



**Guardian Coach Limited v Terer & 2 others (Civil Appeal
E044 of 2022) [2025] KEHC 4150 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4150 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E044 OF 2022
JK NG'ARNG'AR, J
APRIL 1, 2025**

BETWEEN

THE GUARDIAN COACH LIMITED APPLICANT

AND

WILLIAM KIMUTAI TERER 1ST RESPONDENT

SIMON KIPCHIRCHIR SINGOR 2ND RESPONDENT

NYAMIRA LUXURY EXPRESS COMPANY 3RD RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 9th September 2024 which sought the following Orders:-
 - i. Spent.
 - ii. That this Honourable Court be pleased to revive, extend, maintain, sustain and/or preserve the orders number 1, 2, 3, 4, 5 and 6 issued on 28th August 2024 pending the hearing and determination of this Application.
 - iii. That the orders number 7 and 9 be varied and/or vacated in the interest of the Applicant and the substantive Appeal filed by the Applicant/Appellant.
 - iv. That the Honourable Court be pleased to order deposit of security by the Respondent/Judgement Debtor in place of the Applicant.
 - v. That costs of this application be in the cause.
2. The Application was brought under Order 45 Rule 1 & 2, Order 22 Rule 52, Order 42 Rule 6 (1), (2), Order 51 Rules 1 of the [Civil Procedure Rules, 2010](#), section 1A, 1B, 3A, 63(e) and 80 of the



Civil Procedure Act, and it was based on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Julius Mokaya on 9th September 2024.

The Applicant's Case.

3. The Applicant stated that it was dissatisfied with this court's Ruling dated 30th May 2024. That it filed an Application for stay dated 26th June 2024 and orders were issued by this court on 28th August 2024. The Applicant further stated that in the said orders, this court directed that it provide security for costs by providing a bank guarantee sufficient to discharge the decretal amount, costs and interests.
4. It was the Applicant's case that this order was overburdening and inconvenient it as it was not the judgement debtor in the main suit. It was the Applicant's further case that it had already incurred huge losses since its motor vehicle registration number KBX 343L had been carted away since 11th February 2024.
5. The Applicant stated that this order should be varied or vacated. The Applicant further stated that the 1st Respondent would suffer no prejudice if the Application was allowed.
6. The court directed that the Application be canvassed by way of written submissions.
7. In its written submissions dated 25th October 2024, the Applicant submitted that the purpose of the Application was for this court to review order number 7 issued on 28th August 2024. That the order required that it provide security for costs by providing a bank guarantee sufficient to discharge the decretal amount, costs and interests. It further submitted that it was not the judgment debtor and did not take part in the main suit in the main suit and could not carry such a burden.
8. It was the Applicant's submission that this court ought not burden an innocent party who only came into the picture because their motor vehicle was wrongfully attached. That burdening it with the duty to deposit security was prejudicial. It was the Applicant's further submission that the decree holder should pursue the fruits of his Judgement against the 2nd Respondent (Nyamira Luxury Express Co. Ltd) and should be estopped from executing the decree against the Applicant. It relied on the Nigerian case of Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002.
9. The Applicant submitted that its motor vehicle registration number KBX 343L had been in the decree holder's custody for approximately 18 months and because it was in the transport industry, it was not able to conduct business hence incurring losses.
10. I have gone through the record and I have noted that the 1st Respondent did not respond to the Notice of Motion Application dated 9th September 2024 despite being served with the same. The 1st Respondent did not also file their written submissions despite being directed to do so by this court.
11. I have read through and carefully considered the Notice of Motion Application dated 9th September 2024 and the Applicant's written submissions dated 25th October 2024. The only issue for my determination was whether the Applicant had met the requirements for a grant of a Review Order.
12. It is trite law that the High Court has a power of Review. The law on Review is based on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2010. It is salient to note that this court's power must be exercised within the framework of the aforementioned statutes.
13. Section 80 of the Civil Procedure Act provides as follows:-

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.

14. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* 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 review of judgement to the court which passed the decree or made the order without unreasonable delay.

15. From the above provisions, it is clear that section 80 of the *Civil Procedure Act* gives the power of Review while Order 45 of the *Civil Procedure Rules 2010*, sets out the rules. The rules limit the grounds applicable for Review as follows:-

- a. The 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.
- b. On account of some mistake or error apparent on the face of the record.
- c. Any other sufficient reason and that the Application has to be made without unreasonable delay.

16. Regarding the discovery of new and important matter or evidence, the Court of Appeal in *Rose Kaiza v Angelo Mpanju Kaiza* [2009] KECA 422 (KLR), held:-

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

17. Similarly, the Court of Appeal in *Tokesi Mambili and others v Simion Litsanga* (2004) eKLR held:-

- “i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time



when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.”

18. The Applicant filed a Notice of Motion Application dated 22nd November 2022 where he sought among others stay of execution of the motor vehicle registration number KBX 343L and a stay of the Ruling delivered on 9th November 2022 by the trial court. The Applicant also wanted an unconditional release order for its motor vehicle that had been proclaimed and ready to be sold through auction.
19. In its Ruling dated 30th May 2024, this court (Korir J.) dismissed the Application dated 22nd November 2022. Being aggrieved by the said Ruling, the Applicant filed a Notice of Motion dated 26th June 2024 seeking among others a stay of this court’s Ruling dated 30th May 2024 and for the unconditional release of its motor vehicle. Directions on this Application were given by Mohochi J. on 28th August 2024 and in particular to the present Application:-
 - VI. A conditional temporary order of stay of execution of the Ruling dated 30th may 2024, the orders thereof and/or consequential procedures pending the hearing and determination of this Application.
 - VII. The Applicant shall within the next seven (7) days provide security for costs by way of providing a bank guarantee sufficient to discharge the decretal amount, costs and interest from a 1st tier commercial bank.
 - VIII. An unconditional order of release of the Objector/Applicant’s motor vehicle registration number KBX 343L proclaimed and carted away on 11th February 2022 by Indomitable Auctioneers is hereby issued against the 1st Respondent and its agent, Indomitable Auctioneers, to forthwith release the same to the Appellant/Objector/Applicant pending the hearing and determination of the Appeal in the Court of Appeal.
 - IX. Failure to comply with direction number 7 above shall result in the automatic vacation of all stay against execution orders issued herein.
20. From the present Application, it is clear that the Applicant protested the direction requiring it to provide a Bank Guarantee as security. Further, the Applicant has not attached any evidence to show that provided the said Bank Guarantee which meant that they conditional stay order of the Ruling dated 30th May 2024 was vacated.
21. As discussed earlier, the conditions for the grant of a Review order are very stringent. I have gone through the present Application and I have not found any new or important matter or evidence which within the knowledge of the Applicant and could not be produced when the Decree was passed. I say so because the Applicant’s stated in his Review Application was that it was not a participant in the main suit and that its motor vehicle was wrongly carted away and proclaimed. It appears to this court that the ownership of motor vehicle registration number KBX 343L between the Applicant (The Guardian Coach Ltd) and the 2nd Respondent (Nyamira Luxury Express Company) was the main contention in the trial suit. As this court rightfully noted in its Ruling dated 30th June 2024, the issue of ownership of the subject motor vehicle cannot be determined at this stage but once the Appeal has been heard and determined.



22. In any event, as seen in section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules, 2010* earlier, once an Appeal has been preferred, there is no avenue for a Review Order. It's either one or the other but not both at the same time. I say so because the main issue in the Memorandum of Appeal dated 21st November 2022 was that the trial court caused the illegal attachment of its motor vehicle registration number KBX 343L and it is the same issue raised by the Applicant in his Review Application when he stated that it was not a participant in the trial suit. In my view, all this issue comes down to the ownership of the subject motor vehicle between the Applicant and the 2nd Respondent and this ground was appellate in nature and the same are not allowed in a Review Application. The Court of Appeal in *National Bank Of Kenya Limited v Ndungu Njau* [1997] KECA 71 (KLR) held that:-

“In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law.....”

23. Regarding the issue on whether there was an apparent error on the face of the record, the court in *Nyamogo & Nyamogo v Kogo* (2001) EA 170 rendered itself as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a long drawn process of reasoning 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 apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

24. I am persuaded by Mativo J. (as he then was) in *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] KEHC 6379 (KLR), where he stated:-

“The starting point is that 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.”

25. I have gone through the Review Application and I have equally not found any mistake or error apparent on the face of the record. This ground fails.

26. In the final analysis, it is my finding that the Applicant has not satisfied the conditions precedent for the grant of the Review order it sought.

27. In the end, the Notice of Motion Application dated September 9, 2024 has no merit and is dismissed with no orders as to costs.



RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 1ST DAY OF APRIL, 2025.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Ruling delivered in the presence of Kwamboka for the Appellant No appearance for the Respondent and Siele and Susan (Court Assistants).

