



**Skytrade Global Enterprises Limited v Owners of Motor Vessel Mt R Ocean & 2 others; Onyx International Fze (Interested Party) (Admiralty Cause E003 of 2024) [2025] KEHC 3205 (KLR) (Commercial & Admiralty) (20 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 3205 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND ADMIRALTY  
ADMIRALTY CAUSE E003 OF 2024**

**JK NG'ARNG'AR, J**

**JANUARY 20, 2025**

**BETWEEN**

**SKYTRADE GLOBAL ENTERPRISES LIMITED ..... PLAINTIFF**

**AND**

**THE OWNERS OF MOTOR VESSEL MT R OCEAN ..... 1<sup>ST</sup> DEFENDANT**

**CAPITAL COMPANY OF SHIPPING AND TRADING**

**CORPORATION ..... 2<sup>ND</sup> DEFENDANT**

**CROWN EXPRESS SHIPPING LLC ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**ONYX INTERNATIONAL FZE ..... INTERESTED PARTY**

**RULING**

1. Before Court are two applications dated 11/10/2024 and 18/9/2024.
2. The first application was dated 18/9/2024. It was brought by the defendants under Part 11 and Rule 61.8(4) (b) of the English Civil Procedure Rules seeking orders to set aside the warrant of arrest issued by this court on 2/9/2024 against motor vessel MT 'R Ocean (herein the vessel) and to release the and orders to strike out the claim on grounds that this court lacks jurisdiction to hear and determine the suit.
3. The grounds of the application were to be found on the face of it and in the supporting affidavit sworn by Samir Inamdar on 18/9/2024. It was contended that the claim was incompetent as it was not brought under any of the specified provisions listed under Section 20(2) or 21 of the Senior Courts



- Act 1981 (the Act) or in compliance with statutory requirements of admiralty procedure. That the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants and the interested party could not be parties to an action in rem as the same is always against a ship but not against a natural person or corporation.
4. It was further contended that the declaration in support of the warrant of arrest did not comply with the statutory requirements nor did it meet the threshold of the Act such as to empower this Court to exercise its admiralty jurisdiction over the claim or issue a warrant of arrest over the vessel. That the claimants failed to establish the provision under which their claim falls within Section 20(2) of the Act, and the owners and managers of the vessel would only be liable in an action in personam thus this Court's jurisdiction was not properly invoked. The defendants further deponed that there was no evidence to show the particulars of the vessel or its ownership details thus it failed to identify the parties that would be liable in an in personam action as per Section 21(4) of the Act thus the omission was fatal.
  5. The defendants further contended that the Harbour Master had been wrongfully added as a defendant and that he lacked statutory power to arrest or release any vessel and the same was solely vested in a court of law. That service of an in rem claim was to be effected on the vessel but the claimants served the 3<sup>rd</sup> defendant via email and this ousted the court's jurisdiction to hear the claim. That the warrant of arrest was not issued by the court and what was obtained was an order that the Harbour Master effects the arrest and the same was irregular. That the losses claimed had also not been particularized by the claims thus the claim for security was unsubstantiated. It was thus contended that this court lacked jurisdiction to determine the application.
  6. The claimant opposed that application vide the replying affidavit sworn by Hanier Zadeh on 21/10/2024. It was contended that the claim was in respect of the hire of the subject vessel by way of charter-party thus the claim fell within Section 20(2) of the Act. That wrongful inclusion of other parties did not negate the court's jurisdiction as the same could be cured through an application to strike out the parties. That court had jurisdiction on several grounds including that the claim fell within the meaning of Section 20 & 21 of the Act, arose in connection to a vessel charter, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are liable in personam, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as owners of the vessel were in control of it at the time the claim arose and were also beneficial owners.
  7. It was further contended that the ship was beneficially owned by the 3<sup>rd</sup> defendant until August 2024 when it changed to the 2<sup>nd</sup> defendant thus both parties were correctly sued. That the harbor master was also correctly added as a defendant as the court could only issue warrants of arrest but could not effect the arrest itself. That the claimant was all along communicating with the 2<sup>nd</sup> defendant in respect of the voyage thus the 2<sup>nd</sup> defendant was rightfully served as it was in control of the vessel. It was further pleaded that service could not oust the jurisdiction of the court and in any case, the court's directions of 2/9/2024 complied with Section 80 of the Act as to specificity of time, place and conditions to be fulfilled.
  8. It was thus contended that all requirements under Paragraph 61 of the English Civil Procedure Rules were satisfied and the claim before the court was warranted and deserving of determination. This Court was thus implored to dismiss the application with costs.
  9. The application was canvassed by way of written submissions. The defendants/applicants' submissions were dated 11/11/2024 whereas the claimant's were dated 20/11/2024.
  10. I have considered both submissions alongside the pleadings and responses. The main task for this Court is to determine whether the orders of 2/9/2024 ought to be set aside on grounds that the court lacked jurisdiction to entertain the application and issue the impugned orders.



11. It is trite that without jurisdiction, a court of law cannot purport to entertain any claim. In *Phoenix of E.A Assurance Company Limited vs. S. M. Thiga t/a Newspaper Service* [2019] eKLR the court held that: -

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place...A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.”
12. In *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989) it was held that: -

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”
13. Section 4 of the *Judicature Act* of Kenya confers on the High Court jurisdiction to hear admiralty matters in the following terms: -
  - (1) The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.
  - (2) The admiralty jurisdiction of the High Court shall be exercisable—
    - (a) over and in respect of the same persons, things and matters; and
    - (b) in the same manner and to the same extent; and
    - (c) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.
  - (3) In the exercise of its admiralty jurisdiction, the High Court may exercise all the powers which it possesses for the purpose of its other civil jurisdiction.
  - (4) An appeal shall lie from any judgment, order or decision of the High Court in the exercise of its admiralty jurisdiction within the same time and in the same manner as an appeal from a decree of the High Court under Part VII of the *Civil Procedure Act* (Cap. 21)” (emphasis added).
14. The relevant law for a claim in rem is to be found under the Senior Courts Act of England at Section 20 which provides for the admiralty jurisdiction of the High Court. I have carefully considered the claim and note that the dispute arose in respect of a vessel that was chartered to stow goods from Bashar, Iraq, to Mombasa, Kenya.
15. It was the claimant’s case that the vessel was chartered on a one load port and one discharge port Charterparty dated 7/8/2021. That there was the Bill of lading dated 14/7/2024 indicating receipt of the consigned Bitumen for shipment signed by the vessel’s master and that the bill of landing created a contract for the carriage of goods. It was also the claimant’s case that due to the vessel’s mismanagement, diversion for technical maintenance and misrepresentation of seaworthiness of the vessel, there was a 26-day delay that caused severe damage to the claimant including cancelation of the order, loss of profits, loss of business, charging of interest on the financed vessel and loss of reputation.



16. Section 20 of The Act provides that: -

“Admiralty jurisdiction of High Court.

- (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say—
  - (a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);
  - (b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);
  - (c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and
  - (d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen’s Bench Division and directed by the rules to be exercised by the Admiralty Court.
- (2) The questions and claims referred to in subsection (1)(a) are—
  - (a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
  - (b) any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
  - (c) any claim in respect of a mortgage of or charge on a ship or any share therein;
  - (d) any claim for damage received by a ship;
  - (e) any claim for damage done by a ship;
  - (f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of—
    - (i) the owners, charterers or persons in possession or control of a ship; or
    - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship;



- (g) any claim for loss of or damage to goods carried in a ship;
- (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- [F1(j) any claim—
  - (i) under the Salvage Convention 1989;
  - (ii) under any contract for or in relation to salvage services; or
  - (iii) in the nature of salvage not falling within (i) or (ii) above;
    - or any corresponding claim in connection with an aircraft;]
- (k) any claim in the nature of towage in respect of a ship or an aircraft;
- (l) any claim in the nature of pilotage in respect of a ship or an aircraft;
- (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- (o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- (p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- (q) any claim arising out of an act which is or is claimed to be a general average act;
- (r) any claim arising out of bottomry;
- (s) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.”

17. Considering the above provision, I do find that the claim falls squarely under Section 20 of the Act, more specifically Section 20 2 (h), and (k) of The Act. I say so as the claim relates to a claim arising out of an agreement related to the carriage of goods in the vessel or in this case, the hire of a ship, and also related to a claim in the nature of towage in respect of the vessel. It then follows that this Court is vested with jurisdiction to hear and determine the claim against the 1<sup>st</sup> defendant.



18. As regards jurisdiction over the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, the mode of exercise of the court's jurisdiction based on a claim in rem falls under Section 21(4) of the Senior Courts Act which provides as follows: -

“In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—

- (a) the claim arises in connection with a ship; and
- (b) the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—
  - (i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
  - (ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.” (emphasis added).

19. Bearing in mind the provisions of Section 21(4)(b)(i) above, it is evident in this case that the claim in rem has been brought against the owners and manager of the vessel. In the instant application, the deponent himself admits that the 1<sup>st</sup> and 3<sup>rd</sup> defendants are owners of the vessel, and the 2<sup>nd</sup> defendants are managers of the vessel. It then follows that the claim could be brought against such parties in personam. In *The Nordglint* [1987] 2 Lloyd's Report at 470, Hobhouse J, stated as follows in regard to the issue of when an action in rem becomes enforceable in personam: -

“Unless and until anyone appears to defend an action in rem, the action proceeds solely as an action in rem and any judgment given is solely against the res. It is determinative and conclusive as against all the world in respect of the rights in the res, but does not create any rights that are enforceable in personam. An action in rem may be defended by anyone who has a legitimate interest in resisting the plaintiff's claim on the res. Such a person may be the owner of the res but, equally, it may be someone who has a different interest in the res which does not amount to ownership, or, again, it may be simply someone who also has a claim in rem against the res and is competing with the plaintiff for a right to the security of a res of an inadequate value to satisfy all the claims that are being made upon it ....Unless and until a person liable in personam chooses to defend an action in rem, the action in rem will not give rise to any determination as against such person or any personal liability on his part, nor will it give rise to any judgment which is enforceable in personam against any such person.”

20. In *The Kommunar* (No.2) 1997 1 LLR 8 Coleman J while expounding on the meaning of the relevant person said the following: -

“The function of this sub-section is to lay down the required connecting factors between the ship in connection with which the claim arose, the person liable in personam in respect of that claim (“the relevant person”) and the vessel against which an action in rem can be brought. The effect of the sub-section is to prescribe that the person liable in personam in respect of the claim must have that connection with the ship with connection with which the claim arose which is identified at s. 21(4)(b), that is to say such person must have been the owner or charterer of it or must have been in possession or control of it when the cause



of action arose. The latter part of sub-section (4) then identifies the prescribed connection between the ship to be arrested and that person by requiring that such ship, if the same ship as that in connection with which the claim arose, must either be wholly beneficially owned by the relevant person or demised chartered to him, or if a different ship, that it must be wholly beneficially owned by that person.

Fundamental to this connection code is that the beneficial owner or demise charterer of the vessel to be proceeded against in rem should also (i) be the person who would be liable in personam and (ii) have been the owner or charterer of or in possession or control of the vessel in connection with which the claim is brought at the time when the cause of action arose.

Thus, if the beneficial owner of the vessel proceeded against in rem is not the same person as the relevant person having the required connection with the vessel which is the subject matter of the claim, the proceedings in rem cannot be pursued.” (emphasis added).

21. Applying the provisions of Section 21(4)(b)(i) of the Senior Courts Act and the above decision to the circumstances of this case, it is apparent to this court that the claimant properly brought the claim in rem as against the owners of the motor vessel as the said ship is beneficially owned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and managed by the 2<sup>nd</sup> defendant. This Court is thus vested with jurisdiction to entertain the claim.
22. In the circumstances, the warrants of arrest issued herein cannot be set aside on grounds that this Court lacked jurisdiction to issue the orders of 2/9/2024.
23. The second application is dated 11/10/2024. It was brought by the claimant under Articles 2(5) & 6, 10, 25(d) & 50 of *the Constitution*, Section 80 of the *Civil Procedure Act*, and Orders 45(1) & Order 51 Rule 1 of the Civil Procedure Rules.
24. The pending orders in the application were that this Court be pleased to vary, review and/or set aside the ruling dated 9/10/2024 and all consequential orders.
25. The grounds of the application were to be found on the face of it and in the supporting affidavit sworn by Hanieh Zadeh on 11/10/2024. It was the claimant’s case that the ruling delivered on 9/10/2024 discharging the arrest warrants dated 2/9/2024 issued against Motor Vessel MT R. Ocean (the vessel) had an obvious error on the face record.
26. It was contended that the order authorized issuance of a Bank guarantee of USD 400,000 as a security to replace the vessel despite that vide the claimant’s replying affidavit dated 4/10/2024, it was pleaded that only a security of USD 800,000 could cover the vessel. That the vessel continued to make losses because of the respondent’s omissions and though USD 400,000 was sufficient at the time of filing the claim, the losses continued to persist and the principal loss had risen to USD 541,121.1. That the release order would constrict the claim to USD 400,000 and it was thus just that the order be reviewed to uplift security from USD 400,000 to USD 800,000.
27. It was further contended that the claimant’s submissions were not considered in the impugned ruling and the security ordered was not sufficient as per the compelling reasons contained in the claimant’s replying affidavit dated 4/10/2024 and submissions dated 8/10/2024. That unless the orders sought were granted and the impugned ruling reviewed, the claimant would suffer prejudice that was not reparable in monetary terms.
28. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants (the defendants) jointly opposed the application vide the replying affidavit sworn by Samir Inamdar dated 22/10/2024. It was contended that the value of the security was based on the exercise of judicial discretion and such decision could not be impugned on the basis



- that the discretion was not exercised properly or at all. That such challenge could only be by way of appeal and not through an application for review.
29. It was also deponed that the argument that the Court failed to consider the claimant's submissions on the issue of security was not within the scope of a review. That such failure would form a basis for an appeal but not for a review. It was thus contended that in the circumstances, there was no plausible basis for the claimant's application and the orders sought were not possible of being granted.
  30. The application was disposed of by way of written submissions. The claimant filed submissions dated 20/11/2024 in respect of both applications whereas the defendants filed their submissions dated 30/10/2024 in opposition to the instant application.
  31. The applicant submitted that power to set aside, vary or review orders was discretionary as provided for under Section 80 of the Civil Procedure Act and further anchored on Order 45 Rule 1 of the Civil Procedure Rules. That the threshold through which such orders can be reviewed was captured in Republic vs Advocates Disciplinary Tribunal Ex Parte Apollo Mboya Misc App. No. 317 of 2018 (2019) KEHC 6379 (KLR) (Judicial Review).
  32. It was thus submitted that the application was based on an error apparent on the face of the record as the court failed to consider the parties responses and submissions and the impugned ruling lacked legal analysis. It was thus submitted that the application ought to have been allowed with costs.
  33. The defendant's on the other hand submitted that the ruling had taken into consideration the application, response, parties submissions and the relevant law thus the claimant's assertion had no basis. That the argument was a ground for appeal and not review. It was also submitted that the court's decision on form and amount of security was discretionary and such decision could not be a subject for review. To buttress this point, the defendant's relied on National Bank of Kenya Ltd vs Ndungu Njau (Civil Appeal 211 of 1996) (1997) KECA 71 (KLR) and Bethwel Omondi Okal vs Managing Director KPLC & Co (2017) Eklr.
  34. Quoting similar law and authority as the claimant, it was submitted that the claimant did not meet any of the three grounds of review and that the application was an attempt to have this Court appeal its own decision. It was thus concluded that the complaint ought to have been a subject of an appeal and this Court was urged to dismiss the application with costs.
  35. The sole issue for determination by this court is whether the application has satisfied any grounds for review.
  36. It is now well settled that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 80 of the Civil Procedure Act. This means that the High Court has a power of review, but such power must be exercised within the framework of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules 2010.
  37. 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

38. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides: -

“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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

39. Section 80 gives the power of review and Order 45 sets out the rules. From the reading of these two laws, grounds for review can hence be adduced as thus;

- (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 and whatever the ground there is a requirement that the application has to be made without un reasonable delay.

40. The claimant herein based its application on the ground that there was an error apparent on the face of the record as the court failed to consider the claimant’s pleadings and submissions and thus ordered for release of the vessel and security of USD 400,000.

41. The brief facts of the case are that the claimant filed a claim dated 30/8/2024 and an application of even date seeking for arrest warrants against the vessel. The orders were issued ex parte vide orders dated 2/9/2024 causing the defendants to file the applications dated 18/9/2024 and 25/9/2024 as well as a supplementary application dated 27/9/2024. The claimant filed a replying affidavit dated 4/10/2024 and submissions dated 8/10/2024 while the defendants filed two submissions dated 3/10/2024 and 7/10/2024. This Court then delivered the ruling dated 9/10/2024 discharging the warrants of arrest against the vessel and ordered issuance of a bank guarantee of USD 400,000 as security to replace the vessel.

42. It is that ruling that triggered the claimant to file the instant application on grounds that there was an error apparent on the face record as the court failed to consider the claimant’s replying affidavit and submissions on the issue of security. This Court was thus implored to review the said ruling by varying the security of USD 400,000 to USD 800,000.

43. The question then is whether the court failed to consider the parties pleadings and submissions, and if so, whether such was an error apparent on the face of the record.



44. In *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows: -

“...In *Nyamogo & Nyamogo -vs- Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.

45. In *National Bank of Kenya Ltd vs Ndungu Njau* (Civil Appeal 211 of 1996) (1997) KECA 71 (KLR) the court had this to say on error: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

46. I have considered this court’s ruling of 9/10/2024. The ruling clearly states that the Court considered the application, responses, submissions and the relevant law. The allegation that the claimant’s pleadings were not considered therefore fails and I find that there is no error apparent on the face of the record.

47. As regards the issue of security, I do note that the claimant vide its replying affidavit dated 4/10/2024 pleaded that security of USD 400,000 was not sufficient and only USD 800,000 would suffice. The Court vide its ruling ordered for security of USD 400,000. The claimant’s dissatisfaction on this order cannot suffice as a ground for review on the ground that the court could have had a different view on the most sufficient amount for security.

48. It is well established that the issue of security is within the court’s discretion. Justice F. Tuiyot in *Ocean View Beach Hotel Ltd v. Salim Sultan Mollo & 5 Others* (2012) e KLR held as follows: -

“The court has a complete discretion, whether to order security, and accordingly it will act in the light of all the relevant circumstances...”

49. The issue of security was further discussed in *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] eKLR wherein the court held that: -

“In exercising its discretion to order provision of security for costs, a court will consider the circumstances of each case and in particular whether it is fair and equitable, to both the parties, to require the furnishing of security. When considering the circumstances of each



case the court will take into account the financial status of the litigant and whether an order for security for costs may effectively preclude a Plaintiff from proceeding with his case. The courts will also guard against placing unreasonable barriers in the way of either litigant to the extent that justice may be denied.<sup>1</sup>. The order sought is discretionary in nature. The court should have due regard to the particular circumstances of the case and considerations of equity and fairness to both parties. There must be some special fact, inherent to the action itself, which will persuade a court to exercise its discretion in favour of the applicant. The court should exercise its discretion in favour of granting the order only sparingly and in exceptional circumstances. The courts' discretion must be exercised in a manner which is not discriminatory. The discretion should be exercised in a manner reflecting its rationale, not so as to put a litigant at a disadvantage compared with the defendant.”

50. It then follows that the issue of security is discretionary and the Court was not bound to accept the claimant's view on the suitable amount, as long as such discretion was exercised judiciously. Whether or not this Court exercised such discretion within the limits of the law is a question that can only be answered by way of appeal. It is not for this court to re-look into the facts of the case and determine whether it exercised its discretion judiciously when it ordered for security of USD 400,000. I am inclined to agree with the defendants' submissions that the same will be tantamount to this Court sitting on its own appeal. The claimant's dissatisfaction with the security amount can only be complained by way of an appeal, not a review.
51. I say so with reliance on *Housing Finance Co of Kenya Ltd vs Prudential Dry Cleaners Ltd* (2002) 2KLR 162 wherein the court had this to say: -
- “To my mind there are two things I cannot do in an application of this nature. First I cannot fault or review the judges' exercise of discretion and secondly I cannot review the decision merely because the judge may have decided the matter on an incorrect procedure or his decision is based on the wrong misapprehension of the law. These two, to my mind are grounds of appeal. I hold the strong view that a decision made in the exercise of the discretion of the judge cannot be reviewed.”
52. See also *Eastern and Southern African Development Bank vs Africa Green Fields Ltd and others* (2002) 2E. A 377 where a similar holding was reached.
53. Going by the above, a decision such as the one in the impugned ruling was made in the exercise of this Court's discretion and the same cannot be reviewed. Any complaint with such decision can only be a ground for appeal, and not a ground for review. This was the holding in *Abasi Belinda vs Fredrick Kangwamu and another* (1963) E.A 557 where Bennet J held that: -
- “a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal”
54. Having found that there was no mistake or error apparent on the face of the record, and having found that the ground relied on for review could only be a ground for appeal, I find that there is no sufficient reason to grant orders for review and the application dated 11/10/2024 is therefore unmeritorious and the same is hereby dismissed with costs to the defendants.
55. In the end, I proceed to make the following final orders: -



1. The applications dated 18/9/2024 and 11/10/2024 are found to be unmeritorious and both applications are hereby dismissed.
2. Each party shall bear its own costs.

It is so ordered

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**J.K. NG'ARNG'AR, HSC**

**JUDGE**

**DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 20<sup>TH</sup> DAY OF JANUARY, 2025**

