



**Onyango & 2 others v Inda (Commercial Appeal E348 of 2023)
[2025] KEHC 807 (KLR) (Commercial and Tax) (3 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 807 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E348 OF 2023
JWW MONG'ARE, J
FEBRUARY 3, 2025**

BETWEEN

**KENNEDY OCHIENG ONYANGO 1ST APPELLANT
DAVID OUMA ABONYO 2ND APPELLANT
GODFREY OMONDI 3RD APPELLANT**

AND

AMBROSE ODEYO INDA RESPONDENT

RULING

Introduction and Background:-

1. On 24th December 2023, the court, on application by the Appellants, stayed the execution of the orders emanating from the decision of the Small Claims Court in NBI SCCCOMM E2329 of 2023 upon the deposit of the sum of Kshs.599,632.00/= in court within 30 days of the court's ruling. This ruling has precipitated the filing of two applications; the 2nd Appellant's Notice of Motion dated 22nd January 2024 that seeks to review and set aside the conditional stay orders and the Respondent's Notice of Motion dated 30th January 2024 that also seeks to review the stay orders but that he be allowed to proceed with execution. The court directed the parties to file submissions in respect of the 2nd

Appellant's application which are on record.

Analysis and Determination:-

2. The 2nd Appellant's application essentially seeks to review the orders of the court by substituting the security he was ordered to provide. Whereas the 2nd Appellant has based his application under inter alia Order 42 Rule 6 of the Civil Procedure Rules, this court, as well as the Court of Appeal has



always held that an application for review of security of costs is brought under Order 45 Rule 1 which gives this court discretionary power to review its orders for security of costs (See *Pancras T. Swai v Kenya Breweries Limited* [2014] KECA 883 (KLR) and *Edward Mungai Waweru v Samson Ochieng Kagunda & Kimani Mary* [2018] KEHC 5408 (KLR]). However, I find that this misapplication of the Rules is not fatal and I will therefore proceed to determine the merits of the application in the spirit of the provisions of Article 159 (2)(d) of *the Constitution*.

3. The said Order 45 Rule 1 of the Rules provides as follows:-

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.”

4. From the above provision, it is clear that for an Applicant to succeed in an application for review, one must establish to the satisfaction of the court any one of the following three main grounds:-

- i. That there is discovery of new and important evidence which was not available to the Applicant when the judgment or order was passed despite having exercised due diligence; or
- ii. That there was a mistake or error apparent on the face of the record; or
- iii. That sufficient reasons exist to warrant the review sought.

In addition to proving the existence of the above grounds, the Applicant must also demonstrate that the application was filed without unreasonable delay.

5. The 2nd Appellant has not stated under which limb his application has been brought but I can deduce that it is being brought under ‘sufficient reasons’ as he has deponed that he does not have a stable job or employment and cannot therefore raise the whole decretal amount to deposit as security as ordered and directed by the court. However, the 2nd Appellant has not attached any evidence to demonstrate his impecunity or that his trade only fetches Kshs.12,000.00/= per month as deponed. The Court of Appeal, in *Coastal Bottlers Limited v Commissioner of Domestic Taxes* [2009] KECA 190 (KLR) held that an applicant ought to table evidence to demonstrate their financial position that may lead the court to appreciate that they are unable to furnish such security as ordered by the court. A mere deposition or averment is not enough.

6. In any event, the 2nd Appellant was fully aware of the orders of the court when they were issued on 24th December 2023. He was also aware of his financial status as at the same period and ought to have in the circumstances made the application as soon as possible to salvage the situation and not after the lapse of the conditional period of 14 days. It is therefore my opinion that this application has been made late in the day and this imputes that the same was not made in good faith but rather was made to delay and avert the execution for reason of non-compliance (see *Simba Coach Limited v Kiriuyu Merchants Auctioneers* [2019] KEHC 8787 (KLR)). As the 2nd Appellant has failed to demonstrate sufficient reasons to review the orders for the security and that his application is inordinately late, he is not entitled to the orders he seeks.



Conclusion and Disposition:-

7. It is therefore my finding that the application 22nd January 2024 is devoid of merit and the same is hereby dismissed with costs to the Respondent. I will, however, in the interest of justice, hand the 2nd Appellant a lifeline and he shall deposit the decretal sum of Kshs. 599,632.00/= in court in the next fourteen (14) days and there shall be conditional stay for the same period. Failure to do so, execution shall ensue and the Respondent's application dated 30th January 2024 will be allowed as a result.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 3RD DAY OF FEBRUARY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Mrs. Maumo for the Applicants.
2. Ms. Kawira holding brief Mr. Calistus for the Respondent.
3. Amos - Court Assistant

