



**Hayer & another v Kenya Railways Corporation (Environment & Land
Petition 18 of 2019) [2023] KEELC 15820 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15820 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND PETITION 18 OF 2019
SO OKONG'O, J
MARCH 1, 2023**

BETWEEN

SARNAGER SINGH HAYER 1ST PETITIONER

HAYER BISHAN SINGH & SONS LTD 2ND PETITIONER

AND

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. The full facts of this suit are set out in the judgment of Ombwayo J. delivered herein on March 11, 2022. In the said judgment, the court dismissed the petitioners' petition and allowed the respondent's cross-petition. The court declared the respondent to be the owner of all that parcel of land known as Kisumu/Municipality Block 6/95(hereinafter referred to as "the suit property"). The court also declared the subdivision of the suit property that gave rise to the parcels of land known as Kisumu/Municipality Block 6/392 and Kisumu/Municipality Block 6/393(hereinafter referred to as "the subdivisions") illegal, irregular, fraudulent, null and void. The court ordered the cancellation of the titles for the said subdivisions and restrained the petitioners from interfering in any way with the respondent's possession and use of the suit property. The petitioners were also condemned to pay the costs of the cross-petition.
2. The petitioners were dissatisfied with the said judgment and filed a notice of intention to appeal against the same to the Court of Appeal on March 18, 2022. On the same date, the petitioners filed an application seeking a stay of execution of the said judgment of March 11, 2022 pending the hearing and determination of the petitioners' appeal to the Court of Appeal against the said judgment. In their application, the petitioners averred among others that they were willing to abide by any condition that the court could impose for granting the stay order that they had sought. The application was opposed by the respondent through an affidavit sworn by Stanley Gitari on March 23, 2022. In the said affidavit, the respondent urged the court to order the petitioners to deposit a sum of Kshs. 570,000,000/- in a



joint interest-earning account as security for the performance of the decree in the event that the court was inclined to grant a stay order. In their submissions in support of the application, the petitioners reiterated that they were willing to abide by any reasonable terms that the court could impose as a condition for granting the stay order.

3. In its submissions in opposition to the said application, the respondent reiterated that the court should order the petitioners to deposit a sum of Kshs. 570,000,000/- in a joint interest-earning account as security in the event that the court was inclined to grant the stay order sought by the petitioners.
4. In a ruling delivered on November 10, 2022, the court allowed the petitioners' application for stay on condition that the petitioners deposited in court a sum of Kshs. 10,000,000/- as security within 30 days from the date of the order failure to which the stay was to lapse automatically. In the ruling, the court stated as follows in part:

“On the issue of security, the petitioners have stated that they are willing to abide by the conditions granted by this court for the performance of the orders ought. The respondent on the other hand has stated that the petitioners should be ordered to deposit the total value of the suit properties being Kshs. 570 million in an interest earning account as security for the performance of the decree.”

5. What is now before me is the petitioners' application brought by way of Notice of Motion dated December 1, 2022 seeking the following orders;
 1. That the court be pleased to review and vary the order made on November 10, 2022 that required the petitioners to deposit Kshs. 10,000,000/- in court within 30 days.
 2. That the court does consider and order that security be provided by way of a guarantee preferably title deeds or undertaking from directors.
 3. That the court does extend the time within which the petitioners are to comply with the condition.
6. The petitioners' application was brought on the grounds set out on the face thereof and on the supporting affidavit of the 2nd petitioner's director, Charanjit Singh Hayer. The petitioners contended that the 2nd petitioner had had most of its funds held up in government projects which had affected its liquidity while the 1st petitioner was 80 years old and was unable to secure the deposit of Kshs. 10,000,000/- ordered by the court. The petitioners averred further that the cancellation of the petitioners' titles by the court affected the overdraft arrangements that the 2nd petitioner had with its bankers which was secured by the said titles. In their affidavit in support of the application, the petitioners averred among others that it was punitive to require the petitioners whose titles had been cancelled to deposit Kshs. 10,000,000/- in court as security. The petitioners urged the court to consider granting a stay without security as a condition.
7. The application was opposed by the respondent through a replying affidavit sworn by Stanley Gitari on February 10, 2023. The respondent contended that the court was functus officio. The respondent contended that the stay application had been dealt with and the conditional stay that was granted to the petitioners by the court had lapsed. The respondent averred without prejudice to its functus officio argument that the petitioners' application was based on averments that were not substantiated. The respondent averred further that the conditions for granting an order for review had not been met by the petitioners.
8. The petitioners' application was heard on February 28, 2023. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the



respondent in opposition to the application. The petitioner's application was brought principally under Order 45 Rule 1 of the [Civil Procedure Rules](#) which deals with the review of decrees and orders. The only issue arising for determination in the application before me is whether a sufficient basis has been laid to justify a review of the court order made herein on November 10, 2022. The court's power to review its orders and decrees is provided for in section 80 of the [Civil Procedure Act](#) as follows;

" 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."

Order 45 of the [Civil Procedure Rules](#) under which the petitioners' application has been brought lists specific grounds upon which an application for review can be made as follows;

7.

- a. "Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.
- b. Where there is a mistake or error apparent on the face of the record.
- c. For any other sufficient reason."

8. The Court of Appeal set out the requirements to be satisfied by an applicant seeking review in [Francis Origo & another v. Jacob Kumali Mungala](#), Eldoret CA No. 149 of 2001[2005]eKLR as follows:

"...it is clear that an applicant 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 he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay."

9. Similarly, in [Kenya Power & Lighting Company Limited v. Benzene Holdings Limited t/a Wyco Paints](#) [2016]eKLR, the requirements were set out as follows:

"To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay."

10. The scope of the court's jurisdiction to review its own orders was captured in [John Kamau Rubangi v. Kenya Reinsurance Corporation](#), Civil Appeal No. 208 of 2006[2012]eKLR__ as follows:

"It is important to bear in mind that Order 44 Rule 1 of the [Civil Procedure Rules](#) sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence



is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground of review. All these are grounds of appeal.

11. The petitioners did not come out clearly in the application as to the basis or ground upon which their application was brought. I will take it that the application was brought on the basis of “any other sufficient reason”. Sufficient cause was defined in *Attorney General v. Law Society of Kenya & another* [2017]eKLR as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black’s Law Dictionary*, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

12. I am not satisfied that the petitioners have shown sufficient cause to warrant a review of the order made herein on November 10, 2022. When the petitioners made the application for a stay, they were aware that a stay could not be granted unless they furnished security. The petitioners were also aware of their financial position as at the date of making the said application. The petitioners did not make any proposal in their application for stay as to the kind of security they wished to provide. Their position was that they would comply with any reasonable condition that the court could impose. During the hearing of the stay application, the issue of security was live and both parties addressed the court on the same. Even at that stage, the petitioners maintained that they would abide by any order on security that the court could make. In its ruling, the court applied its mind to the arguments that were made by both parties on the issue and ordered the petitioners to deposit in court as a condition for the stay a sum of Kshs. 10,000,000/- as security.
13. The petitioners are now before the court seeking a review of the order on security and proposing an alternative security of “guarantee preferably title deed or undertaking from the directors”. I am of the view that these proposals should have been put before the court considering the application for a stay. The petitioners have not explained why they did not propose the alternative security during the hearing of the stay application. From their affidavit in support of the application, the petitioners appear not to favour the idea of furnishing security as a condition for stay. They want an unconditional stay. They have referred to the conditional stay as punitive and have urged the court to consider granting a stay “without security”. I am of the view that if the petitioners felt that the court’s order on security was punitive, that was a ground for appeal rather than a review. I wish to add that I am in agreement with the respondent that no evidence was placed before the court by the petitioners in support of the grounds on which the review has been sought. There is no evidence of the funds alleged to be held up in government projects or the cancellation or withdrawal of the overdrafts the 2nd petitioner is alleged to have enjoyed prior to the judgment made herein. There is also no evidence of the age of the 1st respondent who is alleged to be over 80 years and as such cannot raise the deposit ordered by the court. The petitioners have also not come out clearly on type of the security that they wish to furnish. There are no particulars of the persons whose guarantees the petitioners would wish to provide as security. The details and the value of the parcels of land whose title deeds the petitioners wish to use as security have also not been provided. Lastly, the names of the directors of the 2nd petitioner whose undertakings the petitioners have proposed to provide as security and their net worth have not been given to the court.



14. In the final analysis and for the foregoing reasons, I find no merit in the petitioners' Notice of Motion application dated December 1, 2022. The application is dismissed with costs to the respondent.

DELIVERED AND DATED AT KISUMU ON THIS 1ST DAY OF MARCH 2023

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Petitioners

Ms. Moraa for the Respondent

Ms. J. Omondi-Court Assistant

