



REPUBLIC OF KENYA



**Toncap Investment v LN Property Development Company Limited (Environment and Land Appeal E014 of 2023) [2025] KEELC 4265 (KLR) (5 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4265 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT AND LAND APPEAL E014 OF 2023  
FO NYAGAKA, J  
JUNE 5, 2025**

**BETWEEN**

**TONCAP INVESTMENT ..... APPLICANT**

**AND**

**LN PROPERTY DEVELOPMENT COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. By way of Notice of Motion dated 15/08/2024 the Applicant seeks the following orders: -
  1. The Court be pleased to review its orders striking out the present Appeal.
  2. The Court be pleased to grant the Applicant more time to have the Records of Appeal prepared and filed.
  3. The Court thus be pleased to allow this Appeal to be disposed of on merit.
2. The Application is premised on the grounds on the face of it and the contents of the affidavit of Samuel O. Nyauke sworn in support of the Application.
3. The gist of the Application is that the Appeal was struck out on grounds of non-compliance with the order for filing Record of Appeal and the Applicant seeks to have the same reinstated for hearing.
4. In his affidavit, the Deponent averred that he was not aware of the date of 03/07/2024 when the matter came up before the Court. Additionally, that the court was oblivious of the circumstances that have faced the Applicant in the Tribunal file when it issued the orders striking out the Appeal. He urged that the delay in filling the Record of Appeal was occasioned by the fact that the Tribunal file has been missing, which situation has seen the Appellant seek reprieve from the Ombudsman Office.
5. He deponed further that the Tribunal is in the process of reconstituting their file and as soon as such is done, the Record of Appeal would be availed. He stated that he shall take every necessary step in the



circumstances, including filing Judicial Review Application against the Tribunal to have the records availed so as to have this instant matter disposed of on merit.

6. The Respondent opposed the Application through the Replying Affidavit of one Philip Okundi on 5<sup>th</sup> December 2024. He laid out the sequence of events, deposing that the Applicant lodged an appeal in this Court on 24/10/2023 and subsequently filed an Amended Memorandum of Appeal and, that the appeal was admitted by this Court on 08/02/2024. He stated that the Applicant was directed to file and serve the Record of Appeal within 30 days and the matter was fixed for mention for directions on the Appeal, on 11/03/2024. He pointed out that the Applicant neither served the record of appeal nor the mention date and further, that his advocates came to learn of the date and directions given from the judiciary e-filing portal as they were checking the status of the appeal. He stated that when the matter came up for mention in Court on 20/05/2024, there was no representation on the part of the Applicant and the Court ordered service of the mention notice upon the Applicant's advocates through courier services. The same was served on 22/05/2024 and an affidavit of service was filed to that effect. As such, the deponent cannot feign that he was not aware of the date of 03/07/2024.
7. The Deponent argued that no evidence had been adduced that the Business Premises Rent Tribunal (BPRT) file was missing to prove that there was any communication on the same from the Tribunal. Further, that the Applicant filed the appeal out of time and never moved the Court appropriately to file the said appeal out of time pursuant to section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) and Section 6A of the [Environment and Land Court Act](#) Chapter 8D Laws of Kenya and therefore, the said appeal was a non-starter.
8. The deponent stated that after Orders, of 02/12/2019 were issued the Applicant filed an Application to set aside the said taxation of the Orders of 02/12/2019 which was dismissed on 02/08/2021. He annexed as "EP03" a copy of the said order. Further, he stated that the appeal was a delay by the Applicant designed to avoid paying the Respondent the taxed sums of Kshs. 210,235 as the intended appeal which the Applicant seeks to be reinstated was filed after the Applicant was served with the Respondent's Application filed in Homa-bay MCC Miscellaneous Application No. 920 of 2023 seeking to adopt the Orders issued by the Business Premises Rent Tribunal on 02/12/2019 as a decree of this Court and to have said Orders enforced.
9. He urged that the Application was an abuse of the Court process and intended to obstruct and delay the course of justice and therefore, it should be dismissed with costs. Further, that in the event the Court allows the Application, the reinstatement of the appeal be allowed on condition that the Applicant pays costs of Kshs. 60,000.

### **The submissions**

10. The parties submitted on the Application. In its submissions dated 17/02/2025, the Applicant began by stating the provisions for review of Court orders and further, that a review of the Court orders, judgement and or decision is allowed under the provisions of section 80 [Civil Procedure Act](#) and Order 45 Rule. He listed the provisions and additionally cited the decision of the Court in *Pancrast Swan v Kenya Breweries Ltd (2014) eKLR*.
11. The Applicant reiterated the contents of the supporting affidavit and cited the cases of *Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR* and *Mwangi S. Kimenyi vs Attorney General & Another [2014] eKLR*, where the Court outlined the test to be considered in a case for reinstatement of suit.
12. Counsel urged that the Applicant stands to suffer great prejudice if the orders sought are not granted and urged that the Respondent intends to levy execution of the tribunal decision. Further, that the Application has met the threshold for Review.



13. On their part, the Respondents began by reproducing the contents of the Application and the Replying affidavit filed in opposition to the Application. The submissions contained similar content as the replying affidavit. Counsel for the Respondent submitted that Review is provided for in section 80 of the *Civil Procedure Act* and order 45 of the Civil Procedure Rules 2010 which provisions he reproduced. He relied on the guiding principles on the issue of Review as set out by the Court in the case of Paul Mwaniki v National Hospital Insurance Fund Board of Management [2020] eKLR and submitted that the Applicant's Application has not met the principles to warrant the Court to review its Orders.
14. The Respondent submitted that the Applicant has not annexed a copy of the Orders issued by the Court on 03/07/2024 striking out the appeal and has not pointed out any error apparent on the face of the record to warrant the same to be reviewed. Further, that the instant Application is incompetent, and fatally defective for failure to attach the Court Orders the Applicant seeks to be reviewed. He placed reliance on the case of Wilson Saina vs Joshua Cherutich T/a Cherutich Company Ltd (2003) eKLR and additionally cited the case of Suleiman Murunga v Nilestar Holdings Limited and another (2015) eKLR.
15. The Respondent argued that the Applicant did not adhere to Order 45 of the Civil Procedure Rules and therefore the Application should be dismissed. He placed reliance on the cases of Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others [2004] KEHC 2163 (KLR) and Evan Bwire vs Andrew Aginda Civil Appeal No. 147 of 2006. Additionally, counsel cited the Court of Appeal case of National Bank of Kenya vs Ndungu Njau (1997) eKLR.
16. Counsel submitted that the orders striking out the appeal were made on 03/07/2024 and the instant Application dated 15/08/2024 was filed in Court on 24/09/2024 urging that no reason has been given by the Applicant why it took more than 2 months to file the Application. He placed reliance on the holding of Justice Mativo in the Stephen Githua Kimani Case (Supra) pointing out that the Applicant has only given reasons for the delay in filing of the record of appeal and not of the Application. Counsel cited the cases of Karanja (Suing as the Representative of the Estate of David Karanja Ng'ang'a) V Kiboinet t/a Sweetland Consultant Limited & 2 others (Environment & Land Case 45B of 2021) [2024] KEELC 3654 (KLR) (30 April 2024) (Ruling); Cherop v Bowen (Civil Case E009 of 2022) [2024] KEHC 10425 (KLR) (21 August 2024) (Ruling) and the case of the Supreme Court of India in the case of Aribam Tuleshwar Sharma v Ariban Fishak Sharma (1979) 45CC 3:89, 1979(11) UJ 300 SC in this regard.
17. The Respondent reiterated the contents of the replying affidavit, pointing out that the Applicant has deliberately failed to explain his non-appearance in Court subsequent to being ordered to file the record of appeal and, that he only surfaced when the dismissal orders were made in a bid to frustrate the Respondents' just entitlement for costs. Additionally, to frustrate the Respondent's case to wit; Homa-bay MCC Misc. No. E020 of 2023 pending before the subordinate Court for adoption of the tribunal orders and subsequent execution for already assessed costs but for this Appeal.
18. Counsel reiterated that the Application for Review does not meet the threshold of warranting the Court to review its Orders of 03/07/2024. Further, that the Appeal which the Applicant seeks to reinstate is void ab initio having been filed out of time and without the leave of the Court.

### **Analysis & Determination**

1. Whether the Applicant has met the threshold to warrant review of the orders issued on 03/07/2024



2. Whether the Court should reinstate the suit and allow the Applicant more time to prepare the record of appeal

**Whether the Applicant has met the threshold to warrant review of the orders issued on 03/07/2024**

19. The applicable provisions that govern the review of Court decisions are encapsulated by Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 states that;

“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.”

20. Further, Order 45 Rule 1 (1) of the Civil Procedure Rules provides as follows: -

“(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 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.”

21. In order for an Applicant to succeed in an Application for Review, he/she must convince the Court that; there is discovery of new and important matter, mistake or sufficient cause. Additionally, the Application must be made without unreasonable delay.
22. From the pleadings, the Applicant relies on sufficient cause as the Appeal was struck out for non-compliance, which non-compliance the Applicant attributes to the Tribunal’s failure to avail the file and enable the preparation of the record of appeal.
23. When exercising judicial discretion, this court must at all times, give effect to the overriding objective of the [Civil Procedure Act](#) as set out in Sections 1A and 1B thereof. The Respondent pointed out that the Applicant was aware of the mention date on which the Appeal was dismissed whereas the Applicant contends it had no knowledge of the same. The Respondent has produced evidence that the Applicant was served with the mention notice in line with the provisions of Order 5 Rule 22B of the [Civil Procedure Act](#) as well.
24. The conduct of the Applicant throughout the pendency of the appeal raises concern as to whether he was desirous of prosecuting the appeal. The Court is of this view because when the matter came up on 20/05/2024, there was no appearance on the part of the Appellant. Despite being served with a mention notice for the mention on 03/07/2024, the Appellant did not appear for the same. The



matter was dismissed on 03/07/2024. Then the Applicant filed the Application dated 15/08/2024 on 24/09/2024, a period of more than a month from when the application indicates on the face of it as having been drawn, and two months from when the struck was made, which delay has not been explained. Moreover, he does not indicate when and how, if at all he was not aware of the date when the struck out was made, he came to know of the adverse orders sought to be reviewed.

25. The Court of Appeal, in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR stated as follows: -

“22]. The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the Courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the Court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

26. The Applicant annexed correspondences between its advocates and the Judiciary Service Desk Team dated 18/04/2024, another letter to the Judicial Service Commission dated 28/02/2024 and to letters to the Administrator of the Business Premises Rent Tribunal dated 26/02/2024 and 17/10/2023. Additionally, the Application is premised on the grounds that the Tribunal is in the process of reconstituting the file but there is no proof of any communication from the tribunal on the same. Bu there is no communication from the Tribunal about reconstitution of the file. This deposition is a mere figment of imagination by the Applicant. One would expect that there would be official communication on the same. In the absence of any proof that the file is missing or being reconstituted, this court has no option but to find that there is no sufficient cause to review the orders of this Court.
27. In any event, while the Court is in doubt that the annextures referred to comply with Rule 9 of the Oaths and Statutory Declaration Rules, regarding the requirement that “All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification” as made pursuant to Section 6 of the *Oaths and Statutory Declarations Act*, Chapter 15 Laws of Kenya, the content on the said documents is totally at variance with the pleadings herein. By the pleadings this Court refer to the Memorandum of Appeal which instituted the appeal struck out. The Memorandum of Appeal refers dated 16<sup>th</sup> October 2023 and filed on 18<sup>th</sup> October, 2023 at 17:56 hours show that the appeal was preferred against Nairobi Business Premises Tribunal Case No. 26 of 2016 (Kisii), vide a Ruling made on 2<sup>nd</sup> December, 2019, and is against a Respondent/ party known as L. N Property Development Co. Ltd. All the annextures marked as Toncap 1, 2, 3, 4 and 5 in the Affidavit sworn on 15<sup>th</sup> August, 2024, all of which are neither commissioned nor bear the seal of the commissioner for oaths refer to Kisii (Migori) Business Premises and Rent Tribunal Court BPRT No. 51 of 2014) which was between the Appellant herein versus Luore Management. The depositions therefore are mere inadmissible hearsay.
28. Even assuming for the sake of argument that the ‘annextures’ referred to comply with the law, as much as one may be led to think that the institution of the Reference in the Tribunal in one station, for instance in Kisii, and a subsequent transfer of the same to another such as Migori could give rise to different registration numbers, the parties cannot change. In the instant matter the L. N Property Development Co. Ltd is not the same as Luore Management. The two parties are wholly different from each other. Therefore, the complaint referred to in the application relates to a totally different file than the one the appellant wishes to rely on to convince the court that it was lost and under reconstruction.



29. The upshot of the foregoing is that the Application is not merited as the Applicant has not established sufficient cause to warrant the review of the orders striking out the appeal.
30. The Application is hereby dismissed with costs to the Respondent.
31. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 5<sup>TH</sup> DAY OF JUNE, 2025**

**HON DR. IUR NYAGAKA**

**JUDGE**

In the presence of;

Miss. Ochieng holding brief for respondent- Present

Ndungu holding brief for Nabiru for respondent -Present

Court Assistant- Mutiva.

