



**Ndubi v Mwonjiru & another (Civil Appeal E138 of 2024)
[2025] KEHC 6571 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6571 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E138 OF 2024**

**HM NYAGA, J
MAY 15, 2025**

BETWEEN

ALEX GITONGA NDUBI PLAINTIFF

AND

ALICE MWONJIRU 1ST DEFENDANT

HENRY KWARA M'LAIKURU 2ND DEFENDANT

RULING

1. Coming up for determination in the Application dated 26th November, 2024, which seeks, the following orders: -
 - a. Pending the hearing and determination of this application, there be a stay of execution of the decree emanating from Judgment delivered in Tigania PMCC NO. E037 of 2023 Henry Kwara M'Laikuru & Ano. Vs Alex Gitonga Ndubi.
 - b. The Honourable court be pleased to review and vary its orders made on 31/10/2024 requiring the applicant to deposit an amount exceeding Ksh. 3,000,000/= being Ksh. 3,077,268 with the court and the Plaintiff's Advocates as a condition for stay of execution
 - c. The Honourable Court substitutes the condition with an order requiring the Applicant to deposit a sum not exceeding Kshs. 3,000,000/= which is the statutory liability limit of the Applicant as an insurer under Section 5 of the [Insurance \(Motor Vehicles Third Party Risks\) Act](#) Cap 405.
 - d. The Honourable Court do issue an order that K.Shs. 1,500,000 be deposited with the court as security for performance of the decree within 30 days.
 - e. The Honourable Court do issue a further order that K.Shs. 1,500,000 be deposited with the Respondents Advocates with 30 days.



- f. In the alternative, the Honourable be pleased to extend the timelines for stay for 30 days within which the Applicant will comply with the courts reviewed conditions for stay. Costs of this application be in the cause
 - g. Unless this Honourable Court intervenes urgently, the Applicant faces the risk of non-compliance with the condition, which may result in execution proceedings, causing irreparable harm.
 - h. This application has been filed promptly and in good faith.
 - i. It is fair and just to grant the orders.
2. The application is propped by ground set out on the face of it and is supported by the affidavit of Dominic Etyang sworn on even date.
 3. The applicant's case is that this court, albeit differently constituted, delivered a ruling on 31/10/24, and gave conditional stay of execution of the decree of the lower court. That the Appellant was unable to comply with the said orders as the respondent's advocates frustrated its efforts to open a joint account, by failing to provide a passport photo, which is mandatory. That the parties were also in talks over settling the matter but the same collapsed. That it is the imperative that the orders in question are reviewed so that the sum in question is deposited in court.
 4. It is further averred that there was an error apparent on the face of the record as the court did not consider the statutory limit of the applicant's Insurer, capping the payable sum at Ksh. 3,000,000/=, under the provision of Section 5 of the Insurance (Motor Vehicle Third Party Risks) Act. That the applicant is aggrieved by the orders to deposit an amount exceeding that statutory limit.
 5. It is further averred that the applicant has partly complied with orders of the court by filing the record of appeal. That unless the court reviews its orders the applicant will suffer substantial financial prejudice and irreparable harm. That no prejudice will be suffered by the respondent.
 6. In response, the respondent filed an affidavit sworn on 4th December, 2024. It is the respondent's case that the applicant's advocates were duly furnished with all the documents required to open the joint account, including the passport photographs.
 7. It is further averred that the appellant herein is not an Insurer and as such he cannot be heard to rely on the statutory limit under the Act in question. That in any event, the court only ordered payment of Ksh.1,538,634/- to him and the balance into a joint account. That the latter is accessible to the applicant should he be successful on appeal.
 8. It is further averred that there is no error apparent on the face of the record to warrant a review and the applicant is arguing an appeal in disguise.
 9. It is further averred that the attempts by the applicant to have the orders reviewed by consent were declined and, in any case, the applicant ought to have made the payment to him first.
 10. The parties filed submissions which I shall refer to in this ruling.
 11. Being an application for review, the applicant ought to bring himself under the provisions of Section 80 of the [Civil Procedure Act](#), which provides that:-
 - i. "80 Any person who considers himself aggrieved by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred.
 - ii. or



- iii. (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 order therein as it thinks fit”.
12. Further, the applicant must satisfy the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules, which provides as follows.
 - i. “45 (1) Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - ii. (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 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.
 - iii. (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 to the review”.
13. An application for review is guided by the principle of discovery of a new and important matter, an error apparent in the face of record or any other reason analogous to the first two. In *Muyodi vs. Industrial & Commercial Development Corporation & Anor.*, (2006) 1 EA 243, the Court of Appeal stated:
 - i. “For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.
14. In the Indian case of *Aribam Tuleswar Sharma vs. Ariban Pishak Sharma* (1979) 45CC 389, 1979(11) UJ 300 SC, it was held that:
 - i. “The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits that would be province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court.”
15. In the ruling delivered by my brother Justice E. Muriithi on 31st October, 2024, the court ordered a stay of execution of the decree of the lower court, on condition that the applicant, would, within 30 days, pay KSh. 1,5228,634/= to the respondent and deposit a similar sum in a joint interest earning account in the names of the advocate for the parties.



16. Evidently, the applicant failed to meet either condition. While he has belaboured to explain why the amount to be deposited was not so deposited, he has conspicuously failed to state if the payment to the Respondent was done.
17. So has the applicant surmounted the threshold for a review?
18. The applicant basically wanted this court to alter the terms of the ruling, by couching this application as a review while in essence, it all points to an appeal. The fact that the court ordered a deposit of the amount said to exceed the statutory limit is not an error on the face of the court record. It is a substantive determination and if the court erred, then it is a subject of appeal, not a review.
19. I also agree with the respondent that the question of the Insurer does not arise. It is the applicant who was ordered to comply with the orders.
20. If for arguments sake, that the Insurer could only pay out a total of Ksh. 3,000,000/= then it was incumbent upon the applicant to pay any amount in excess of that amount and not come to seek to alter a substantive order, made by a court of concurrent jurisdiction.
21. It is alleged that the failure to deposit the sum in court was due to the failure of the respondents advocates to provide passport photos. The letter requesting for the requisite documents was sent to the respondents advocates on 26th November, 2024, just 4 days to the expiry of the 30 days period set by the court, and it is the same day the application is dated.
22. The respondent states that all the documents, including the photos, were duly sent. It is thus difficult to tell who is telling the truth. The onus lay on the applicant to provide proof of steps taken to comply with the orders but he has failed to do so.
23. Having considered the matter, I find that the application lacks merit and is dismissed with costs to the respondent.

DATED, SIGNED & DELIVERED AT MERU THIS 15TH DAY OF MAY, 2025.

H.M. NYAGA

JUDGE

