



REPUBLIC OF KENYA



**Ohayo & Company Advocates v Ajinja & another (Miscellaneous Civil Case E009 of 2024) [2025] KEHC 6596 (KLR) (21 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6596 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
MISCELLANEOUS CIVIL CASE E009 OF 2024**

**DK KEMEL, J**

**MAY 21, 2025**

**BETWEEN**

**OHAYO & COMPANY ADVOCATES ..... APPELLANT**

**AND**

**OTIENO KEVIN AJINJA ..... 1<sup>ST</sup> RESPONDENT**

**ERICK OTIENO OWINO ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicant herein filed an application vide a Notice of Motion dated 27<sup>th</sup> January 2025 wherein he sought the following prayers.
  1. Spent
  2. That there be a stay of execution of the decree/ruling made on 6/12/2024 and any further proceedings in this reference pending the hearing of this application inter partes.
  3. That the court be pleased to review and vary its directions made on the 6/12/2024 at Order No. 2 by unconditionally allowing the Applicants to proceed with the Reference before the court.
  4. That the court be pleased to issue directions on the Reference.
  5. That the court makes further orders as it may deem fit and just to grant.
  6. That costs of this application be in the course.
2. The application is supported by the grounds set out thereunder and a supporting affidavit of the Applicants sworn on even date which states inter alia; that the court directed the Applicant to deposit the whole taxed amount of Kshs191574 in a joint account in the names of the counsels within thirty days; that the 1<sup>st</sup> Applicant is a teacher at Uranga Secondary School where his net salary pay is Kshs20,000/= in fact kshs15,617; that the 2<sup>nd</sup> Applicant is a teacher by profession but has since left



the profession for private reasons and as such he too does not have a sure and permanent point of income; that the applicant therefore cannot meet the condition of depositing the said taxed bill in court or in the names of the counsels; that the Applicants are therefore financially unsound to meet the conditions of the court in order to proceed with their Reference; that the Applicant had already paid the Respondent's counsel all the fees as agreed at the time when she came to hold brief in the matter; that the Applicants plead that they be allowed to ventilate their Reference unconditionally which they believe has high probable chance of success; especially in proving the issue of retainer between them and the Respondent's counsel; that the Applicant is undergoing difficult economic times that even meeting counsels fees has been difficult; that it is prudent that the court sits back and review and or vary its conditional orders made on 6/12/2024; that it is in the interest of justice that the orders sought herein are considered and granted.

3. The application was opposed by the Respondent via a replying affidavit of Ohayo Cynthia Mariam sworn on 25/2/2025. She averred inter alia; that she has read the notice of motion application and the affidavit in support thereof dated 26/1/2025 and wish to respond that she denies paragraph 2 of the supporting affidavit and that the Applicants are misled as the court do not issue orders and judgment in vain as the same would render court proceedings a mere academic exercise; that the applicant lacks audience before this court as they are in contemptuous breach of the orders of court issued on 6/12/2024 and that they should not be granted audience before this court until they purge their contempt; that the Applicants were well aware of the circumstances of the brief when they gave her instructions to represent them in the trial court; that she vehemently denies the contents of paragraph 4 of the supporting affidavit and that the application sought leave to be allowed to file a reference out of time made by the Respondents herein was allowed conditionally on 6/12/2024 and the court directed that the order for stay be granted on condition that the said Applicants Eric Owino and Kevin Ajinja do deposit a sum of Kshs 192,000/= in a joint interest earning account in the joint names of both advocates within 30 days from the issuance of the ruling, failing which the stay of execution shall lapse; that the prevailing circumstances, the Applicants have been in defiance of the court's orders issued in its ruling dated 6/12/2024; that the rationale for security for costs is aimed at balancing the overarching objectives in the administration of justice and that the same shall protect her firm against the risk that the order for deposit of security for costs issued by court on 6/12/2024 made in favour of the firm shall be rendered ineffective by the Applicants impecuniosity; that paragraph 5 of the supporting affidavit is admitted; that as for paragraph 6 and 7 of the supporting affidavit, it is denied and Applicants are put to strict proof thereof; that paragraph 9 Applicants need to give flimsy excuses in a bid to deny paying the sum owing to the firm and thus should be estopped from continuing with the constant abuse of the court process; that for paragraph 9,10 and 11 of the supporting affidavit, the Applicants are undesirous of prosecuting the matter as they failed to honour the condition set out by the court and should not be heard unless they purge their contemptuous acts; that paragraph 12 is denied and this court accorded a conditional order discretionally, and thus the Appellants should be compelled to abide with its directive in effecting access to justice to both parties; that it is in the interest of justice that the orders sought in the application dated 26/1/2025 be denied and same be dismissed with costs.
4. The application is canvassed by way of written submissions. Both parties complied.
5. Applicant submissions are dated 2/5/2025. The Applicants contend that the ruling of this court dated 6/12/2024 has placed the Applicants in a dire situation as they are unable to comply with the order to deposit security in the sum of Kshs192,500/= which was to be deposited into the joint interest earning account in the names of the advocates for the parties pending determination of the Reference. The Applicants further maintain that they have presented formidable and sufficient grounds to justify their prayer for review of the orders of this court on the ground that the Applicants financial means is not sufficient to meet the sums ordered to be deposited pending determination of the reference.



That both Applicants are teachers by profession and that they earn meagre salaries which cannot even sustain their families. That they seek this court to allow them contest the taxed costs in the Reference unconditionally without having to make the deposit as ordered. It was finally submitted that this court has inherent power pursuant to the provisions of Section 3 A of the *Civil Procedure Act* to make such orders as are appropriate in the interest of justice. The Applicants therefore have urged this court to allow the application as prayed.

6. The Respondent's submission are dated 30/5/2025. It was submitted that the application dated 27/1/2025 is an abuse of the court process as the Applicants were required to comply with the orders of 6/12/2024. That the Applicants have not given sufficient reasons why they could not comply with the order. That the Applicants claim that they have financial difficulties does not amount to the discovery of new matters since the Applicants were aware of their finances right from the beginning. That the hardship occasioned by the court order cannot form the basis for review of the order. That it would set a bad precedent for the Applicants to be allowed to seek review of taxed costs by merely citing inability to pay. That the Applicants did not raise objections regarding their financial wherewithal during the taxation of the bill. That the proper option for the Applicants is to negotiate the payment plans with the Applicants and if not to comply with the order. It was finally submitted that the application has not met the threshold for review under Order 45 Rule 1 of the Civil Procedure Rules and that the same should be dismissed with costs.
7. I have considered the Applicants application dated 27/1/2025 together with the rival affidavits as well as the submissions by learned counsels. It is not in dispute that this court vide the ruling dated 6/12/2024 granted the Applicants an order of stay of execution of the ruling of the lower court dated 27/8/2024 upon the Applicants depositing the assessed/taxed costs in a joint interest earning account in the names of advocates within thirty (30) days of the ruling failing which the stay shall lapse. It is not in dispute that the Applicants have not complied with the said order. I find the issue for determination is whether the application has merit.
8. It is noted that the Applicants' application aforesaid was brought pursuant to provisions of Order 45 Rule 1 of the Civil Procedure Rules which deals with review of orders made by courts. Indeed, a party is entitled to approach the same court that made orders with a view to persuading the said court to review its orders as appropriate. Review as set out under the above Order 45 Rule 1 of the Civil Procedure Rules is as follows:

“Any person considering himself aggrieved by a decree or order... from which no appeal has been preferred 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 on account of some mistake or error apparent on the face of the record... may apply for a review.”

From the foregoing, the Applicants must show that there is discovery of new and important matter or evidence which after the exercise of due diligence was not within their knowledge or that there is reason on account of mistake or error apparent on the face of the record.

The Applicants in their application have maintained that they had already paid the Respondent all her fees as agreed and that they feel that they have been prejudiced by being ordered to deposit another sum as a condition for them to pursue their grievances by way of a Reference. They also maintain that they do not have the money with which to deposit as ordered.
9. I have carefully analyzed the averments of the Applicants as well as those of the Respondents and find that the Applicants appear in my view to be using their inability to comply with the orders issued on



6/12/2024 to act as sufficient ground for review of the said orders. I find that the reasons advanced do not meet the threshold for review since the Applicants financial wherewithal or circumstances were matters well within their knowledge even at the time when they appeared before the lower court during the assessment/taxation of the advocate/client bill of costs and even before this court when they filed the application for stay pending the filing of a Reference. Hence, this is not a new matter that has emerged and in which the Applicants could not even by due diligence have seen. Again, the Applicants seem to fault this court for the order on stay on the ground that they had already paid the Respondent the requisite retainer and or sufficient legal fees. The question whether the Applicants had already paid the Respondent and therefore the Respondent cannot charge further fees should be properly canvassed in the Reference and not in this application. The Applicants must wait and ventilate that issue during the hearing of the Reference. In the case of *National Bank of Kenya v Ndungu Njau* [1997] eKLR, the Court of Appeal held:

“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. but it may not be granted on the ground that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law... That would be a ground of appeal, not review.”

It would therefore appear to me that the Applicants are appeared to suggest that this court while issuing the orders on 6/12/2024 had proceeded on an incorrect exposition of the law and reached an erroneous conclusion of the law. If that is the position, then the Applicants should not approach this court by way of review but proceed to appeal against the said order.

8. As the Applicants main plank in their application is in regard to the fact that they are unable to comply with the order of 6/12/2024 on grounds of financial inability, they ought to have brought the said fact to the fore during the canvassing of the application for stay of execution of the assessed costs so that the court could consider the same while issuing the conditional order on deposit of security pending determination of the Reference. Hence, I find the ground raised by the Applicants that they are now persons of straw cannot be taken as one recognized by Order 45 Rule 1 of the Civil Procedure Rules, as the same does not represent an error apparent on the record. It is clear that the Applicants have failed to comply with the order of 6/12/2024 and are now using the guise of not being able to get funds to satisfy the order due to their financial inability. Even though the Applicants are going through a rough patch in their financial circumstances, that is not sufficient reason to warrant a review of the order dated 6/12/2024. It is instructive that the rationale for orders of security for costs are made to balance the interest of the parties and to ensure that none of the parties in a suit are prejudiced whenever orders for stay of execution pending determinations of appeals or References as the case may be are made. The suggestion by the Applicants herein to be permitted to prosecute their reference without any conditions on deposit of security would greatly prejudice the Respondent who will have no recourse in the end and that the Applicants would have gotten away with impunity by not depositing the security for the due performance of the decree which would be binding on them in the end.
9. It is also noted that the issue in contention is about costs which were assessed by the lower court. It is trite that the issue of assessment and or taxation of costs is at the discretion of the taxing master and that once they have been assessed/taxed, they become payable by the party which has been ordered to



comply. In the case of Premchand Raichand Ltd & Another v Quarry Services of East Africa Ltd & Another [1972] EA 162, where it was held

“that taxation of costs is not a mechanical exercise but one that must be guided by reasonableness and fairness. Once taxed, costs become enforceable as decrees of the court under Section 51(2) of the Advocates Act Cap 16).

10. Even though the Applicants might be having financial constraints, it is my view that they should not use it as a reason to avoid performing their obligations pursuant of the order of 6/12/2024. In any event, the Applicants compliance with the same order does not prejudice them in any way since they will have an opportunity to ventilate their grievances during the hearing of the Reference and that in the event of success of the Reference, the Respondent who is an advocate of the High Court of Kenya will reimburse the Applicants any money or sums that had been paid in excess of what is owed to the said Respondent by the Applicants. Hence, granting the aforesaid application will not only prejudice the Respondent but it will set a bad precedent if parties are allowed to seek review of orders already made regarding deposit of security for due performance of decrees on grounds of financial difficulties. If any party is aggrieved by the orders of this court dated 6/12/2024 then the appropriate remedy will be to appeal against the same.
11. In view of the foregoing observations, it is my finding that the Applicants application dated 27/1/2025 lacks merit. The same is dismissed with costs to the Respondents.

**DATED AND DELIVERED AT SIAYA THIS 21<sup>ST</sup> DAY OF MAY 2025.**

**D. KEMEI**

**JUDGE**

In the presence of.

Ondego..... for Applicants/Clients

M/s Ochanyo.....for Respondent/Advocate

Okumu.....Court Assistant.

