



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. E060 OF 2021**

**CHUI BING SUN.....1ST PLAINTIFF**

**CHECKMATE CAPITAL LIMITED.....2ND PLAINTIFF**

**VERSUS**

**CHIEN HOE YONO.....1ST DEFENDANT**

**HENCO MANAGEMENT LIMITED.....2ND DEFENDANT**

**BRUNO OTIENO OLIENDE (alias ELIJAH MURENZI**

**MALIBA.....3RD DEFENDANT**

**JOSEPH LUGANZA.....4TH DEFENDANT**

**GLOBAL FREIGHT MANAGEMENT LIMITED.....5TH DEFENDANT**

**BRIAN ODHIAMBO.....6TH DEFENDANT**

**ODHIAMBO, TALAM & CO. ADVOCATES LLP.....7TH DEFENDANT**

**OSEWE ALPHONCE COLLINS ODOYO.....8TH DEFENDANT**

**ODERO OSIEMO & CO. ADVOCATES.....9TH DEFENDANT**

**JONATHAN OKOTH OPANDE.....10TH DEFENDANT**

**KENNEDY ANYANGA.....11TH DEFENDANT**

**TITUS KAMAU NGUNJIRI MWANGI.....12TH DEFENDANT**

**AND**

**NATIONAL BANK OF KENYA LIMITED.....1ST INTERESTED PARTY**

**UNITED BANK FOR AFRICA KENYA LIMITED.....2ND INTERESTED PARTY**

**CREDIT BANK KENYA LIMITED.....3RD INTERESTED PARTY**

**STANBIC BANK KENYA LIMITED.....4TH INTERESTED PARTY**

**RULING**

The plaintiffs filed an application dated 26th February 2021 seeking among other prayers orders freezing the accounts of the 3rd, 6th, 7th, 9th and 11th respondents. The application was fully heard and on 27th May, 2021 Justice Mbogholi Msagha delivered a ruling and granted among other orders the following:-

> **a) Freezing orders be and are hereby issued with immediate effect against the account held by the 7th defendant with the 1st interested party at its Wilson Airport Branch and with Account Number 02020213494100 prohibiting any and all withdrawals, outgoing transfers and any and all dealings with the money in the account by the 6th and 7th defendants, their agents, nominees or any person claiming any right of interest under or through them, pending the hearing and determination of the suit.**
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> **b) Freezing orders be and are hereby issued with immediate effect against the account held by the 8th, 9th and 11th defendants with the 2nd interested party at its Upperhill Branch and with Account Number 55030130000663 and Chiromo Branch and with Account Number 0100006927453 prohibiting any and all withdrawals, outgoing transfers and any and all dealings with the money in the account by the 6th and 7th respondents, their agents, nominees or any person claiming any right of interest under or through them, pending the hearing and determination of the suit.**

The 6th and 7th respondents filed the notice of motion dated 29th June, 2021 seeking the following orders:-

> **1. THAT the court ruling and orders delivered by Justice MBOGHOLI MSAGHA J. on the on the 27th May 2021 as against the 6th and 7th Defendants/Applicants be stayed pending the Hearing and determination of this application.**
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> **2. THAT the High court orders and Ruling made on 27th May 2021 as against the 6th and 7th Defendants/Applicants be reviewed and or varied to the extent that the 6th and 7th Defendants/Applicants Bank Account with the 1st Interested Party at Wilson Airport Branch Account No. 02020213494100 be unfrozen.**
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> **3. THAT the High court orders and Ruling made on 27th May 2021 as against the 6th and 7th Defendants/Applicants be reviewed and or varied to the extent that the orders directing for service of interrogatories be set aside.**
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> **4. THAT the Ruling and orders of 27th May 2021 be reviewed and/or varied to the extent that the Plaintiffs be directed to deposit security for costs of Kshs. 80,000,000/ before proceeding with this case failure to which the case stands dismissed with costs.**
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> **5. THAT cost be to the 6th and 7th Defendants/Applicants.**

The application is supported by the affidavit of Brian Otieno Odhiambo sworn on even date. The plaintiffs filed grounds of opposition dated 28th July, 2021.

The application was heard by way of written submissions. Counsel for the applicants in their submissions dated 12th July, 2021 submitted that there is an error apparent and mistake on the face of the record which led to the ruling of 27th May 2021. As a result, the applicants have suffered a miscarriage of justice. The error is on a substantial point of law to the effect that the applicants produced their bank statement for their clients account and not office account. The court did not notice the same. The effect of the ruling is that the clients' account has been frozen and all their clients are unable to retrieve their funds deposited with the 7th defendant. Counsel relies on the case of **NYAMOGO & NYAMOGO V KOGO (2001) E.A. 170** where it was held:

> **"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."**

It was further submitted that what has been frozen is the client account of the 7th respondent. The applicants will suffer irreparable damage and there will be loss of their clients, likelihood of third party suits and irreparable damage to reputation. Counsel contend that whereas the court in its ruling admitted that the plaintiffs' application and facts were not supported by an affidavit, it went ahead to erroneously rely on and uphold unverified facts which is an error on the face of the record. The court on the one hand acknowledged that there was no affidavit in support of the plaintiff's application but made reference to averments by the plaintiff which presupposes an affidavit. According to the applicants, the freezing of the account was done without full disclosure by the plaintiffs. The plaintiffs at the material time were not the applicants' clients and have never transacted directly with them. The scope and nature of legal service provided to the 1st defendant was only limited to receiving some funds on behalf of the first defendant in an escrow account and disbursing the same as per instructions given by the 1st defendant. The applicants' fee was agreed at 1.5% of the sums received and disbursed. The trial court erred by failing to recognise that document on the escrow account which is on record.

It was further submitted that the applicants did not play any role in any transaction relating to the source of the funds nor were they meant to

make a follow up on the expenditure or usage of the funds once paid out on instructions of the 1st and 2nd defendants. Between 16th June, 2020 to December 2020 written instructions were given by the 1st and 2nd defendants on how the funds were to be disbursed from the escrow account. The 1st and 2nd defendants discharged the 7th defendant from any liability associated with the receipt and disbursements of the funds. It was also stressed that the funds were disbursed and the recipients did execute acknowledgement of receipt of the funds. The 1st and 2nd defendants have acknowledged receipt of the funds. The court made an error when it failed to analyse the identities of the depositors to the applicants' bank account which did not include the plaintiffs yet a bank statement was availed and was not disputed. By the time the freezing orders were issued, the bank account had no money due to the plaintiff. The money in the account is from different and various clients. The applicants are prejudiced yet the plaintiffs have no interest in the funds in the account at all. The plaintiffs' position was that they were dealing with the 1st and 2nd defendant who was on the other hand dealing with the 7th applicant/defendant and instructions were given to the 7th respondent to disburse the funds. It was the 1st defendant who interacted with the plaintiffs.

Counsel contend that there is a mistake on the face of the record as the ruling fails to take into account the fact that the 1st and 2nd defendants were the instructing clients to the applicants and did authorise the release of the funds and the two defendants even confirmed that the plaintiff was informed that the remaining part of the transaction would be between the 1st and 2nd defendants and the plaintiff only. At no time did the plaintiff involve the applicants in his dealing with the 1st and 2nd defendants. The 1st plaintiff in his witness statement states that he has known the 1st defendant since 2006 and has had no reason to mistrust him.

Counsel for the applicants further contend that the freezing order is causing great hardship to them, is onerous and premised on untruth and misinformation given by the plaintiffs whereas the plaintiff alleged that the account was holding 1,560,000 US dollars, the account only has 22,517 US dollars. The total sum of USD 5,549,000 received on the account was fully disbursed on the instructions of the 1st and 2nd defendants. The 7th respondent has rendered an account on the expenditure of all the funds in the escrow account. There is no breach of trust or fiduciary duty on the part of the applicants to the plaintiffs.

On the ground of review on the issue of security for costs, Counsel referred to the case of **AGGREY SHIVONA –V- THE STANDARD GROU PLC** where the court cited the case of **JAYESH HASMUKH SHAH –V- NARIN HAIRA & ANOTHER (2015) eKLR** where it was held:-

> ***"It is now settled Law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstances of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs; the general financial standing or wellness of the plaintiff; the bonafides of the plaintiff's claim, or any other relevant circumstances or conduct of the plaintiff or defendant may be taken into account".***

It was submitted that the plaintiffs are not residents of Kenya and have never visited Kenya as per their pleadings. They ought to have been ordered to deposit security for costs. The plaintiffs are not known to the applicants. The application was made without unreasonable delay.

The respondent raised grounds of objection which can be summarised as follows:-

1. The applicants lodged a notice of appeal dated 27th May, 2021 against the court ruling which notice has not been withdrawn.

2. The review application does not meet the requirements of Section 80 of the Civil Procedure Act, 2010 in relation to discovery of new and important matter or evidence, mistake or error apparent on the face of record or any other sufficient reason.

3. The plaintiff's application was supported by an affidavit that was served on the defendants. Even if the court did not see the affidavit that does not prejudice the applicants.

4. All the issues raised in the application were conclusively addressed by the court.

5. The application for review was filed a month after the ruling was delivered and this is an inordinate delay. The application is an afterthought.

The ruling that is the subject of the application for review was delivered on 27th May, 2021 by Justice Mbogholi Msagha who has since joined the Court of Appeal.

Order 45 Rules 1,2 and 3 states 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.**
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> **(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency**

**of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.**

**To whom applications for review may be made [Order 45, rule 2.]**

**(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.**

**(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.**

**(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.**

**3. When court may grant or reject application [Order 45, rule 3.]**

**(1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.**

**(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:**

**Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation."**

Similarly, Section 80 of the Civil Procedure Act states:-

**"Any person who considers himself aggrieved— (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**

The grounds in support of the application do not indicate that it is based on the discovery of new evidence. The applicant contend that there is an error apparent on the face of the record. It is the applicant's position that what was frozen is a client's account which does not contain the plaintiffs' money as opposed to an office account. The freezing order is causing the applicant's legal practice irreparable damage. The plaintiffs are foreigners who have never set foot in Kenya and ought to be ordered to deposit security for costs.

Applications for review of court judgment for orders have been the subject of litigation in our courts. In the case of **KENYA PORTS AUTHORITY V OBENDELE (2009) KLR 364,** O'Kubasu JA observed as follows at page 367:-

**"We reiterate that this Court has always refused invitations to review, vary or rescind its own decisions except so as to give effect to its intention at the time the decision was made for to depart from this rule would be a most dangerous course in that it would open the doors to all and sundry to challenge the correctness of the decisions of this Court on the basis of arguments thought of long after the judgment or decision was delivered or made. It matters not whether the judgment or ruling has been perfected or not. See Lakhamshi Bros Ltd v Rajah & Sons [1966] EA 313 and Somani's v Shirinkhanu (No 2) [1971] EA 79. The only exception, of course, is where the applicant has been wrongly deprived of the opportunity of presenting his argument on any particular point, which might lead to the proceedings being held to be null and void. A consideration which, as presented itself in the latter authority, but, is absent in the matter now before us."**

Similarly, in the case of **ORIGO & ANOTHER –V- MUNGALA (2005) 2KLR 307,** the Court of Appeal held:-

**"A person who makes an application for review under the Civil Procedure Rules order XLIV rules 1 has to show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time; or that there was some mistake or error apparent on the face of the record or that there was any other sufficient reason. The applicant must make the application for review without unreasonable delay.**

**An erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal."**

Additionally, in the case of **NDIRANGU –V- COMMERCIAL BANK OF AFRICA (2002) 2 KLR, 603,** the Court, (Oguk, J) reiterated that an application for review can only succeed if the applicant proves an error or mistake apparent on the face of record, discovery of new evidence or any sufficient reason.

The parameters for an application for review are therefore well outlined. The court has to apply those parameters on a case by case basis. The overriding objective is to do justice to the parties. In the case of **NDUATI –V- MUKAMI (2002) 2 KLR, 778, Mbito J** while dealing with an application for review held *inter alia*:-

**"Unless there is a specific provision to the contrary in other written laws, nothing in the Civil Procedure Act or Rules shall limit or otherwise affect the inherent power of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.**

**Even though the applicant had preferred an appeal against the lower court's decision, the appeal was not determined on merits and it would still be open to this court to review its original orders if the ends of justice so demanded."**

The dispute herein involves the freezing of the accounts of the 7th defendant.

In the case of **Astian Group Limited and Indian Ocean Petroleum Services Ltd –V- Truk Industrial Holdings Limited, Alfa petroleum Holdings Limited and Oil and Gas Industrial Holdings Limited**, **claim No. BVIHCV 2003/0072,** Justice Hugh A. Rawling of the High Court of British Virgin Islands stated as follows on the issue of freezing orders:-

> **"It is trite principle that the "Mareva" injunction or "freezing order" is usually made in cases such as this, where there is a pecuniary claim for a debt or damages against a defendant. It is usually made where the defendant has no assets within the jurisdiction, or, if it has assets within the jurisdiction, there is a real risk that those assets will be dissipated or be removed from the jurisdiction. The claimant must have a good and arguable claim.**
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> **The purpose of a freezing order is to ensure that a fund will be available within the jurisdiction to meet any judgment obtained against a defendant. In nature, it is an interim interlocutory remedy that is designed to prevent a judgment against a defendant for a sum of money from being a mere brutum fulmen. [See per Lord Diplock in *Siskina (owners of cargo lately laden on board) v Distos Compania Naviera SA* [1977] 3 ALL E R 803, at page 822; accepted with approval in Coney Island Carribean Amusement inc. v Good Times Shows Inc. and Others (1984) 37 WIR 79)"**

Apart from the requirement that there should be an error or mistake apparent on the face of record or the discovery of new evidence, there is the third limb which requires that the applicant has to provide any sufficient reason. The sufficient reasons have to be analogous to the other conditions. There is no discovery of new evidence by the applicant. It is true that the ruling makes reference to averments without reference to the supporting affidavit. The respondents have countered this issue with the contention that indeed a supporting affidavit was served upon the applicant. Paragraph one of the ruling refers to affidavit of the 1st plaintiff while paragraph 12 indicate that there was no supporting affidavit.

The applicant's other contention is that what was frozen was the applicants' clients account and not office account. In my view, this position falls under any other sufficient reason. It was submitted that what is in the account belongs to other clients and not the plaintiff. In my view the court can consider that contention and if its merited review its ruling. I am in agreement with the holdings by Mbito J that the inherent powers of the court can be exercised where necessary so as to meet the ends of justice. The ruling of Justice Mbogholi at paragraph 16 dealt with the issue raised by the applicants that the funds in the account belong to third parties.

There is no dispute that the plaintiffs have never dealt with the applicants. It has also been established that indeed some money was sent to the account by the plaintiffs. The money was not for the benefit of the applicants but that of the 1st and 2nd defendants. The plaint dated 26th February, 2021 states that between 6th of March, 2020 and 3rd November, 2020 the 1st Plaintiff transferred a total of USD 5,549,000 to the 7th defendant's account at National Bank of Kenya. The plaintiffs paid the money upon instructions by the 1st defendant. The plaintiffs at paragraph 35 of the plaint aver that the funds were fraudulently transferred or misappropriated by the 1st, 6th and 7th defendants. It is therefore evident that the funds were taken out of the account and the plaintiffs are aware of that fact. The applicants have annexed documents showing how the funds were paid out of the account between 16th June 2020 to 3rd November, 2020 upon instructions by the 1st and 2nd defendants. The 1st defendant, signed documents on 14/12/2020 indicating that he had instructed the applicants to release the funds to Elijah Murenzi who is not one of the defendants. I am of the considered view that since the funds were transferred out of the account and since what remains in the account belongs to third parties, the freezing orders have the effect of collapsing the applicants' business leading to claims by their clients. The applicants' account cannot be frozen while the accounts of those who benefited from the money have not. In the interest of justice, the owners of the funds in the frozen account are entitled to enjoy the right to their property as enshrined under Article 40 of the Constitution.

Section 80 of the Civil Procedure Act allows the court to review a judgment or order. Section 80 allows the court to make such orders as it thinks fit. Such orders are intended to enhance justice to the parties in the event that the earlier orders are causing injustice. The money was transferred into the account between March 2020 to November 2020. The plaintiffs are aware that the money was paid out. The purpose of freezing order is to safeguard the defendant's property so that any judgment obtained against such a defendant can be released from the frozen funds or assets. A freezing order should not be used to freeze the assets meant for third parties. The funds could be in the 6th and 7th defendant's account but the same does not belong to them.

On the issue of time taken to file the application for review, I do find that the application was filed without any inordinate delay. The ruling which is the subject of review was made on 27th May 2021 while the application on 29th of June 2021, a period of about one month.

The applicants are also seeking review on the orders relating to interrogatories and deposit of security for cost of Kshs.80 million by the plaintiffs. Since the applicants' position is that they only acted for the 1st and 2nd defendants and the funds were paid out, I see no harm in the order for interrogatories. They should be able to provide whatever documents are relevant to the case. With regard to the issue of deposit of security for costs, the basis for this claim is that the plaintiffs are foreigners who have never set foot in Kenya. I do appreciate the fact that should the plaintiffs' claim be dismissed with costs the defendants may not be able to recover their costs. However, in my view, it would be quite a draconian order to call upon the plaintiffs who are claiming to have been swindled over six million US dollars to make a further deposit in court of Kshs. 80,000,000 as security for costs. In the interest of justice, I do find that the prayers for review of the two orders on interrogatories and security for costs cannot be granted.

The upshot is that the application dated 29th June, 2021 partly succeeds. The application is granted in terms of prayer two (2) only whereby the applicants' account is unfrozen. The rest of the prayers are declined. Costs shall follow the outcome of the main suit.

**DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2021.**

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**S. CHITEMBWE**

**JUDGE**