



**Homeart Limited v Diamond Trust Bank Kenya Limited & another (Commercial Case E144 of 2024) [2025] KEHC 7691 (KLR) (Commercial and Tax) (3 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 7691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E144 OF 2024  
JWW MONG'ARE, J  
JUNE 3, 2025**

**BETWEEN**

**HOMEART LIMITED ..... PLAINTIFF**

**AND**

**DIAMOND TRUST BANK KENYA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DALALI TRADERS AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before this Honourable Court is an Application by the Plaintiff filed under a Certificate of Urgency and is brought under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and it seeks the following orders:-
  1. Spent
  2. Spent
  3. That this Honourable Court be pleased to grant a stay of execution of the orders emanating from its Ruling dated 5<sup>th</sup> November 2024 in HCCOMM/E144 /2021- Homeart Limited vs Diamond Trust Bank Kenya Limited and Dalali Traders Auctioneers pending the hearing and determination of main suit.
  4. That this Honourable Court be pleased to review, set aside/vary the Ruling dated 5<sup>th</sup> November 2024 dismissing the Applicant's Application dated 15<sup>th</sup> arch 2024.
  5. That such further reliefs be granted to the objectors as this court would deem just and fit in the circumstances.
  6. The costs of this application be provided for.



2. The application is supported by the grounds set on its face and the supporting and further affidavits of Liban Mahdi sworn on 25<sup>th</sup> November 2024 and 7<sup>th</sup> March 2025 respectively. The Application is opposed and the Defendants have filed a replying affidavit sworn by Faith Ndonga. Both parties on the directions of this court filed written submissions which I have carefully considered.

3. It is not in dispute that this court considered an application by the Plaintiff and rendered its decision on the said application by its ruling of 5<sup>th</sup> November 2024. Flowing from the said ruling, the present application has been filed seeking to have the court review its said ruling and or vary or set aside the same. Section 80 of the *Civil procedure Act* has set out the parameters within which a court can review its own decision. The said section 80 provides as follows: -

“ 80. Review; 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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

4. In addition, Order 45 Rule 1 of the *Civil Procedure Rules* has set the grounds upon which such review can be conducted. Order 45 provides as follows:-

“ 1. Application for review of decree or order [Order 45, rule 1]

(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(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 for the review.”

5. As argued by the Plaintiff, the above provisions have been elucidated by the courts in various court decisions. In the case of *Republic v Cabinet Secretary for Interior and coordination of Government ex parte Abdulahi Said Said* (2019) eKLR cited by the Plaintiff, the court stated:-

“ a clear reading of the above section 80 gives the power of review while order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds:-



- a) 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 the decree was passed or the order made or;
- b) On account of some mistake or error apparent on the face of the record,”

6. I have carefully considered the application made by the Plaintiff and I have not found demonstrated through evidence or the matters pleaded to in the affidavit in support of this application any new facts that were not available at the determination of the application for injunction to the Applicant. Neither has it been pointed out by the Applicant that there is an error on the face of the record of the said ruling to warrant the court to review its ruling of 5<sup>th</sup> November 2024.
7. I agree with the arguments put forth by the Defendants that this court is therefore functus officio in so far as the present application is concerned. I note that the Applicant simultaneously with the present application filed a Notice of Appeal in the Court of Appeal signaling its intention to appeal the whole of the ruling of 5<sup>th</sup> November 2024. It is only appropriate that the Applicant proceeds to make the necessary application to stay the ruling herein before the Court of Appeal as this court, having pronounced itself on the application for injunction, cannot through the present application review its own ruling as to do so would amount to the court sitting on appeal on its own decision.
8. In sum, this court finds that the present application is without merit. The same is dismissed with costs to the Defendants. Interim Orders issued herein before are vacated. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3<sup>RD</sup> DAY OF JUNE 2025**

.....

**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

1. Ms. Wanjau holding brief for Mr. Hassan for Plaintiff/Applicant.
2. Mr. Muriungi holding brief for Mr. Kisinga for the Defendants/Respondents.
3. Amos- Court Assistant

