d) of the Constitution; Order 12 Rule 7, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 (CPR); and sections 3A and 80 of the Civil Procedure Act, Cap 21 (CPA). The two key orders sought by the Applicant are:
  - i. That this Honourable Court be pleased to vary and/or review its judgment dismissing the Plaintiff/Applicant's suit.
  - ii. That this Honourable Court be pleased to admit the complete copy of the Plaintiff's investigation report dated August 18, 2018 annexed to the supporting affidavit herein and to be pleased to write a fresh judgment guided by the complete copy of the investigation report.
2. The application is based on the grounds on the face of the application and an affidavit sworn by Kiongo Murimi, the advocate for the Plaintiff/Applicant.
3. The Defendant/Respondent, Paul Musee Shimoli, swore an affidavit on April 8, 2022 in opposition to the application.
4. A brief background to the application will do no harm. The Respondent's motor vehicle registration number KBU 533U was involved in an accident on November 14, 2017. Some of the passengers who were travelling in the motor vehicle were injured and later brought compensation claims at the Magistrate's Court against the Respondent. The Plaintiff subsequently brought this suit seeking to



- disclaim liability on account that at the time of the accident the passengers on the vehicle were being carried for hire and reward in breach of the insurance policy which had covered the motor vehicle for private use only. In a judgement delivered on December 14, 2021, I dismissed the Applicant's suit.
5. The Applicant now seeks to review my judgement on the ground that the dismissal of its suit was based on the fact that it had filed an incomplete investigation report. According to the Applicant  

“it inadvertently placed an incomplete investigation report as opposed to the complete report which was an honest mistake.” That is the ground upon which the Applicant is asking this Court to review its judgement.
  6. The Respondent's position is that the Applicant has not made a case for the review of the judgement of this Court. According to the Respondent, there is no discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the Applicant or could not be produced by him at the time when the judgment was made. The Respondent asserts that there is no new material because at the time the Court was making the judgment, the Applicant had filed an investigation report in the list of its documents. Further, that the handwritten investigation report the Applicant now seeks to produce was all along in its custody and largely contradicts the evidence adduced at the trial. It is averred that the Applicant simply wants to litigate the matter afresh.
  7. The Respondent contends that there is no mistake or error apparent on the face of the judgment to warrant a review of the same and that the Applicant has failed to give sufficient reason for the Court to review its decision. It is further the Respondent's case that litigation must come to an end and the application should be dismissed since the Court is *functus officio*.
  8. In submissions dated May 16, 2022 the Applicant states that the application for review is brought pursuant to Section 80 of the [CPA](#) and Order 45 Rule 1 of the [CPR](#) which allow a court to review its orders or decrees in certain circumstances. The Applicant submits that the application is based on the fact that due to an inadvertent mistake on the part of its advocate, part of a document that would be crucial in assisting the court reach a just determination was left out. It is argued that the hand written statements of the witnesses from which the typed statements emanated were erroneously not produced.
  9. The Applicant contends that there is an error on the face of the judgment because this Court relied on an incomplete investigation report in generating its decision. The Applicant cites the case of [Nyamogo & Nyamogo Advocates v Kogo \[2001\] 1 EA 173](#) (CAK) as defining what amounts to an error on the face of the record. According to the Applicant, there is an error apparent on the face of the record that can be cured by the Court admitting the complete copy of the investigation report and writing a fresh judgment.
  10. The Applicant contends that its explanation that it believed that it had submitted the complete investigation report amounts to sufficient reason warranting the review of the judgement. Reference is made to the case of [Republic v Advocates Disciplinary Tribunal Ex-parte Apollo Mboya \[2019\] eKLR](#) in support of the submission.
  11. The Applicant submits that the typed statements already produced in Court originated from the handwritten statements it now seeks to introduce and the same are thus not strange to the Respondent. Further, that the Respondent is in any case not challenging the contents of the report.
  12. The Applicant states that it has come to Court with clean hands, and, in accordance with the requirements of Article 159(2)(d) of the [Constitution](#), this Court should not drive it away from the seat of justice based on procedural technicalities.



13. On his part, the Respondent through submissions dated May 30, 2022 asserts that the Applicant has not established discovery of a new and important matter. The Respondent claims that the investigation report the Applicant wants to produce has more pages than the one on record and the Respondent is therefore attempting to adduce fresh evidence.
14. It is further the Respondent's case that failure to produce evidence is not equivalent to a mistake or an error apparent on the face of the record. This argument is supported by reference to the case of [\*Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others \[2021\] eKLR\*](#).
15. The Respondent submits that there is no prima facie visible error in the investigation report that was produced in evidence. According to the Respondent an error or mistake must be so obvious and glaring, and the error or mistake fronted by the Applicant is not apparent and needs some explanation. Further, that the error or mistake cannot be apparent because the Applicant never noticed it all through the proceedings until when the issue was pointed out in the judgment of this Court. It is additionally the Respondent's submission that had the error or mistake been apparent, the Applicant ought to have noticed it when it successfully made an application for the reopening of its case on October 2, 2020.
16. The Respondent asserts that it is the Applicant's lack of diligence that led to the failure to exhibit the investigation report, and submits that as was held in [\*Odoyo Osodo v Rael Obara Ojuok & 4 others \[2017\] eKLR\*](#), lack of diligence cannot be said to be an apparent error or mistake. According to the Respondent, the Applicant is simply using the judgment in this matter to rebuild and restructure its case which is not sufficient reason to review the judgment. Reliance is placed on the decisions in [\*Samuel Kiti Lewa v Housing Finance Co of Kenya Ltd & another \[2015\] eKLR\*](#) and [\*Odoyo Osodo v Rael Obara Ojuok & 4 others \[2017\] eKLR\*](#) for the holding that the re-opening of a case should not be allowed where it is intended to fill gaps in the evidence.
17. In response to the Applicant's reliance on Article 159(2)(d) of the [\*Constitution\*](#) in support of the application for review, the Respondent submits that as was held in the case of [\*Marigat Group Ranch & others v Wesley Chepkoimet & 19 others \[2013\] eKLR\*](#), rules of procedure should be observed as failure to do so may result in prejudice and injustice, and that failure to observe rules of procedure amounts to an abuse of the court process.
18. The only question to be answered in this ruling is whether the Applicant has met the conditions for allowing a review of an order or decree as set down in Order 45 Rule 1 of the [\*CPR\*](#). Those conditions are specified in Rule 1(b) as "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." The grounds were reiterated by the Court of Appeal in [\*Otieno, Ragot & Company Advocates v National Bank of Kenya Limited \[2020\] eKLR\*](#) as follows:

"The main grounds for review are therefore; discovery of new and important matter or evidence; mistake or error apparent on the face of the record; or for any other sufficient reason and most importantly, the application has to be made without unreasonable delay."
19. The Applicant submits that its application for review is based on the fact that its failure to produce the investigation report containing the signed statements of its witnesses was due to an inadvertent mistake on the part of its advocate. It is the Applicant's case that the investigation report produced had typed statements of witnesses interviewed by the investigator but the section of the report which included the handwritten statements from which the typed statements emanated was erroneously excluded from the report produced in Court.



20. I have read and reread the Applicant’s application and I notice that as per paragraph 6 of the grounds on the face of the application and paragraph 8 of Kiongo Murimi’s supporting affidavit, the only reason for the application is that the Applicant “inadvertently placed [on record] an incomplete copy of the investigation report as opposed to the complete copy which was an honest mistake.” In light of that statement, I take it that the Applicant seeks a review on the ground that there is a mistake or error apparent on the face of the record. This is because it is obvious that the document the Applicant wants to introduce in Court was available at the time the suit was filed and the application cannot therefore be based on the ground of discovery of new and important matter or evidence.
21. It is important to identify the ground upon which an application for review is premised as was held by the Court of Appeal in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR* that:

“This submission provides an interesting twist. The respondent’s counsel confirms in his submissions that the application was no longer about the discovery of any new evidence as it was made to appear. The respondent’s case is now about an error on the face of the record. The learned Judge should have seen straightaway that the respondent had changed its case from one of review based on discovery of new and material evidence to one of an error on the part of the court apparent on the face of the record. He should have seen that the application as presented could not succeed and he should not have allowed the respondent to shift the goal post midway without amending the application thereby denying the appellant opportunity to respond. An application for review must be specific on the ground on which it is brought. And if the complaint was that the Judge made an error, then he should have pursued an appeal which it had already commenced. Clearly then the learned Judge fell into error when he allowed the application for review based on an inadvertent error or mistake on the part of the respondent yet the respondent itself had disclosed that it was an error on the part of the court.”

[Underlining supplied]

22. The question therefore is whether the failure by the Applicant to exhibit the complete investigation report is a mistake or error apparent on the face of the record. An error or mistake that is apparent on the face of the record was defined by the Court of Appeal in the case of *Muyodi v Industrial and Commercial Development Corporation and another EA LR [2006] 1 EA 243 at pages 246-247* 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 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.”



23. What the Applicant has demonstrated before this Court is that there was a mistake during the filing of its case leading to the exclusion of a crucial exhibit. That is not a mistake apparent on the face of the record. It is an error on the part of the Applicant's counsel and the same cannot be used to reopen the case for fresh litigation to the prejudice of the Respondent. This statement finds support in the holding in *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited [2020] eKLR* that:

“Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. There was no response to the replying affidavit in so far as it accused the respondent of lack of diligence. The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence...It was quite clear therefore that the respondent having found out why the Judge decided against it went back to the drawing board and fished out evidence that would bolster its case. This was too late in the day as the horse had already bolted from the stable.”

24. The Applicant has not established any ground for reopening the case. It has not demonstrated any error or mistake on the face of the record. The record here meaning the Court record. There is no mistake on the part of the Court to warrant a review of the judgment. The application is therefore for dismissal.

25. It is important to also state for purposes of record that although the Applicant claim that its case was dismissed because it had not provided the complete investigation report, the truth of the matter is that the production of unsigned witness statements was not the only reason for the dismissal of the case as seen from the excerpt of the judgement as follows:

“24. I have already summarized the evidence of the parties in this judgement and I only need to analyze it in order to reach my decision. During cross-examination, PW1 told the Court that there was no record of any fare paid by any of the passengers and that the claim form by the Defendant did not mention any hire or reward. Further, that the extract from the OB has no reference to payment of fare by any of the passengers. PW1 stated that the insurance indemnifies third parties when there is no fare-paying passenger.

- i. PW2 produced an investigation report as an exhibit. I have perused the report and note that he did not sign it. However, he was the maker of the report and owned it when he testified in Court. The submission by the Defendant that the report is not genuine cannot therefore amount to much in the circumstances. PW2 may as well have testified without providing any report and this Court would still have had to consider his oral testimony vis-à-vis that of the Defendant. Notwithstanding what I have just stated, I find that the investigation report does not add any value to the Plaintiff's case. I say so because the key supporting documents, being the statements allegedly made by the persons who were passengers in the vehicle, were not signed. This state of affairs is disconcerting and in disfavour of the Plaintiff's case when one considers that the same witnesses prepared and signed statements which were produced by the Defendant. In the statements exhibited by the Defendant, all the passengers averred that they were being given free rides in the Defendant's ill-fated motor vehicle.
- ii. In a situation where there are signed and unsigned statements by the same witnesses, the Court is inclined to rely on the signed statements. The signed statements lead this Court to conclude that the passengers did not pay any



fare. In reaching this conclusion, it is observed that none of the witnesses who testified for the Plaintiff and the Defendant was present when the accident occurred. The police abstract filled for the victims simply stated that the victims were passengers without specifying whether they paid any fare or not. Being a passenger in a car is not the same thing as paying fare for the ride.”

26. The Applicant gives the impression that it has statements signed by the claimants before the lower court showing that they had paid fare for the ride in the ill-fated vehicle. Even if signed witness statements had been produced by the Applicant, its case would still have failed on the ground that both the Applicant and the Respondent were relying on the same witnesses and their testimony would have been self-contradicting hence the Applicant’s claim that the passengers paid fare for the ride would not have been proved. It was upon the Applicant to prove that the passengers had paid fare. It failed to do so. I therefore find no merit in this application. The application is dismissed with costs to the Respondent.

**DATED AND SIGNED AT NAKURU THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022.**

**W Korir, Judge**

**DATED, COUNTERSIGNED AND DELIVERED AT KABARNET THIS 27<sup>TH</sup> DAY OF OCTOBER, 2022.**

**H K Chemitei, Judge**

