



**New Mega Africa Limited v ABSA Bank Kenya PLC (Civil Suit
E068 of 2022) [2025] KEHC 286 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 286 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E068 OF 2022
JK NG'ARNG'AR, J
JANUARY 22, 2025**

BETWEEN

NEW MEGA AFRICA LIMITED PLAINTIFF

AND

ABSA BANK KENYA PLC DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion application dated 18th July 2024 under Certificate of Urgency pursuant to Article 50 (1) of the Constitution, Section 1A, 1B, 3A and 80 of the Civil procedure Act, Order 45 Rule 1, Order 51 Rule 1 of the civil Procedure Rules and all other enabling provisions of the law.
2. The Plaintiff/Applicant seeks for orders that this court be pleased to review its ruling issued on 26th February 2024 and in particular set aside the order directing that the matter must be heard and concluded by 25th February 2025 as well as the ruling issued on 9th May 2024 declining to admit a witness on account of pleadings having closed and instead allow Evans Wekesa Murumba to file a witness statement as a Plaintiff witness, and cost of this application be in the cause.
3. The application is premised on grounds on its face and the Supporting Affidavit of Omusala Abai David sworn on 18th July 2024 that both parties complied and the matter was set down for hearing and that the hearing took off on 4th October 2023 wherein the Plaintiff's director testified in chief, partly cross examined but due to time constraints, he was stood down for further cross examination and reexamination. That the matter was fixed for further hearing on 17th January 2024 but there was an application by a third party seeking to be enjoined in the suit which scuttled the hearing date of 17th January 2024 since the application had to be heard first. That the application was heard and ruling delivered on 26th February 2024 declining the application. That the court in the same ruling ordered that the case must be heard and determined by 25th February 2025 failing which the suit shall stand dismissed. That based on the averments made by the Third Party in his application for joinder,



- the Plaintiff made an application seeking to have the Third Party admitted as a witness. That the application was heard and through a ruling delivered on 9th May 2024, the court declined the same on account that pleadings had closed.
4. It was further deposed that the Plaintiff sought leave to appeal and the same was granted on 15th May 2024 thereby allowing the Plaintiff to lodge its appeal dated 16th May 2024 on 21st May 2024 and subsequently filed an application for stay of proceedings pending appeal. That having taken instructions, the two orders of 26th February 2024 and 9th May 2024 are amenable to review by this court. That there are sufficient reasons for the court to review the two orders since the order capping the conclusion date on 25th February 2025 is putting the Plaintiff at a disadvantage since the said date can be reached without conclusion of the matter through no mistake of its own making. That transfer of the judge and the application by the intended third party have inadvertently delayed hearing and determination of the case.
 5. Further, that as for the order refusing to admit a witness, though pleadings have closed, it is only one witness who had partly testified. That equally, the court reserves discretion to reopen pleadings even at the stage of judgment and the Defendant will have ample time to cross examine the said witness. That the Plaintiff have withdrawn the Notice of Appeal and application for stay of proceedings pending appeal. That this application has been filed without unreasonable delay.
 6. The Defendant filed a Replying Affidavit sworn on 22nd July 2024 by Michael Massawa, the Legal Counsel for the Defendant, that the Plaintiff elected not to file the application for review before the judge who heard the applications and that this amounts to forum shopping which is an abuse of the court process. That the Plaintiff has not established sufficient cause to warrant a review of the court's decision nor discovery of new material not within its knowledge despite exercising due diligence. That the facts of the case at the time of filing the application for leave to file the witness statement which was dismissed are not different from the facts in the present application.
 7. The Defendant further averred that the Plaintiff is inviting this court to sit as an appellate court over its decision and that this court does not have jurisdiction to hear and set aside decisions rendered by another judge of concurrent jurisdiction. That this court does not also have jurisdiction to interrogate the application for review having become functus officio after rendering its decision on the issue for leave to file additional witness statement. That the court dismissed the application dated 5th March 2024 on account of delay in filing the application and that the court observed that the witness was not introducing any new evidence and was therefore not a necessary witness in the matter.
 8. The Plaintiff/Applicant filed a Supplementary Affidavit sworn on 23rd July 2024 by Omusala David Abai that the deponent of the Replying Affidavit is reading provisions of Order 45 (2) selectively since Order 45 Rule 2(2) explicitly provides that 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. That the judge who made the order was immediately transferred upon granting leave on 15th May 2024 and it is therefore not correct for the Respondent to allege that the Applicant is forum shopping. That the Applicant has clearly set out its basis for seeking review. That review powers of this court are donated by statute and the court has an unfettered discretion to review its orders.
 9. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed their submissions dated 24th September 2024 while the Defendant/Respondent filed their submissions dated 11th October 2024.



10. I have considered the Notice of Motion application dated 18th July 2024, the Replying Affidavit sworn on 22nd July 2024, the Supplementary Affidavit sworn on 23rd July 2024, and submissions by the parties. The issue for determination is whether the application is merited for grant of the orders sought.
11. The Plaintiff's application is for review of two orders. First, a review of the ruling issued on 26th February 2024 to set aside the order directing that the matter must be heard and concluded by 25th February 2025. Second, a review of the ruling issued on 9th May 2024 declining to admit a witness on account of pleadings having closed, and instead allow Evans Wekesa Murumba to file a witness statement as a Plaintiff witness.
12. The power of review is set out in Section 80 of the Civil Procedure Act while Order 45 of the Civil Procedure Rules sets out the grounds for review. Section 80 of the Civil Procedure Act provides: -
 - 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.
13. Order 45 of the Civil Procedure Rules provides: -
 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.
 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.
14. The Defendant raised a concern that the Plaintiff filed an application for leave to file an appeal which leave was granted on 15th May 2024 when the matter was scheduled for hearing. That the Plaintiff thus elected to exercise one of the rights under Order 45 Rule 1 (1) of the Civil Procedure Rules in which case it preferred to file an appeal as opposed to an application for review.
15. The Court of Appeal in *Yani Haryanto v. E. D. & F. Man. (Sugar) Limited*, Civil Appeal No. 122 of 1992 held as follows: -
 - “The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and



important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore, despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal.”

16. The Plaintiff admitted to having filed a Notice of Appeal later changed its mind and opted to file the present application. That in compliance with the law it proceeded to withdraw the Notice of Appeal and therefore nothing bars the Applicant from prosecuting the present application since it is not prosecuting an appeal and review simultaneously.
17. This court has perused the documents filed herein and established that indeed the Plaintiff withdrew the Notice of Appeal through their Notice of Withdrawal of Notice of Appeal dated 18th July 2024. I therefore find that the application for review herein is not an abuse of the process of court and the same can be determined by this court. This then leads us to a determination on whether the Plaintiff has established a basis for review.
18. The Plaintiff stated reasons for review of the order that capping the conclusion date at 25th February 2025 is putting them at a disadvantage since the date can be reached without conclusion of the matter and through no mistake of their own.
19. The Plaintiff on review of the order declining to admit a witness on account of pleadings having closed, and instead allow Evans Wekesa Murumba to file a witness statement as a Plaintiff witness, submitted that the first witness (PW1) is yet to testify fully, that none of the defence witnesses have testified and that the defence case is yet to be known to imply gap filling. That the party whose application for joinder was declined was the Defendant’s Coast Region Manager and his assertions through his affidavit for joinder were a leakage of how the Plaintiff suffered serious financial losses which corroborated the Plaintiff’s assertions. That the Plaintiff therefore sought to have the Third Party as one of the witnesses for full and effectual determination of the issues in question.
20. The Plaintiff further submitted that there would be no prejudice demonstrated to the Defendant as it still reserves the right to cross examine the intended witness. That the application has been made without unreasonable delay, which was barely two months after the orders were made. That the trial judge went on transfer and that the current court has unfettered discretion to review its orders pursuant to Order 45 Rule 2 of the Civil Procedure Rules.
21. The Respondent in opposition to review the orders stated that the application for review ought to have been filed before the judge who made the order and that the application for review has come late in the day. That the Plaintiff has neither established sufficient reasons to warrant review of the orders nor has there been discovery of new material. That additionally, the court has become functus officio having pronounced itself on the issues and does not have jurisdiction to interrogate the application for review.
22. The grounds for review as set out in Order 45 Rule 1 of the Civil Procedure Rules include: -



- a. Discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. On account of some mistake or error apparent on the face of the record; or
 - c. For any other sufficient reason
23. I have considered the reasons for review as set out by the Plaintiff/Applicant as any other sufficient reason in seeking review of the rulings issued on 26th February 2024 and 9th May 2024 and establish that it met the threshold set out in Order 45 Rule 1 of the *Civil Procedure Rules*.
24. In consideration of the above, the Plaintiff/Applicant's Notice of Motion application dated 18th July 2024 is allowed. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF JANUARY, 2025.

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

.....Advocate for the Plaintiff

.....Advocate for the Defendant

Court Assistant – Shitemi

