



**Malde & another v Karoki & 2 others (Commercial Case E384 of 2023)
[2025] KEHC 6080 (KLR) (Commercial and Tax) (16 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E384 OF 2023**

A MABEYA, J

MAY 16, 2025

BETWEEN

PRATIK MANSUKHLAL MALDE 1ST PLAINTIFF

ANIL KUMA VIRPAR MALDE 2ND PLAINTIFF

AND

RAHAB MWIHAKI KAROKI 1ST RESPONDENT

FAMILY SIGNATURE LIMITED 2ND RESPONDENT

KENYA REVENUE AUTHORITY 3RD RESPONDENT

RULING

1. For determination is the Motion dated 2/4/2024. The same was brought inter alia, under Order 45 Rule 1 and 2 of the *Civil Procedure Rules*. It sought that the ruling delivered on 18/12/2023 be reviewed, varied and/or set aside.
2. The grounds thereof were set out in the body of Motion and Supporting Affidavit of Pratik Mansukhlal Malde and Anil Kumar Virpar Malde sworn on 2/4/2024. The grounds were that there were sufficient reasons to review the ruling of 18/12/2023. These were that the Court held that the applicants' application was *res judicata* yet it was not similar to the Constitutional Petition No. E041 of 2021, that there was a settlement agreement between the 1st respondent dated 30/4/2012 which severed links between the applicants and the 3rd respondent and that the Court failed to consider the applicant's legitimate expectation that the 1st and 2nd respondents should have caused the registration of the transfer of shares they held in the 2nd respondent.
3. The Motion was opposed vide Grounds of Opposition dated 13/5/2024 by the 3rd respondent. It was contended that there was no discovery of new evidence or any error apparent on the record to warrant



- a review. That the Court having held that it had no jurisdiction due to the pending appeal No. E254 of 2023, the application was untenable.
4. That the filing of multiple suits on the validity of the Departure Prohibition amounted to Forum shopping. That the issue in the current application had been determined in Constitutional Petition No. E041 of 2021 and HC TA No. E384 vide ruling of 18/12/2024 and it was pending before the Court of Appeal in Appeal No. E254 of 2023. That the applicant should have sought recourse in the Court of Appeal and not before this Court.
 5. The Court has considered the rival contestations. The application is one for review under Order 45 of the *Civil Procedure Rules*. The jurisdiction of this Court under that provision of the law is exercisable if it is demonstrated that there is new evidence that was not available, despite exercise of diligence, at the time the order sought to be reviewed was passed, or where there is error apparent on the record or for sufficient reason. In addition, the application must be made timeously.
 6. To start with, the ruling sought to be reviewed was made on 18/12/2023. The present application was made on 2/4/2024. The same was made within 120 days. The application was, in my view, brought timeously. There was no inordinate delay.
 7. The present application was brought on the 3rd limb of Order 45 of the *Civil Procedure Rules*, for sufficient reason. The Court notes that the 3rd respondent's objection was that there was no new evidence or error apparent on the face of the record to warrant a review. It therefore did not address the issue of whether the grounds cited were sufficient reason under Order 45 of the *Civil Procedure Rules*.
 8. The applicant's contention was three-fold, that the application that the Court determined was different from the Constitutional Petition No. E041 of 2021 and therefore, the pending appeal No. E254 of 2021. That the application was therefore not res judicata; that there was a settlement agreement dated 30/4/2012 and that the Court had failed to consider the applicant's legitimate expectations that the 1st and 2nd respondent must have caused the registration of the transfer of their shares in the 2nd respondent.
 9. The objection was that the Court having found that the matter was res judicata, it was benefit of any jurisdiction to consider the present application and that by filing multiple suits, being the Constitutional Petition, the appeal arising therefrom and the present suit, the applicants were engaging in forum shopping.
 10. The answer to the contention that the Court lacks jurisdiction to entertain this application is in the negative. Under Order 45 of the *Civil Procedure Rules*, this Court has jurisdiction, under any of the three headings or grounds; new evidence, error apparent on the record and sufficient reason, to relook at the matter by entertaining the present application. The Court still retains the power to see if it erred on the basis of the said three principles or headings in holding that the matter was res-judicata.
 11. In the impugned ruling, this Court held as follows: -
 - “ 15. It is not disputed that the issue of the legality or otherwise of the Departure Prohibition Orders was an issue that was raised in the said Constitutional Petition No. E041 of 2021. The Constitutional Court determined the matter in favour of the defendant and found the challenge of the said orders to be unmeritorious. The plaintiffs appealed against the said orders and an appeal is pending in the Court of Appeal in *CA No. E254 of 2023*. I find that the issue of legality or otherwise of the impugned Departure Prohibition Orders was



raised and determined in the said Constitutional Petition. It cannot be raised in these proceedings. It is res judicata.”

12. I believe in order to gauge whether the issues in the Constitutional Petition were the same as in the application of 22/8/2023, it is imperative that the two principal pleadings, the Petition and the Plaint in this suit be compared.

13. In the Petition these were the prayers: -

- “(A) Declaration that the petitioners constitutional right of freedom of movement, to equality before the law, human dignity, freedom and security of the person, fair administrative action and fair hearing as guaranteed by Article 25 (c), 127, 28, 29, 38, 39, 47 and 50 of the Constitution have been violated and/or threatened to be violated by the respondent’s, their agents, employees and/or servants;
- (B) This Honourable Court be pleased and do hereby grant a Judicial Review Order of Prohibition to prohibit the respondent, its officials, employees, servants and/or agents or anybody working under or for it from commencing any tax enforcement measures, whether civil or criminal in nature, against the petitioners with respect to any tax questions or tax due from Family Signature Limited;
- (C) A permanent injunction to restrain the respondents, it officials, employees, servants and/or agents or anybody working under or for it from commencing any tax enforcement measures, whether civil or criminal in nature, against the petitioners with respect to any tax questions or tax due from Family Signature Limited;
- (D) This Honourable Court be pleased and do hereby grant a Judicial Review Order of certiorari to quash the respondent’s decision to issue a Departure Prohibition Orders against the petitioners and the respondent’s decision to commence tax enforcement measures against the petitioners with respect to tax due from Family Signature Limited;
- (E) Cost of this petition.

14. On the other hand, in the Plaint the following were the prayers: -

- “(a) A declaration that that the 1st and 2nd defendants are in breach of the Settlement Agreement dated 30/4/2012
- (b) A declaration that the 3rd defendant is in breach of its statutory duty owed to the plaintiffs.
- (c) An order directing the 1st and 2nd defendants to, within fourteen (14) days from the date of judgment, cause the registration of the transfer of the plaintiffs shares in the 2nd defendant to reflect that the 1st and 2nd plaintiffs are no longer shareholders or directors of the 2nd defendant herein.
- (d) in default to compliance with (c) above, the Registrar of Companies be directed to forthwith cause the register in so far as it relates to the 2nd defendant,



to be updated to show that the 1st and 2nd plaintiffs are not directors or shareholders of the 2nd defendant.

- (e) A declaration that the plaintiffs are not liable to settle or pay the 2nd defendant's tax liabilities as stated in the Departure Prohibition Orders dated 14/1/2021, or at all, or any other tax found to be due from the 2nd defendant.
- (f) A permanent injunction restraining the 3rd defendant, its agents, servants, or employees from claiming, demanding or taking any tax enforcement measures, including issuing any Departure Prohibition Orders, against the plaintiffs in respect of taxes owed by the 2nd defendant.
- (g) An order lifting the Departure Prohibition Orders issued against the plaintiffs by the 3rd defendant on 14/1/2021, and directing the 3rd defendant to communicate to all relevant agencies the lifting of said Departure Prohibition Orders.
- (h) As against the 1st and 2nd Defendants jointly and severally, special damages being the costs incurred, or to be incurred, in prosecuting Nairobi High Court Petition No. E041 of 2021.
- (i) As against the 1st and 2nd defendants jointly and severally, general damages for breach of contract.
- (j) As against the 3rd defendant, general damages for breach of statutory duty.
- (k) Interest on the special damages at 14% from the date of filing suit, and on the general damages at 14% from the date of judgment.
- (l) Cost of this suit plus interest at court rates from the date of judgment.”

15. From the foregoing, it is quite clear that the prayers in the Petition are completely different from the Plaintiff, save for prayer Nos. (D) in the Petition and (g) in the Plaintiff. These two were the only prayers directed at the quashing and lifting of the Departure Prohibition Order dated 14/1/2021.
16. I have also looked at prayer Nos. (c), (d) and (e) of the Plaintiff. They are geared towards correcting the anomaly that occurred. The anomaly is that despite having allegedly transferred all their shareholding in the 2nd respondent in 2012 and resigned as directors, the plaintiffs failed to ensure that they regularized that position by causing the transfer and resignation to be registered with the relevant government agencies including the Business Registration Bureau (BRS). Obviously, had they caused the said registration at the time or shortly thereafter, then in 2020 when the 3rd respondent carried out a search on the 2nd respondent, it would not have found in the CR12 that they were still shareholders and directors of the 2nd respondent when the subject tax liability was being incurred.
17. The other issue is that, it is clear from the Plaintiff that the plaintiffs are seeking to compel the 1st and 2nd respondent to register the said transfers and resignations. In the event of default, they have sought the Deputy Registrar to execute the necessary documents to effect the same.
18. The Court has noted that neither the 1st and 2nd respondent nor the 3rd defendant challenged the validity of the alleged transfer and resignations. Indeed, it was positively sworn that during the investigations of the 2nd respondent by the 3rd defendant which led to the tax liability, the 1st and 2nd respondent opposed the participation of the plaintiffs in the exercise on the basis that they were neither shareholders nor



directors of the 2nd respondent. A position the 3rd respondent agreed with. That positive averment was neither denied nor challenged by the 3rd defendant.

19. This Court is aware that in matters Judicial Review, which was in the Petition, the Court is basically concerned with the regularity of the process, whether the 3rd respondent followed the due process in issuing the Prohibition Departure Order. In that Petition, the Court found that the 3rd respondent followed the due process and was therefore entitled to issue the impugned subject order under the Law.
20. However, in the Plaint, the Court will at the trial consider, whether in view of the transfers of shares and resignation from directorship, the tax liability in the 2nd respondent could extend to the plaintiffs. The Court will be concerned with the merits of the whole transaction and not just the process. Before the merits are examined, a matter cannot be said to have been finally determined. To hold that the matter is res judicata would be to close the door of justice on the plaintiffs from litigating its case.
21. To this Court's mind, the two processes should have been considered, that is, that under judicial review the Constitutional Court was only concerned with the process while under the suit (Plaint), the Court would be considering the merits of the transactions from 2012 to 2020. If it is found that indeed there were transfers and resignation from directorship in 2012, then the tax liability of 2016 – 2010 of the 2nd respondent cannot stretch to the plaintiffs.
22. As regards, the Agreement between the parties of April, 2012, the Court finds that the same was effectively considered and determined by the Constitutional Court. It cannot be a sufficient ground to interfere with the ruling of 18/12/2023.
23. On whether the filing of a petition and suit is forum shopping, the Court does not think so. The Petition sought to effect and protect some perceived human rights. However, the suit seeks to enforce contractual obligations or remedies between the 1st and 2nd respondent, while the outcome of the dispute between the plaintiffs and the 1st and 2nd respondent will affect the actions of the 3rd respondent towards the plaintiffs.
24. In view of the foregoing, the Court finds that this matter is not res judicata either to Petition No. E041 of 2021 or [*CA No. E254 of 2023*](#). It therefore follows that that is sufficient reason to review the impugned ruling.
25. The other issue is that there are properties owned by the 2nd defendant which the 3rd respondent is said to have failed and refused to liquidate. These are LR Nos. 209/4987 and 209/3842. This is so despite the passage of time, 4 years after issuing the Departure Prohibition Order. It is even longer since the tax demand was made! In this regard, the Court sees no prejudice that may be suffered by the 3rd respondent if the orders sought are granted.
26. For the foregoing reasons, the application dated 2/4/2024 is meritorious. The Court finds that there is sufficient reason to review the orders of 18/12/2023.
27. Accordingly, the application dated 2/4/2024 is allowed. The ruling of 18/12/2023 is reviewed and set aside. Consequently, prayer Nos. 5, 6 and 7 of the Motion dated 22/8/2022 are allowed subject to the plaintiffs depositing security in the sum of Kshs.5 million. The costs of the application to be in the cause.

It is so ordered.

DATED AND DELIVERED AT KISUMU ON THIS 16TH DAY OF MAY, 2025.

A. MABEYA, FCI Arb



JUDGE

