



**Isaac's Investments Company Limited v Lubulellah & Associates  
Advocates (Commercial Miscellaneous Application E626 of 2021)  
[2025] KEHC 4030 (KLR) (Commercial and Tax) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4030 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION E626 OF 2021**

**MN MWANGI, J**

**MARCH 21, 2025**

**BETWEEN**

**ISAAC'S INVESTMENTS COMPANY LIMITED ..... APPLICANT**

**AND**

**LUBULELLAH & ASSOCIATES ADVOCATES ..... RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion application dated 20<sup>th</sup> March 2024 pursuant to the provisions of Article 159 of the *Constitution* of Kenya, 2010, Sections 1A, 1B, 3A & 95 of the *Civil Procedure Act*, Order 50 Rule 5 and Order 51 of the Civil Procedure Rules, 2010. The applicant prays for an order of extension of the stay of execution orders granted on 23<sup>rd</sup> February 2024 for an additional 30 days and for an order that this Court varies part of the ruling delivered on 23<sup>rd</sup> February 2024 requiring a deposit of half the decretal sum, and instead allow the applicant to deposit a log book for a Mercedes Benz motor vehicle valued at Kshs.5,500,000/=, as security.
2. The application is premised on the grounds on the face of the Motion, and it is supported by affidavits sworn on the same day by Mr. Ali Isaac, the applicant's Director and Ms Habiba Ali Maalim, the daughter of the applicant's Director. Mr. Isaac averred that on 23<sup>rd</sup> February 2024, this Court granted the applicant a stay of execution in this suit, conditional on the applicant depositing the sum of Kshs.5,560,000/= within 30 days from the date of the ruling, which time elapsed on 24<sup>th</sup> March 2024. He however contended that the applicant being a non-profit business, is unable to raise the required deposit. He proposed that the applicant be allowed to deposit a log book for the Mercedes Benz motor vehicle valued at Kshs.5,500,000/=, as security.



3. Ms Maalim on the other hand averred that she is the registered owner of a motor vehicle Mercedes Benz GLC 250 4Matic, registration No. KDL 0092, which vehicle she purchased from Hashi Trading Limited on 31<sup>st</sup> March 2023, for Kshs.5,700,000/=. She averred that she was willingly offering the said motor vehicle's logbook as security in Court.
4. In opposition to the application, the respondent filed a replying affidavit sworn on 22<sup>nd</sup> March 2024 by Mr. Eugene Lubale Lubulellah, an Advocate of the High Court of Kenya and learned Counsel for the respondent. He asserted that this Court is functus officio following its ruling delivered on 23<sup>rd</sup> February 2024 thus it lacks the jurisdiction to vary its own orders. He averred that the applicant has already filed a Notice of Appeal and even requested for typed proceedings, precluding any review.
5. The above notwithstanding, Counsel contended that the applicant has not met the legal threshold for review as provided for under Order 45 of the Civil Procedure Rules, 2010, as there is no new evidence, error, or sufficient reason to justify being granted of the orders sought herein. Mr. Lubulellah claimed that the belated offer of a motor vehicle logbook as security is inadequate, as that type of asset depreciates in value, accrues risks, and is not owned by the applicant, whereas the decree continues to accrue interest.
6. The application herein was canvassed by way of written submissions which were highlighted on 6<sup>th</sup> November 2024. The applicant's submissions were filed on 15<sup>th</sup> April 2024 by the law firm of Muma & Kanjama Advocates, while the respondent's submissions were filed by the law firm of Lubulellah & Associates Advocates on 25<sup>th</sup> June 2024.
7. Mr. Kanjama (SC), learned Counsel for the applicant relied on the case of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR, and submitted that under Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, 2010, this Court has the jurisdiction to review its orders if the necessary conditions are met, which means that this Court has the power to grant the orders sought herein. He relied on the Court of Appeal case of Pancras T. Swai v Kenya Breweries Limited [2014] eKLR, and argued that there is sufficient reason to vary this Court's orders to allow the deposit of a motor vehicle logbook as security and to extend the stay of execution granted on 23<sup>rd</sup> February 2024. Further, he submitted that this is a proper case to invoke the provisions of Section 3A of the *Civil Procedure Act*. Mr. Kanjama (SC) further submitted that depositing the sum of Kshs.5,560,000/= by the applicant as security shall occasion substantial loss to the applicant's business.
8. Mr. Lubulellah, learned Counsel for the respondent referred to the Court of Appeal case of The Chairman Board of Governors Highway Secondary School v William Mmosi Moi Civil Application No. 277 of 2005 and the case of Shah Rekhavanti Pankai v Bank of Baroda & another [2021] eKLR, and submitted that it is trite that a litigant cannot apply for both review and appeal from the same decree or order. He argued that since the applicant has already filed a Notice of Appeal against the Court's ruling of 23<sup>rd</sup> February 2024, it is barred from seeking a review or variation of the same ruling.
9. Counsel stated that nonetheless, the instant application fails to meet the threshold for review under Order 45 of the Civil Procedure Rules, 2010. He relied on the decision in Onesmus Mburu Njuguna v Samson Kitire Kuna [2007] eKLR and Nelson Kanini v Elikanah Kagunda Kangethe [2020] eKLR, and submitted that it is trite that the security for a money decree should be in form of money, to be deposited in Court or in a joint interest earning account.



## **Analysis and Determination.**

10. I have considered the application filed herein, the grounds on the face of it, and the affidavit filed in support thereof. I have also considered the replying affidavit by the respondent and the written submissions filed by Counsel for the parties. The issue that arises for determination is whether the applicant has made out a case for being granted the orders sought.
11. The applicant prays for an order for extension of the stay of execution orders granted on 23<sup>rd</sup> February 2024 for an additional 30 days, and for an order varying part of the ruling delivered on 23<sup>rd</sup> February 2024 requiring a deposit of half the decretal sum and instead, for this Court to allow the applicant to deposit a logbook for a Mercedes Benz motor vehicle valued at Kshs.5,500,000/=, as security on the ground that the applicant has been unable to raise the required deposit.
12. In as much as the applicant seeks variation of the Orders of this Court, Mr. Kanjama (SC) relied on arguments based on grounds for review. He relied on the provisions of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 in urging this Court to grant the applicant the orders being sought herein.
13. Review applications are provided for under Section 80 of the Civil Procedure Act as read with Order 45 of the Civil Procedure Rules, 2010. Section 80 of the Civil Procedure Act states that -  
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.
14. Order 45 of the Civil Procedure Rules, 2010 on the other hand provides as follows –
  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.
15. From the above provisions, an application for review can only be filed against a decree or order from which an appeal is allowed, but from which no appeal has been preferred and/or a decree or order from which no appeal is allowed. It is not in contest that the applicant has a right to appeal against the ruling of 23<sup>rd</sup> February 2024. As such, pursuant to the provisions of Order 45 Rule 1(a) of the Civil



Procedure Rules, 2010, the applicant had a choice to either lodge an appeal against the said decision or file an application for review against it.

16. It is not disputed that the applicant has already lodged an appeal against the ruling of 23<sup>rd</sup> February 2024 vide a Notice of Appeal dated 27<sup>th</sup> February 2024, and has requested for copies of typed proceedings vide a letter dated 27<sup>th</sup> February 2024 for purposes of preparing a Record of Appeal.
17. It is my finding that having chosen the path of appealing against the ruling of 23<sup>rd</sup> February 2024, the provisions of Section 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules, 2010 are no longer available to the applicant.
18. The above notwithstanding, even if I was to consider the instant application on merits, I would still not be inclined to grant the orders sought. This is because the applicant seeks to substitute this Court's Order issued on 23<sup>rd</sup> February 2024 requiring it to deposit half the decretal sum as security, with an order for deposit of a log book of a Mercedes Benz motor vehicle valued at Kshs.5,500,000/= as security. It is however worthy noting that the security being offered by the applicant is a motor vehicle which depreciates in value over time instead of appreciating in value. In the premise, one cannot tell how far the motor vehicle offered by the applicant will have depreciated in value by the time the applicants appeal will be heard and determined by the Court of Appeal. That makes it uncertain as to whether the said motor vehicle will retain sufficient value to satisfy the respondent's decree by the time the said appeal is heard and determined.
19. The upshot is that the instant application is fatally defective and cannot be sustained. It is therefore struck out with costs to the Advocate/respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF MARCH 2025.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Anyona h/b for Mr. Kanjama (SC) leading Ms Arum h/b for Mr. Musyoki for the client/applicant

Mr. Lubullelah Eugene for the Advocates/respondent

Ms B. Wokabi – Court Assistant.

**NJOKI MWANGI, J.**

