



REPUBLIC OF KENYA



KENYA LAW
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**Volex General Motors (K) Ltd v Ukhevi (Civil Appeal E175 of 2023)
[2025] KEHC 12176 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12176 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E175 OF 2023

TW CHERERE, J

MAY 15, 2025

BETWEEN

VOLEX GENERAL MOTORS (K) LTD APPELLANT

AND

BENSON ONCHALA UKHEVI RESPONDENT

RULING

“Review is a limited remedy—available only to correct a clear error, admit new evidence, or for other sufficient cause—not to re-open a matter already determined.”

1. By a ruling dated 06th March 2025, this court dismissed the Appellant’s notice of motion dated 06th December 2024 for stay of execution of the judgement and decree dated 24th of February 2023 in Milimani CMCC No. 4464 of 2017 on the grounds that it was filed with undue delay and there was no proof of substantial loss.
2. The Appellant has moved the court by notice of motion dated 24th March 2025 under the provisions of section 1A, 1B and 3A of the *Civil Procedure Act* and Order 45 rule 1 and 2 and Order 51 rule 1 of the *Civil Procedure Rules* seeking;
 1. Review and setting aside of the ruling dated 06th March 2025
 2. Stay of execution of the judgement and decree dated 24th of February 2023 in Milimani CMCC No. 4464 of 2017
 3. Costs be provided for
3. The application is supported by the affidavit sworn on 26th March 2025 by Peter Gicheha, the managing director of the Appellant on the grounds that:



1. The court found that the Appellant had not demonstrated substantial loss without satisfying itself whether the Respondent was in a position to refund the decretal sum
2. The delay in applying for stay of execution was caused by the unavailability of the court file, as demonstrated by letters dated 09th October 2024 and 29th November 2024 marked PG-2 and the unavailability of the decree as evidenced by the letter dated 26th June 2024 marked PG-3
3. The orders sought will not be prejudicial to the Respondent
4. The Respondent though served neither filed a response nor attended court. While unopposed, the application must still meet the legal threshold for review and the applicable standards for stay of execution.

Issues for Determination

5. I have considered the application in light of the supporting affidavit and identified the following issues as arising for determination:
 1. Whether the application meets the legal threshold for review under Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#);
 2. Whether the renewed prayer for stay of execution is res judicata, having been previously determined Legal Framework on Review
6. The jurisdiction to review a court’s decision is conferred by Section 80 of the [Civil Procedure Act](#), which provides:

“ 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, and who from the discovery of new and important matter or evidence... 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... may apply...”
7. The procedure is outlined under Order 45 Rule 1 of the [Civil Procedure Rules](#), which states:

“ Any person considering himself aggrieved by a decree or order... 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, or for any other sufficient reason, may apply for a review.”
8. In [National Bank of Kenya Ltd v Ndungu Njau](#) [1997] eKLR, the Court of Appeal explained:

“ A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission... The error or omission must be self-evident... It will not be a sufficient ground for review that another judge could have taken a different view...”



9. And in *Francis Origo & Another v Jacob Kumali Mungala* [2005] eKLR, the Court held:
- “An erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.”
10. Similarly, in *Pancras T. Swai v Kenya Breweries Ltd* [2014] eKLR, the Court affirmed:
- “The power of review is available only when there is an error apparent on the face of the record or discovery of new and important matter... and not merely because a party is unhappy with the decision.”
11. In *Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd* [2014] eKLR, citing *Niels Bruel v Moses Wachira & 2 others* [2018] eKLR, the Court warned:
- “The jurisdiction is exceptional and has to be exercised sparingly and with circumspection to thwart disaffected parties who merely seek a second bite of the cherry...”

Analysis on Review

12. The gravamen of the Appellant’s application is that the Court erred in failing to consider whether the Respondent could refund the decretal sum. However, this contention goes to the merits of the ruling and amounts to no more than a disagreement with the Court’s conclusions. It does not demonstrate an error apparent on the face of the record within the meaning of Order 45 Rule 1 of the *Civil Procedure Rules*, as interpreted in the authorities cited above.”
13. The letters dated 09th October 2024, 26th June 2024, and 29th November 2024, which the Applicant now relies upon, were not part of the original application for stay of execution. However, no explanation has been offered as to why these documents could not, with the exercise of due diligence, have been obtained and presented at that time. The documents predate the earlier application and appear to have been within the control of the Applicant. The attempt to introduce them now amounts to an impermissible effort to improve upon a previously deficient case, and does not meet the threshold for review based on discovery of new and important matter within the meaning of Order 45 Rule 1.
14. As the Court of Appeal observed in *Francis Origo* case (*supra*), the review jurisdiction cannot be used to repackage arguments or correct omissions in litigation strategy. The proper forum for challenging a judgment perceived to be legally or factually erroneous is the Court of Appeal.
15. Upon consideration of the grounds advanced, the Court finds that no sufficient cause for review has been established under Section 80 of the *Civil Procedure Act* or Order 45 Rule 1 of the *Civil Procedure Rules*. The application does not meet any of the prescribed grounds—namely, discovery of new and important evidence, an error apparent on the face of the record, or other sufficient reason. It is, in substance, a thinly veiled attempt to appeal the decision through the backdoor of review.

Whether the Prayer for Stay of Execution is Res Judicata

16. The Court now turns to the second limb of the application, the renewed prayer for stay of execution. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act*, which provides:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit... and has been heard and finally decided by such court.”



17. The principles were applied in *Uburu Highway Development Ltd v Central Bank of Kenya & 2 Others* [1996] eKLR, where the Court affirmed that res judicata applies to applications, not just substantive suits.
18. This Court rendered a ruling on 06th March 2025 in which it dismissed the Appellant's application for stay of execution after hearing both parties. The issue of delay and substantial loss were fully canvassed and conclusively determined. The Appellant now seeks, in identical terms, a second determination of that same issue. The renewed prayer for stay of execution is therefore res judicata and its re-litigation is procedurally impermissible and amounts to an abuse of process.

Disposition

19. From the foregoing, I find that;
 - i. The Appellant has not demonstrated any error apparent on the face of the record
 - ii. No new and important evidence has been disclosed that was unavailable earlier
 - iii. The grounds raised fall within the province of an appeal and not review
 - iv. The prayer for stay of execution is res judicata, and thus not open for reconsideration.
20. In the end, the Notice of Motion dated 24th March 2025 lacks merit and is accordingly dismissed in its entirety. Given that the application was not opposed, there shall be no order as to costs.

DELIVERED AT NAIROBI THIS 15th DAY OF May 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Abdirizack

For Applicant - Mr. Wambui for Kibatia & Co. Advocates LLP

For Respondent - N/A for Wahito & Co. Advocates

