



**Ashwin Brothers CPA (K) v Development Bank of Kenya Limited (Civil Appeal E444 of 2023) [2025] KEHC 109 (KLR) (Civ) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 109 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL E444 OF 2023  
CW MEOLI, J  
JANUARY 16, 2025**

**BETWEEN**

**ASHWIN BROTHERS CPA (K) ..... APPELLANT**

**AND**

**DEVELOPMENT BANK OF KENYA LIMITED ..... RESPONDENT**

**RULING**

1. Ashwin Brothers CPA (K) (hereafter the Applicant) brought the Notice of Motion dated 8.10.2024 (the Motion) which is supported by the grounds on its face and the affidavit sworn by the Applicant's advocate David Muthee Michuki, and seeking an order to review the judgment delivered on 21.05.2024 in HCCA No. E443 of 2023 in respect of liability, to the effect that the finding on liability do apply to the present appeal.
2. In his supporting affidavit, the advocate stated that the present appeal emanates from Nairobi CMCC No. 5779 of 2018 (the suit) filed by the Applicant before the lower court alongside a separate suit (Nairobi CMCC No. 5780 of 2018-*Alexander Consultants Limited v Development Bank of Kenya Limited*) (the second suit) latter suit equally further progressing to appeal stage vide Civil Appeal No. E443 of 2023-*Alexander Consultants Limited v Development Bank of Kenya Limited* (the first appeal). The advocate proceeded to state that the respective suits were instituted against the same Defendant, Development Bank of Kenya Limited (hereafter the Respondent) and arising out of the same subject matter. That it was agreed between the parties and conveyed to the lower court that the second suit would serve as the test suit and hence the decision rendered on liability therein would apply to the suit. That, consequently, the two (2) suits proceeded concurrently resulting in the dismissal of the Plaintiff's suit in the second suit, pursuant to the judgment delivered on 25.05.2022, the lower court directing that the finding applied to both suits.



3. Further, that being aggrieved by the dismissal order, the Applicant herein, being the Plaintiff in the suit, filed the present appeal, whereas the Plaintiff in the second suit equally lodged the first appeal, against the dismissal order made therein.
4. It is also stated by the advocate that the respective appeals were against with respect to liability, with the first appeal being rendered the test appeal and hence the decision arrived at therein would automatically apply to the present appeal. It is also the averment by the advocate that the first appeal was heard and determined first, vide the judgment delivered on 21.05.2024 by Musyoka, J. whereby the appeal was allowed, and the dismissal order was consequently set aside. That however, there is an error apparent on the face of the aforesaid judgment, namely that the learned Judge did not indicate that the finding would apply to the present appeal; thereby necessitating a review of the said judgment, accordingly.
5. The Respondent opposed the Motion by filing the Grounds of Opposition dated 16.10.2024 featuring the following grounds:
  1. There is no decision or Order made in this appeal that is capable of review within the meaning of Section 80 of the Civil Procedure Act or Order 45 Rule 1 of the Civil Procedure Rules, and this Application is therefore misplaced, misconceived, and a non-starter.
  2. The decision in H.C. Civil Appeal No. E443 of 2022 cannot be reviewed in the present proceedings.
  3. The Judgment sought to be reviewed was not rendered in this matter, and the Court lacks jurisdiction.
  4. This Civil Appeal has yet to be heard or determined, and the Appellant remains obligated to prosecute it.
  5. In a bid to escape his responsibility, the appellant has brought this application seeking a quick and unmerited judgment against the Respondent.
  6. The Judgment sought to be reviewed does not even remotely suggest or contemplate the orders sought herein.
  7. The parties in HCCC Appeal No. E443 of 2022 are distinctly different from those in HCCC No. E444 of 2022. The cases arise from distinct causes of action and seek distinct amounts of reliefs, making the present application incurably defective.
  8. No loss or prejudice is likely to be suffered by the Appellant if it were to prosecute this Appeal to its proper conclusion, thereby ensuring fairness and equity in the legal process.
  9. The application does not show proper grounds for review, so it is not merited and ought to be dismissed with costs. (sic)
6. At the hearing of the Motion, by concurrence of the parties' respective counsel, it was agreed that the motion be determined on the basis of the affidavit material on record and the Grounds of Opposition.
7. The court has therefore considered the affidavit material supporting the Motion and the Grounds of Opposition. The key prayer in the Motion seeks review of the judgment delivered on 25.05.2024 in the first appeal, so that the said judgment applies to the present appeal.
8. The principles governing the court's power of review are encapsulated in Order 45 of the CPR and reaffirmed under Section 80 of the CPA in the manner below:

“ 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.”

9. Ideally, the review of an order or judgment ought to be sought before the court which passed the order or delivered the subject judgment, in this case Musyoka J who is based elsewhere, and was only visiting the Civil Division during the service week. Hence the Motion was properly placed before a Judge in the Civil Division for hearing.
10. That said, the review is being sought in relation to a matter separate and distinct from the appeal presently before this court. This present appeal is yet to be heard and the court therefore concurs with the sentiments raised by the Respondent in its Grounds of Opposition, that, there is no decision in the present appeal capable of being reviewed, as envisaged by Section 80 (supra) and Order 45, rule 1 (supra). It is safe to say that the Applicant has filed the application for review in the wrong matter. Ordinarily, an application for review of a decision or order ought not to be made in a matter other than the one in which the subject decision was rendered.
11. Additionally, although the two lower court suits giving rise to both the subject appeals were by consent determined via the decision rendered in the test suit, before this court there is no indication that the appeals were ever consolidated before the hearing of the first appeal, as would have been the proper thing to do in the circumstances. Or that the first appeal was appointed the leading file whose judgment when eventually rendered, would apply in the present appeal. Besides, despite the appointment one of them as the test suit, the suits giving rise to the appeals in question involved different plaintiffs (notwithstanding the fact that they share the same directors) and related to distinct causes of action arising out of different transactions undertaken on separate dates and were seeking distinct reliefs, despite the Respondent being sued as the common defendant.
12. Consequently, the court finds that the review Motion is improperly brought in so far as the present appeal is concerned and is a non-starter. The Notice of Motion dated 8.10.2024 is therefore struck out with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 16<sup>TH</sup> DAY OF JANUARY 2025.**

**C. MEOLI**

**JUDGE**

In the presence of

For the Applicant:

For the Respondent:

C/A: Erick

