



**Shariff & 2 others v Kenya Railways (Environment & Land Case
E002 of 2021) [2025] KEELC 1411 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E002 OF 2021
EC CHERONO, J
MARCH 20, 2025**

BETWEEN

NAZMUDIN ABDULALI SHARIFF 1ST PLAINTIFF

ATLAF ABDULALI SHARIFF 2ND PLAINTIFF

FIROZ ABDULALI SHARIFF 3RD PLAINTIFF

AND

KENYA RAILWAYS DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 09/02/2024 in which the defendant/Applicant is seeking the following orders;
 - a. That this Honourable Court be pleased to review and discharge the orders contained in paragraph 3 of its ruling on 28th October 2021.
 - b. That consequent upon the said review and discharge, this Honourable Court direct that the funds deposited by the defendant being Kshs 9,976.699 together with interest earned being held in the joint interest earning account no. xxxxxxxx at National Bank Eldoret Branch in the names of both the plaintiffs' and the defendant's counsel be released to the defendant Account NO. 11-xxxxxx-7 Swift Code-KCBLKENX held at Kenya Commercial Bank, Moi Avenue Branch.
 - c. Any other relief it deems fit and just in the circumstances.
 - d. Costs be provided for.
2. The application is premised on 11 grounds shown on the face of the application supported by the affidavit of Tom Mutei Advocate sworn on even date. According to the Defendant Applicant, the



Plaintiffs/Respondents herein commenced this suit vide an Amended plaint seeking several orders inter-alia general and exemplary damages as well as special damages to the tune of Kshs 9,976.699/=. He deposed that upon successfully obtaining interlocutory default judgment, the plaintiffs proceeded for hearing by way of formal proof and judgment was reserved for 28/9/2021. That upon being notified of the judgment date, the defendant filed an application dated 23/7/2021 seeking to arrest the ex-parte judgment and leave to defend itself. He deposed that by a ruling delivered electronically on 28/10/2021, this Honourable court allowed the defendant's application dated 23/7/2021 upon certain conditions inter alia an order directing the defendant to deposit the sum of Kshs 9,976.699. He stated that the defendant complied with the said order and caused the said funds to be deposited in a joint interest account in the names of both the plaintiffs' and the defendant's counsel. That after the hearing of this suit, judgment was delivered on 6/7/2023 dismissing the plaintiffs' suit with costs to the defendant. He stated that the plaintiff preferred an application before the Court of Appeal at Kisumu in C.A NO. E087 of 2023 seeking interim orders for inter-alia an order that the funds deposited in the joint interest account ought not to be released pending hearing and determination of their appeal. He stated the court of appeal directed that orders of status quo be maintained to the effect that the Applicants wouldn't be evicted nor their structures demolished pending hearing and determination of the intended appeal and that no order was issued restraining the release of the funds as sought in the interlocutory application before the court of appeal dated 17th day of July, 2023.

3. In conclusion, the defendant/Applicant stated that there is no longer any basis for the sums being held in the joint interest account and that this application has been made in good faith and in the interest of justice.

Plaintiff/respondents Summary Of Facts

4. The plaintiffs/Respondents filed a Replying affidavit in opposition to the said application sworn by Nazmudin Shariff on 21st January, 2025 in which he deposed that on 28th October 2021, this Honourable Court issued an order directing the Defendant/Applicant to deposit the sum of Kshs. 9,976,699/= in a joint interest-earning account in the names of both counsels for the plaintiffs and the defendant/Applicant and on 6th July 2023, this Court delivered judgment dismissing the plaintiffs' suit in its entirety. He stated that being dissatisfied with the said judgment, they filed an application before the Court of Appeal in Kisumu being C.A NO. E087 of 2023 seeking interim orders to preserve the status quo pending the determination of the intended appeal.
5. The deponent stated that the Court of Appeal granted orders of status quo, which, while not expressly prohibiting the release of the funds, implicitly includes their preservation. He stated that the funds form part of the reliefs being sought by the plaintiff in the appeal and their release would prejudice the appellate process and potentially render the plaintiff's appeal nugatory. He stated that the preservation of these funds is critical to ensuring that, should the plaintiffs succeed in their appeal, the status quo ante is maintained and the fruits of their litigation are not lost and are available and that the essence of maintaining the status quo is to ensure that no party gains an undue advantage or that the subject matter of the dispute remains intact until the matter is fully adjudicated.
6. In conclusion, it was deposed that allowing the release of the funds at this juncture would only contravene the spirit of the appellate court's orders and that the circumstances surrounding the deposit of the funds and the subsequent proceedings have remained unchanged since the judgment was delivered and the preservation of the funds in the joint account ensures that all parties interests are safeguarded pending the final determination of the matter.



Defendants/applicants Submissions

7. The defendant/Applicant through the Firm of M/S Tom Mutei & Co. Advocates filed submissions in further support of the application dated 9th December, 2024 and stated that the plaintiffs instituted this suit by way of an amended plaint dated 25th March 2021 and when the defendant was notified by the court that the matter was reserved for judgment, it moved the court vide an application dated 21/07/2021 seeking to arrest the said ex-parte judgment and set aside the ex-parte proceedings and for leave to defend itself. They submitted that in a ruling delivered on 28/10/2021, this Honourable Court allowed the defendant's application upon certain conditions inter-alia an order directing the defendant to deposit the sum of Kshs. 9, 976,699/= in a joint interest earning account in the names of advocates for the parties which the defendant complied. They submitted that after filing their defence and compliance documents, the suit was set down for hearing and judgment was delivered on 6/7/2023 dismissing the plaintiffs' suit. Following delivery of the judgment, the plaintiffs were dissatisfied and preferred an application before the Court of Appeal at Kisumu being C.A NO. E087 of 2023 seeking interim orders for inter-alia that the funds deposited in the joint interest earning Account ought not be released pending hearing and determination of their appeal.
8. They submitted that when the said application came up for hearing, the Court of Appeal issued orders of status quo in the following terms;

“ In the circumstances, we order that the status quo currently obtaining be maintained and that therefore the applicants shall not be evicted nor shall their structures be demolished pending hearing and determination of the intended appeal.”
9. The Defendant argued that no orders were issued to the effect that the sums in the joint interest earning account remain deposited in the bank even though the same were sought in the plaintiffs' application

Plaintiffs/respondents Submissions.

10. The plaintiff through the Firm of M/S Alex & Amersi Llp Advocates submitted on the following two issues;
 - a. Whether the defendant's application dated 9th February, 2024 meets the threshold for review and
 - b. Whether court should order the release of the funds held in the joint-interest earning account to the defendant.
11. On the first issue, the learned counsel submitted that whereas the Court of Appeal at Kisumu granted interim orders of status quo in C.A NO. E087 of 2023, restraining the defendant from evicting the plaintiffs and demolishing their structures pending hearing and determination of the intended appeal, the concept of status quo extends beyond physical possession or occupation but inherently includes the preservation of all contested rights, interests and obligations until final adjudication. It was further submitted that while the appellate court's order did not expressly prohibit the release of the funds, they implicitly required their preservation. They submitted that the essence of maintaining status quo is to ensure that no party gains an undue advantage and that the subject matter of the dispute remains intact until the matter is fully heard and determined. They relied on the following case of Patel-v-Amin (1987) eKLR; Stanbic Bank Kenya Limited-v- Kenya Revenue Authority (2009) eKLR
12. On the second issue, the Counsel submitted that the defendant's application is brought under Order 45 Rule 1 of the Civil Procedure Rules and that no material has been placed before the court by the defendant/Applicant to demonstrate existence of new matter or evidence after exercising due diligence.



They argued that the defendant/Applicant has not presented any proof in its application for review of any change in circumstances or discovery of new evidence or information that would warrant a review by this Honourable court on the orders made. They further submitted that the application does not point to any mistake or error apparent on the face of record that would render it necessary for this honourable Court to correct the apparent error or omission on the part of the court. The following cases were relied upon; Nyamogo & Nyamogo –v- Kogo-----; Belgo Holdings Limited –v- Robert Kotch Otachi & Anor NBI High Court Suit Case NO. 454 of 2014; Gulam Hussein –v-Jivanji & Anor 1929-30 KLR 44

Legal Analysis And Decision

13. I have considered the Notice of Motion application dated 9/2/2024, the Replying affidavit, further affidavit, the rival submissions and the applicable law. The brief facts of this case relevant to the current application are that after instituting this suit vide an amended plaint dated 25th March 2021, the suit proceeded ex-parte and a judgment date reserved by the Court. After the Defendant was notified of the judgment date, they moved the court to arrest the said ex-parte proceedings and judgment and for leave to defend themselves vide an application dated 21/7/2021. By a ruling delivered on 28/10/2021, this Honourable Court allowed the defendant’s application on conditions that they deposit the sum of Kshs. 9, 976,699/= in a joint interest earning account in the names of advocates for both the parties. The said sum of Kshs. 9,976, 699/= was derived from the sums the plaintiffs sought as special damages in its amended plaint dated 25/3/2021. The defendant complied with this court’s order and deposited the said sum as ordered by the court. After hearing the parties and their witnesses, this Honourable Court delivered judgment on 28/7/2023 whereby the plaintiffs’ suit was dismissed with costs. The Defendant/Applicant is now seeking an order for review of its orders issued on 21/7/2021.
14. Order 45 Rule 1 of the Civil Procedure Rules which is the applicable law provides as follows;
 - 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 reasons, 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....”
15. What can be gleaned from the above provisions of the law is that a party may apply for the review of a decree or order on the following three (3) grounds;
 - i. Upon discovery of a 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 the decree was passed or order made;
 - ii. On account of some mistake or error apparent on the face of the record or;
 - iii. For any other sufficient reason
16. It is not in dispute that when this suit proceeded ex-parte and before judgment was delivered, the defendant filed a formal application dated 21/7/2021 seeking to arrest the ex-parte judgment and



also set aside the ex-parte proceedings and leave to defend itself. In a Ruling delivered electronically on 28/10/2021, this Honourable court allowed the defendant/Applicant's application on conditions inter-alia that the defendant/Applicant deposits the sum of Kshs 9976,699 in an interest earning account in the joint names of both the plaintiffs and defendant's Counsel within 10 days from the date of that ruling. The defendant/Applicant was also ordered to file and serve its defence and witness statements as well as any documentary evidence. These were conditional orders given to the defendant to defend itself after this court found that it had properly been served with Summons to enter appearance and other court processes but failed to enter appearance and file defence in accordance with the law.

17. After the defendant/Applicant entered appearance and filed defence and all compliance documents as directed by this Court, the matter was set down and proceeded for hearing and judgment was delivered by dismissing the suit with costs to the defendant/Applicant. In my view, the orders requiring the defendant/Applicant to inter-alia deposit the sum of Kshs 9,976,699/ in a joint interest earning account in the names of Counsel for both the plaintiffs and the Defendant were conditional to the defendant defending this suit. Those conditions lapsed after judgment was delivered and this suit dismissed with costs. I therefore find that the defendant/Applicant has established sufficient grounds to warrant the review of the orders of this Court made on 28/10/2021.
18. While opposing the current application, the plaintiff/Respondent at paragraph 5 of their replying affidavit by Nazmudin Shariff sworn on 21/01/2025 stated that the Court of Appeal granted interim orders of status quo restraining the eviction of the plaintiffs or demolition of their structures pending the determination of the intended appeal. At paragraph 6 thereof, the deponent deposed that the Court of Appeal granted orders of status quo which, while not expressly prohibiting the release of the funds, implicitly includes their preservation. I have looked at the copy of the order by the Court of Appeal issued on 8th August 2023 and note that the Superior Court was clear on what constituted status quo and stated as follows;

“---In the circumstances, we order that the status quo currently obtaining be maintained, and that therefore the applicants shall not be evicted nor shall their structures be demolished pending the hearing and determination of the intended appeal.”
19. If the Court of Appeal intended the order for status quo issued to include preservation of the funds in dispute, nothing could have been easier than for them to have expressly stated so, considering that the plaintiffs/Respondents had sought for the order in their application before the Court of Appeal.
20. What in my view the plaintiffs/Respondents are asking this court to do is to covert the conditional funds it had ordered to be deposited before this Honourable Court as security pending hearing and determination of the intended appeal. The defendant/Applicant is the successful litigant after the plaintiffs'/Respondents' case was dismissed with costs. It is therefore inconceivable that the defendant/Applicant who is the successful party in this case can be asked to deposit security for the plaintiff pending their intended appeal.
21. In view of the matters aforesaid, I find the application dated 9th February, 2024 merited and the same is allowed as follows;
 - i. The orders of this honourable court contained at paragraph 3 of its ruling issued on 28th of October 2021 are hereby reviewed and or discharged
 - ii. That consequent upon the said review and discharge under paragraph (i) above, this honourable court directs that the funds deposited by the defendant being Ksh. 9, 976, 699/- together with interests earned being held in the joint interest earning account no. xxxxxxx at



National Bank Eldoret branch in the names of both the plaintiffs and the defendants counsels be released to the defendant account no. 11-xxxxxx-7 Swift Code KCBBLKENX held at Kenya Commercial Bank Moi Avenue Branch.

iii. Each party to bear their own costs

22. Orders accordingly.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 20TH DAY OF MARCH, 2025.

HON. E.C. CHERONO

ELC JUDGE

In the presence of;

Mr. Ochieng for the plaintiffs/Respondents.

M/S Moraa for the Defendant/Applicant.

Bett C/A.

