



REPUBLIC OF KENYA



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Green Planet Initiative 2050 Foundation v Earthbanc AB & 3 others (Commercial Case E004 of 2025) [2025] KEHC 10773 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
COMMERCIAL CASE E004 OF 2025
RN NYAKUNDI, J
JULY 24, 2025**

BETWEEN

GREEN PLANET INITIATIVE 2050 FOUNDATION APPLICANT

AND

EARTHBANC AB 1ST DEFENDANT

EARTHTREE COMPANY LIMITED 2ND DEFENDANT

KHANNA RISHABH 3RD DEFENDANT

JOSEPH KARANJA MURATHI KINUTHIA 4TH DEFENDANT

RULING

1. Before me for determination is the defendants' Notice of motion dated 23rd June, 2025 expressed under the provisions of Art. 159 of the *Constitution*, section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, 2010 and Order 45 Rule 1,2,3 of the *Civil Procedure Rules* 2010, in which the defendants seek orders as follows:
 - a. Spent
 - b. That in particular this Honorable Court be pleased to review and set aside Order (b) which provides: "The disputed donor funds shall be deposited into an interest-bearing escrow account with a reputable financial institution recognized by the Central Bank of Kenya to be jointly managed by the advocates for the parties, with withdrawals requiring mutual consent or leave of this court.
 - c. That in the alternative to (b) above, the Honorable Court be pleased to vary Order 50 (b) (present in the Court's Ruling of 13th June, 2025) to the extent that the applicants be pleased to deposit Kshs. 6,700,000.00 (Kenya Shillings six million, seven hundred thousand only) into



an escrow. The account is to be managed by the advocates on record for the parties herein. Such amount would be paid out of the working capital of the 1st and 2nd applicants.

- d. That the Honorable Court be pleased to make the necessary provision for the costs of this application.
2. The application is anchored on grounds on the face of it and a supporting affidavit as sworn by Joseph Karanja Murathi Kinuthia. The grounds are that:
- a. That the Honorable Court delivered a Ruling dated 13th June 2025 determining the Plaintiff/ Respondent's Notice of Motion Application dated 21st May 2025.
 - b. That as part of the Orders, the Court directed "The disputed donor funds shall be deposited into an interest-bearing escrow account with a reputable financial institution recognized by the Central Bank of Kenya to be jointly managed by the advocates for the parties, with withdrawals requiring mutual consent or leave of this Court."
 - c. That it is the Applicants' contention that the orders are incapable of being performed as 'the disputed donor funds' do not exist. There is no donor involved but rather a commercial transaction between the 1st Defendant on one part and the Plaintiff on the second part, as a service provider. The managing director of the Plaintiff, Festus Kiplagat, subsequently became an employee of the 2nd Defendant (before his services were terminated).
 - d. That plaintiff created an impression to court that their Memorandum of Understanding is a binding agreement. The document was to establish a relationship between the Plaintiff and the 1st Defendant. The legal contract between the Plaintiff and the 1st Defendant is the Services Agreement dated 12th December 2023 and its terms are clearly spelt out. The Services Agreement superseded the Memorandum of Understanding.
 - e. That the Defendant/Applicants are apprehensive of being held in contempt of court orders on the back of orders that are not capable of being performed because there are no donor funds.
 - f. That Respondent has subsequently written to the Kenya Commercial Bank which bank the 2nd Applicant has an account domiciled in. The intention of the Respondent's communication was to bar the 2nd Applicants access to any funds (comprising essentially all of the operational liquid capital of the Project for short term needs) pending the opening of an escrow account.
 - g. That Kenya Commercial Bank, on the strength of the said averments, actually moved and restricted access to relevant accounts between Tuesday 17th June 2025 and Wednesday 18th June 2025 (before deciding to reverse course on petition of the then Applicants' advocates).
 - h. That the actions of Kenya Commercial Bank, together with the Respondents' interpretation of the Court Orders issued on 13th June 2025, were misconceived and do not reflect a correct or lawful understanding of the said Orders indicating that said orders are clearly at risk of abuse and misinterpretation.
 - i. That the aforementioned actions by the Respondent are also in contravention of Order 50 (a) of the Ruling which states;

“That pending the hearing and determination of this suit, all parties are restrained from taking any action that would dissipate, alienate or diminish the subject matter of the dispute”



- j. That the Honorable Judge was misled by the Respondent into erroneously believing that they were donor funds hence issuance of the Order under Paragraph 50 (b).
- k. That the orders in their current form, are incapable of being effectively executed.
- l. That it is the persuasion of the Applicants that unless the said orders are reviewed and/or set aside, there is a likelihood that the Applicants will be held in contempt as the said orders are unenforceable.
- m. That net effect is a knock on effect paralyzing the operations of the 1st and 2nd defendant, its staff and employees and projects held in other sites other than the one with the plaintiff.

3 In further support of the application, Joseph Karanja deposed as follows:

- a. That I am aware that vide a Ruling delivered on the 13th June 2025, the Court issued seven orders. In particular, Order (b) provide that; The disputed donor funds shall be deposited into an interest-bearing escrow account with a reputable financial institution recognized by the Central Bank of Kenya to be jointly managed by the advocates for the parties, with withdrawals requiring mutual consent or leave of this Court.
- b. That the Orders are incapable of enforcement for the following reasons;
 - i. The relationship between the Plaintiff/Respondent and the 1st Defendant is a contractual agreement named Service Agreement dated 12th December 2023.
 - ii. The Memorandum of Understanding was a document only meant to establish a relationship. It was superseded by the Service Agreement.
 - iii. More importantly, this is a purely commercial transaction between the Plaintiff/respondent and the Defendants/Applicants. There Are No Donor Funds. The amount in the bank account is working capital. If the funds are transferred to an escrow account it has a knock on effect to create other breaches of law and statutory obligations.
- c. That I am reliably informed that in an apparently misguided attempt at enforcing these Orders, the Respondent through their advocates on record (Messrs. Kimani Kinuthia & Company Advocates) wrote to Kenya Commercial Bank vide a letter dated 13th June 2025. The aforementioned letter sought to bar any party from accessing the bank account No. 1325638346 (or any other at the said Bank) in the name of the 2nd Applicant, pending the opening of an escrow account.
- d. That based on the contents of the said letter, the Bank informed the 2nd Applicant on 17th June 2025 that their bank account had been restricted pending the establishment of an escrow account.
- e. That I am advised by the Applicants' advocates on record, which advice I verily believe to be true and accurate, that the interpretation adopted by the Respondents, as well as the resulting actions by the Bank, constitute a misapprehension of the Court Orders issued on 13th June 2025. Specifically, there was no directive within the said Orders that would oblige a bank to bar the 2nd Applicant or any other Applicant from accessing any bank account pending the opening of an escrow account or that would permit the Respondent to assert to any third party bank that such was permitted or required.



- f. That I am reliably informed that relevant bank accounts of the 2nd Applicant were put under restriction (from approximately 14.00 on 17th June 2025 until 10.00 on 18th June 2025) and that these are the primary account(s) used by the Applicants for the operation and management of the Project (e.g. payroll, rents, suppliers and similar operating cost). This account is also utilized for the remittance of statutory obligations, including but not limited to PAYE, NHIF, VAT, and Withholding Tax, among others. The funds in this account constitute working capital and not donor funds.
- g. That I am further advised that with the month of June coming to an end (had the bank not decided to reverse course and derestrict the accounts at the urging of the Applicant's advocates), the Applicants might fail to meet their statutory and operational obligations which will in turn jeopardize the project. I am further informed that this position flies in the face of paragraph 50 (a) of the Ruling which directed parties not to do anything that dissipates, alienates or diminishes the subject matter of the dispute. I am reliably informed that the Respondent's actions in approaching the bank and attempting and (for a short period) convincing it to restrict the named bank accounts may itself have been an action which could have resulted in the dissipation or diminishment of the subject matter of the dispute, in as much as it would have forced the Applicants to cease or reduce the scope of operations, which would predictably result in loss of value (or future increase in costs) in the implementation of the Project.
- h. That I am reliably informed that though the court orders are directing parties to deposit 'disputed donor funds' (sic), there are no donor funds. These are investments from equity and loans of the 1st defendant channeled to the 2nd defendant for project implementation.
- i. That I am further reliably informed that the Respondents misled the Honorable Court into believing that donor funds existed.
- j. That I am also advised by the Applicants' advocates on record, which advice I verily believe to be true and accurate that the said orders were obtained by material non-disclosure on the part of the Respondent as they intentionally misled the Court that there existed donor funds and that they had access/were entitled to the same.
- k. That it is important to note that in June 2024 the Managing Director of the Plaintiff, Festus Kiplangat was employed by joined employment with the 2nd Defendant and his contract of employment came to an end on 25th March 2025.
- l. That for the avoidance of doubt, what has been alleged by the Respondents to be donor funds is actually working capital for the Applicants' operations. The only rights to money or payments that ever accrued to the Respondent under the Services Agreement, were rights to payment for services provided or reimbursement for costs expended (being a claim against the 1st Applicant) which amounts were invoiced to and paid out of the working capital of the 1st Applicant, not out of some unproven pool of donor funds. Accordingly, inasmuch as the Respondent has not proven that there were any relevant donor funds or that the Respondent had any rights to such funds, I am reliably informed by advocates for the Applicants that the Respondents have not met the requirements necessary for interim relief such as that stipulated in Order 50(b) to be approved.
- m. That I refer to my Replying Affidavit sworn on 5th June 2025 (paragraph 21) and exhibit JK8 therein, being invoices submitted by the Respondent in the period 2022 - 2024. In order to assist the court by putting into perspective the actual scope of the Respondent's role in the Regeneration Kenya Project and the overall "value" of the Services the Respondent provided.



I provide for the court the following assessment of the total amounts invoiced and fully paid to the Respondent (figures in USD);

- i. Total amount invoiced by the Plaintiff/Respondent during its involvement in the Regeneration Kenya Project (2022-2025) is estimated to be: \$477,023
 - ii. Of that, \$427,023 represented pass-through costs (i.e. purchase of goods/services from third parties for the benefit of the 1st Applicant for which the Respondent was reimbursed, e.g. saplings, surveys, certain overhead costs, etc.)
 - iii. Amount invoiced by the Respondent to the 1st Plaintiff/Applicant in respect of project management and admin fees was only: \$50,000
- n. That I am further and reliably informed that in the Services Agreement and MOUs submitted by Respondent, there were no clauses that provide any fixed fees payable to the Respondent. The Respondent was only entitled to reimbursements for pass through cost or fees for services provided to the 1st Applicant provided its work was executed in accordance with the scope of work agreed.
- o. That I further invite the court to disregard the wholly inaccurate (and unsupported by evidence) allusions made by the Respondent about the overall value of the Regeneration Kenya Project (KES 20 billion) and focus instead on the total value that the Respondent ever invoiced for its own benefit (i.e. excluding reimbursement of purchase costs). I am reliably advised that there is not seemingly any claim that has been advanced by the Plaintiff/Respondent that there is actually any amount currently due and owing to it. However, if the Honorable Court is inclined to make an order for deposit of any amount to escrow, a reasonable assessment of the value of the Respondent's claim should be made on some form of factual basis. It might therefore be suggested that the court could have regard to e.g. actual amounts earned by the Respondent during the currency of its engagement. The amount in respect of project management and admin fees invoiced (USD 50 000) for services (not pass through costs) corresponds to approximately KES 6.5 million.
- p. That I am reliably informed and without undue regard to the foregoing, that as a good faith gesture and in the alternative circumstance that the Honorable Court is inclined to vary rather than set aside Order 50(b), the 1st and/or 2nd Applicant is willing to deposit, from their working capital, a cumulative sum of kshs. 6,700,000 (Kenya Shillings Six Million Seven Hundred Thousand Only) in a joint escrow account to be managed by the parties' advocates on record. It shall be noted for the record that the offer to deposit the aforementioned working capital, does not represent any admission of liability to the Plaintiff, does not constitute any admission of donor funds being disputed, and does not consist of donor funds being deposited, it is merely a gesture of good faith.
- q. That without further undue regard to the foregoing, the Applicants stress that, there are not in fact any amounts currently due and owing to the Respondent as all invoices submitted by the Respondent have been fully paid, and the Respondent has not provided any evidence of any amounts being due and owing. Such amount would be paid out of working capital of the 1st and/or 2nd Applicant (i.e. does not represent "donor funds") and does not represent any admission of liability to the Plaintiff. The offer to deposit the aforementioned, does not constitute any admission of donor funds being disputed, and does not consist of donor funds being deposited, it is merely a gesture of good faith.



- r. That the plaintiff/respondent purported KES 20 billion valuation of the Regeneration Kenya Project has no basis in fact and in law. There is no basis upon which the said amount has been arrived at. The total invoices in respect of project management and admin fees (i.e. not pass through costs) during the life of the services agreement the total invoices raised were approximately USD 50,000 over five months.
 - s. That at the time of signing this affidavit there is no outstanding invoice due and owing to the Plaintiff/Respondent either in his personal capacity or his organization for Service Provision.
 - t. That further to the foregoing an escrow is not necessary but the 1st and/or 2nd Applicants have offered a sum of Kes 6,700,000 as security for costs to be held in an escrow account.
 - u. That without conceding liability and strictly as a goodwill gesture, the Applicant is prepared to deposit KES 6,700,000 into a jointly managed escrow account in place of Order 50(b). This figure is proposed in the absence of any quantified claim by the Respondent in its Plaint.
 - v. That the Applicants further contend that Orders (a), (c), (d), and (e) are impermissibly vague, contradictory, and unenforceable;
 - w. That unless reviewed, these Orders risk holding the Applicants in contempt for impossibility to perform. The instant Application has been filed without delay to ensure fair, expeditious adjudication.
 - x. That in the present circumstances, granting the said orders sought in the present application will enable the Court to adjudicate upon all the issues in this suit effectively, expeditiously, timeously and affordably. I am also persuaded that this Honorable Court has been moved through the application herein without unnecessary and/ or undue delay, and, that it is in the interest of fairness that the orders for review sought.
4. In response to the application, the Plaintiff through Festus Kiplagat swore a replying affidavit on 25th June, 2025 stating as follows:
- a. That I am advised by my learned Advocates on record that this application is incompetent, frivolous, vexatious and an abuse of the process of this honorable court.
 - b. That I am also further advised by my learned Advocates on record that this application is an after-thought which is meant as an escape by the applicants from being cited for contempt of court having been served with notice of contempt and also as a time buying tactic to continue ignoring the court orders.
 - c. That this application is supported by an affidavit sworn by Joseph Karanja Murathi Kinuthia, the 4th respondent who is an employee of the 2nd defendant, did not in anyway participated in the contract between the plaintiffs/respondents and the 1st defendant/applicants and all that he alludes to in the supporting affidavit is hearsay and therefore breaches the rules of evidence.
 - d. That paragraphs 4, 6, 7, 8, 9, 10, 15 and 17 of the supporting affidavit offends the provisions of order 19 of the Civil Procedure Rules as the deponent has not disclosed the source of his information, those particular paragraphs must be struck out.
 - e. That throughout this application, there is non-disclosure of the bank accounts being operated by the defendants and equally non-disclosure of the amount of money being held in those accounts.



- f. That pursuant to paragraph 7 above, it will therefore not make sense for the applicants to start offering to deposit Kshs. 6,700,000/- in an escrow account without disclosing how much money is in their possession and the basis to deposit the Kshs 6,700,000.00.
- g. That the applicants have not in anyway explained what is their monthly expenditure on all the expenditure heads they have alluded to so that they can confidently say as they have done herein that the money they hold in their accounts are meant for running expenses and nothing more.
- h. That our position in law is that we have a binding service contract with the 1st defendant which the 1st defendant has breached by incorporating the 2nd defendant to usurp and obliterate terms of that contract.
- i. That pursuant to paragraph 10 above, we as the plaintiff cannot be bystanders to watch the 1st defendant/applicant breach the afforested contract with impunity and more especially using a 3rd party, the 2nd defendant/applicant to do so, it is a well calculated, intentional act by the applicant which they have perfected globally more especially in India where they have similarly behaved to a company called Worldview Impact.
- j. That the subject matter in this suit is the project regeneration Kenya which was being undertaken by us which has now been taken over illegally by the 2nd defendant/applicant without any due process of the law and in blatant breach of service the contract.
- k. That further, the purported continuity by the 2nd defendant who were not party to the service contract of the project, the substratum herein constitutes acts of further breach of contract and is prejudicial to the plaintiffs. This honorable court has to put a stop to it.
- l. That in the entirety of this application, no difficulty has been disclosed or explained in complying with the court orders herein issued by the court on the 13th June 2025.
- m. That whereas this honorable court did not give timeline for compliance, given that the court gave 24th of June 2025 as a date for mention for compliance, the applicants needed to use that date as a time in which they should have complied with the orders.
- n. That obtaining a resolution by a law firm on which Advocate to open a bank account is a mundane issue which does not have to take 14 days and so is the issue of seeking instructions from the clients on which bank to open which otherwise is an issue that ought to be left to the Advocates on either side, these are very lame excuse.
- o. That this project is geared towards the global climate change alleviation and the programs thereof are funded by donors, I am aware that the donor funds being expended in this project comes from organizations such as Astrazeneca and the sale of carbon credit, it is therefore a lie that the funds are raised by the applicants from other sources as they claim.
- p. That by and large this application is spent, the issues being raised herein are the issues which the applicants advanced in response to our application giving rise to the ruling dated the 13th June 2025, it cannot therefore be said that we misled the court to make the orders when the applicants were heard and fully participated on this same issues.
- q. That my employment to the 2nd defendant/applicant in a contract signed on 7th August 2024 and marked J.K.M 6c did not in anyway extinguish the contract between the plaintiffs and the 1st defendant/applicant (herein marked annex F.K 5) which is a service level contract and not an employment contract.



- r. That the applicant's assertion at paragraph 8 of the supporting affidavit is a clear misinterpretation of the Court Order at paragraph 50(a) of the Court's Ruling, the clear interpretation is that the subject matter was to be preserved nothing less and for nothing more, anything suggested by the applicants in this application especially touching on the 2nd defendant/applicant is a continued breach of contract which is not permissible.
 - s. That the plaintiff respondents are not seeking for any debt from the applicants, the applicants are mistaken by alluding in paragraph 14, 15 and 18 that all the dues to the respondents were paid. The issue before court is one of breach of contract not unpaid dues.
 - t. That this application is based on Order 45 of the Civil Procedure Rules which order I am advised by my learned Advocates on record is premised on discovery of new evidence or on account of mistake or error apparent on the record or any other sufficient reason.
 - u. That pursuant to paragraph 22 above, no error, mistake or sufficient reason has been demonstrated to warrant review, the best that the applicant ought to have done was to seek interpretation of the orders as opposed to a review.
 - v. That the applicant has without prove or basis alleged that the Orders (a) (c) (d) and (e) issued by this court on 13th June 2025 are impermissibly vague, contradictory and unenforceable, this rubbishing of the court orders without indicating and demonstrating how smacks of bad faith, malice and even rudeness.
 - w. That I feel the major issue herein relates to Account No. 1325638846 held by the defendants at KCB Sarit Centre Branch, that account if not restricted will continue to make the applicants blatantly ignore this court's orders and act with total impunity.
 - x. That pursuant to paragraph above, and for the court to understand the aforesaid account, it is important and imperative that the applicant avail bank statements thereof as from 13th June 2025 to date.
 - y. That the applicants have not met the threshold to review the courts orders and we urge that the application be dismissed.
5. I have equally gone through the Plaintiff's supplementary affidavit sworn on 25th June, 2025 which I need not reproduce here and taken into consideration the averments in the said affidavit.

Defendants/Applicants' written submissions

- 6. Learned Counsel Mr Martim started by giving a background of the application and gave a legal background which forms the basis of the instant application. On the legal framework, learned counsel that the law on Review of Orders is provided for under Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* (Review of Orders). He argued that the applicants have met the legal threshold for review under Order 45 of the *Civil Procedure Rules*, 2010, noting that Section 80 gives the power of review while Order 45 sets out the rules that restrict the grounds for review and limit review to specific grounds including 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 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.
- 7. In support of his argument on the scope of review, Mr. Martim relied on the case of *Nyamogo & Nyamogo v Kogo* where the court discussed what constitutes an error on the face of the record. Similarly,



he highlighted the decisions in *Tokesi Mambili and others v Simion Litsanga* and *Evan Bwire v Andrew Nginda*.

8. Learned counsel argued that the Defendants/Applicants assert that this order was made in error because there are no donor funds. Rather, Mr. Martim submitted, the funds arise from a commercial contract between the Plaintiff and the 1st Defendant for services rendered, as governed by the Services Agreement dated 12th December 2023. The prior Memorandum of Understanding referenced by the Plaintiff was superseded and never crystallized into a binding agreement.
9. Mr. Martim further submitted that following the issuance of the ruling, Kenya Commercial Bank, where the 2nd Applicant maintains an account, froze access to said account based on communication from the Plaintiff. This caused material disruption to the operations of the Applicants, as the affected funds represented operational capital and not donor funds.
10. On the issue of whether the applicants have met the legal threshold for review, learned counsel argued that the assumption that donor funds were involved is an error of fact that materially affected the ruling. He submitted that the Services Agreement between the Plaintiff and 1st Defendant governed a commercial relationship, and there is no evidence on record of any external donor or grant.
11. Mr. Martim contended that this mistaken characterization has had legal consequences, including the freezing of business accounts belonging to the Applicants. The Respondent wrote to Kenya Commercial Bank which intention of communication was to compel the bank to bar the Applicants' access to the bank Account (comprising essentially all of the operational liquid working capital to run the project) pending the opening of an escrow account. Kenya Commercial Bank actually moved and restricted access to the said accounts between Tuesday 17th June and Wednesday 18th June 2025 before deciding to reverse course on petition by the Applicants' Advocates.
12. Learned counsel submitted that a further review of the evidence reveals that the funds sought to be frozen do not derive from a third-party donor agency but working capital belonging to the 2nd Applicant necessary for the ongoing operations of the Applicants. That the lack of specificity in the Court's description has led to wrongful interpretation and overreach by the Respondent and the third party bank. Mr. Martim argued that the Respondent misdirected the court that there were Donor Funds and that it had some form of rights to such funds yet the Relationship between it and the Applicant is purely contractual, without reference to any such "Donor" or donor funds or grant of rights to any such funds. The Applicant is a Private Limited Company incorporated in Sweden and runs on its own capital and not donor funds.
13. Regarding whether the impugned order should be set aside or varied in the interests of justice, Mr. Martim submitted that given that the alleged disputed funds have not been quantified and furthered by the fact that the Respondent has not exhibited proof of donor funds, the Applicant posits that Order 50(b) is incapable of performance. He argued that the Court has discretion to either set aside the order in its entirety or vary it by directing deposit of a manageable amount (Kshs. 6,700,000.00) from working capital.
14. Learned counsel contended that the Court's discretion to review, vary or set aside its own orders is guided by the overriding objective of doing substantive justice between parties and avoiding hardship caused by rigid adherence to orders issued in error or based on mischaracterized facts. Mr. Martim submitted that in this case, the impugned Order 50(b) directed the deposit of disputed donor funds into an escrow account. However, the funds in question do not emanate from any donor, but from a purely commercial engagement.



15. On the nature of the relationship between the parties, learned counsel submitted that the Memorandum of Understanding and the Services in all its articles does not create a business partnership with profit sharing at the time of operation. He reiterated that the memorandum of understanding is intended to create a path towards a possible working relationship. The demand to the applicants by the respondent to deposit all their funds is unfair, unjust and unconscionable noting that there is no justification of the existence of donor funds or the respondent's rights therein.
16. In conclusion, learned counsel Mr. Martim submitted that the applicants have met the threshold to reviewing, varying and or setting aside of the Orders in the ruling of the 13th June 2025, and humbly prayed that the honorable court be pleased to grant the Orders sought.

Defendants' supplementary written submissions

17. Learned counsel submitted that whereas it is not in dispute that there existed an agreement between the parties, the Respondent failed to provide evidence that they were actually performing their obligation. Counsel argued that this is prima facie countered by the fact that (to the Applicants' knowledge) each of the employees of the Respondent (including the CEO and affiant for the Respondent) over a year ago agreed to and actually joined the 2nd Applicant's employ (in an exclusive and full-time employment relationship), and therefore the Respondent no longer had the manpower effectively to perform such obligations.
18. Learned counsel submitted that the Respondent also failed to provide any credible evidence to this Court even as to the existence of donor funds, much less that the Respondent has any interest in or rights to the same. In the absence of that, counsel argued that the Applicants posit that the Applicants failed to prove prima facie case with a probability of success.
19. In support of this argument, learned counsel relied on the case of *JM v SMK & 4 others* [2022] eKLR, where Justice Odunga defined irreparable loss.
20. Learned counsel submitted that whilst the test for irreparable loss is an injury that cannot be compensated by an award of damages, the Respondent's own averments that the issue in dispute is breach of contract divests them of irreparable loss. Counsel argued that as is well known, damages as a result of alleged breach of contract must be quantified and therefore must be by definition quantifiable. Counsel stated that the 2nd limb fails because the Respondent's claim(s) could be adequately compensated by an award of damages.
21. On whether the Orders issued on 13th June 2025 should be set aside, learned counsel submitted that the Applicant seeks reliance on Order 45 Rule 1 of the *Civil Procedure Rules* which provides for Application for review of decree or order. Counsel quoted the relevant provisions including the grounds for review such as 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.
22. Learned counsel submitted that it is the Applicant's position that the order directing the Applicants to deposit an unknown sum of monies tagged "donor funds" (which funds cannot be identified and have not been shown to exist) should warrant a review. Counsel argued that it is also not clear what it entails to have the 2nd Applicant stop holding itself as having exclusive authority, and that it is the Applicants' position that as a result of the Respondent's crafty misdirection, the wrong decision was arrived at. The orders as issued are an apparent injustice on the Applicant as compliance with the Order is untenable.



23. In concluding, counsel submitted that the instant application ought to be allowed and the orders issued by this court on 13th June, 2025 be set aside.

Analysis and determination

24. As a matter of recap the impugned ruling was heard and determined on the merits. It was the expectation of this court that the parties were to move the proceedings of litigating on the substantive issues as premised by the Plaintiff and against the Defendants. The affidavits by the Plaintiff as opposed by the respondents by way of grounds of opposition, left some critical issues under cover and it was the hope of this court under Article 50 (1) and other primary clauses on the right to a fair hearing to expedite the interpretation of the contractual relationship between the parties to this suit. However, notwithstanding that position, this court is enjoined by law to rule on the application by the Respondents. The scope of the jurisdiction, is under the power of review which is distinct from the power of a court exercised on appeal. When hearing a review application or a petition, filed against the same court, underpinned on its own order or judgement, the court does not re-hear the case at hand as it would be sitting on its own appeal. The purposes of a review application or petition, is limited to remedying an apparent error or the resultant grave of injustice that has been the consequence of a decision of the court. In so far as this case is concerned, the court is restricted in the exercise of the power of review only where the Applicant/Applicants have brought themselves within the statutory framework of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *CPR*. The spirit and letter of the law on the power of review is such that a party is not entitled to seek a review of a judgment delivered by this court merely for the purpose of a re-hearing and a fresh decision in the case. It is settled law that a judgement pronounced by the court or an application heard on the merits is final and departure from principle can only be justified when circumstances of a substantial and compelling character make it necessary to do so. In essence if the attention of the court which tried the cause of action is not drawn to evidential material or a statutory provision during the original hearing and the same was occasioned by error on the face of the record or mistaken application of the law to the same facts which was referenced to review jurisdiction may be invoked by the aggrieved party. What this means the court may also re-open its ruling or judgement if a manifest wrong has been done and it is necessary to pass an order under Section 80 of the *CPA* and Order 45 Rule 1 to do full, fair, proportionate and effective justice.
25. Having carefully examined the application, affidavits, and submissions filed by counsel, the central issue that emerges for determination is whether this court can set aside the orders issued on 13th June, 2025.
26. The power of review in the High Court is anchored in the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya and the *Civil Procedure Rules*, 2010.
27. Section 80 of the *Civil Procedure Act* provides as follows: -
- “ 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.”



28. Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 further provides for review in the following manner:

“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.”

29. The question of review has been the subject of extensive judicial consideration across multiple court decisions. The Supreme Court in Application No 8 of 2017, [Parliamentary Service Commission v Martin Nyaga Wambora & others](#) [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in [Mbogo and another v Shah](#) [1968] EA, upon establishing the following principles: -

“(31) Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. As a result, a wrong decision was arrived at; or



- b. It is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

30. The Supreme Court of India in the case of *Aribam Tuleshwar Sharma v Ariban Pishak Sharma* [1979] 45CC 389, 1979(11) UJ 300 SC, held that:

“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 exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the 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.”

31. Additionally, the same court in *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 stated as follows:

“The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

32. Finally, in discussing the guiding principles on the issue of review, the court in the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR pronounced itself as follows:

“I am clear in my mind that the reasons offered by the applicant do not qualify to be ‘sufficient reason’ within the meaning of the rules cited above nor are they analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. For this holding I rely on *Evan Bwire v Andrew Nginda* where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh. The principles which can be culled out from the above noted authorities are: -

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.



- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

- 33. The test as established in the authorities, is whether there was a patent error that is apparent without elaborate argument, or whether new evidence has emerged that materially affects the basis of the original decision. In the present case, the question is whether the characterization of the disputed funds as donor funds was based on incomplete or inaccurate information.
- 34. The central pillar supporting the original order was the representation that the dispute involved donor funds that needed to be preserved pending determination of the main suit. This characterization became dominant in the plaintiff's pleadings and formed the foundation for the court's decision to direct that these funds be deposited into an escrow account.
- 35. The defendants/applicants have however disputed that the amount involved was not donor funding. First, while the plaintiff's pleadings made reference to maintaining an account at Diamond Trust Bank, no specific account details were provided to the court during the original application. Yet, immediately following the ruling, enforcement efforts were specifically directed at Kenya Commercial Bank account number 132xxxx46, an account that had never been mentioned in the proceedings. This raises serious questions about whether the court was provided with complete information about the accounts actually at issue in the dispute.



36. What has now emerged from the more detailed evidence presented in this review application is a picture that differs largely from the initial impression. The defendants have provided documentation showing that the relationship between the parties was governed by a Services Agreement dated 12th December, 2023, which established the plaintiff as an implementing agent rather than a partner or beneficiary of the project funds.
37. The financial evidence presented by the defendants/applicants reveals that over the entire period of engagement, the plaintiff invoiced a total of USD 477,023, of which USD 427,023 represented pass-through costs for goods and services purchased on behalf of the first defendant. The actual fees for project management and administration amounted to only USD 50,000, and critically, all invoices have been paid in full with no outstanding amounts due, since the Plaintiff has not taken issue to any due payments.
38. These financial details through the invoices as presented by the applicants has brought out a different picture of the contractual relationship than what was initially understood by the court. While the ultimate nature of the parties' relationship and their respective rights will be determined at trial, the financial documentation now available suggests that the original interim order may have been premised on non-disclosure of the actual arrangements between the parties and the nature of the funds in question.
39. A matter of concern that emerges from the record is the apparent absence of specific details regarding the funds that form the subject of the dispute. The plaintiff has not provided precise amounts involved, has not identified specific funding sources, and has not clearly established the basis of any claimed entitlement to the funds in question. While this may simply reflect the preliminary nature of the proceedings, it does raise questions about the appropriateness of broad interim measures when the exact scope and nature of the dispute remains unclear.
40. If the evidence ultimately establishes that the plaintiff served as an implementing agent compensated for services rendered, then the appropriate scope of any interim preservation measures would logically relate to the value of services provided during that period, rather than the entire project funds in my view. The defendants' evidence indicates that all invoiced amounts have been paid, but the question of what constitutes adequate security pending trial should be proportionate to the actual scale of the claimed breach rather than the total value of the underlying project.
41. It is important to acknowledge that the court's role at the interlocutory stage is not to make final determinations about the merits of the underlying dispute. The relationship between the parties, the interpretation of their various agreements, and the ultimate question of whether any breach of contract occurred are all matters that must be fully ventilated during the trial of the main suit.
42. However, courts must ground interim orders on accurate factual foundations to ensure they remain effective and enforceable. When significant inconsistencies emerge such as in this case regarding the basic nature of the subject matter under preservation, the court has a duty to reassess whether the current interim measures serve their intended purpose or whether it should modify them to better reflect the situation as it now appears.
43. In recognition of the court's legitimate concern about preserving the subject matter of the dispute, the defendants have offered to deposit Kshs 6,700,000 into a jointly managed escrow account. This figure corresponds roughly to the Kshs. 6.5 million equivalent of the USD 50,000 in actual project management fees that the plaintiff received during their engagement.
44. The question before this court at this interlocutory stage is not to determine the ultimate merits of the parties' dispute; that remains a matter for full trial. Rather, the court must consider whether the current



interim arrangements rest on a sufficiently accurate factual foundation and whether they achieve a fair balance between safeguarding the plaintiff's legitimate interests and ensuring that the defendants can continue their operations without undue prejudice.

45. Having said that and having appreciated the applicants' concern, the practical attempt to enforce the original order resulted in operational disruption that may have been disproportionate to the actual scope of the dispute. In these circumstances, the interests of justice are better served by modifying the interim arrangements to reflect the apparent reality of the situation while still providing reasonable protection for the plaintiff's potential claims.
46. Based on the material evidence and arguments advanced by both counsels, I find that there was an error apparent on the face of the record in the original characterization of the disputed funds. This error was not necessarily the result of any deliberate misrepresentation, but rather appears to have resulted from incomplete information being available at the time of the original decision.
47. For the foregoing reasons, I find that the defendants have established grounds for review under Order 45 Rule 1 of the *Civil Procedure Rules* on the basis of error apparent on the face of the record. The original order was premised on incomplete information regarding the nature of the funds in question and the actual contractual arrangements between the parties. This court has carefully perused the impugned judgement order and have gone through the records and given its thoughtful considerations to the arguments advances by the learned counsels for the parties. The only point that arises, for consideration by this court in this review for application is whether the review applicants had made out a case for reviewing the judgement or order issued by this court as challenged by the Respondents. As alluded to above, the law on the limited scope of review power of any court is res integra. There is sufficient evidence to show that the Plaintiff and the 1st Respondent had entered into some contractual or Memorandum of Understanding Legal Relationship capable of being enforced. In the rival affidavits, there are some averments as to the conditions and warranties of executing the contract. There is even a statement on donor funds which formed part of the financial resources to actualize the implementation of the program being executed. However, at this interlocutory level, there is no robust evidence as to its nature, source, character, domiciled accounts and who had the partial or full responsibility of accountability. This is a moot question. Thus, in view of the above, the words donor funds formed part of the declarations made in the impugned ruling of this court. This issue may be crystalized at the main trial so that the court can establish whether it forms one of the serious issues to this commercial dispute between the parties. As of now the court has to go with the evidence which should be strictly confined to the scope and ambit of Section 80 of the *CPA* and Order 45 Rule 1 of the *Civil Procedure Rules*.
48. Given that background, rather than setting aside the interim protective measures entirely, the interests of justice are best served by varying the order to achieve a balancing effect that would not be detrimental to either of the parties. The defendants' offer to deposit KSh. 6,700,000 as security provides a reasonable middle ground that addresses the court's concern about preservation of the subject matter while avoiding the operational difficulties associated with the original order. As established by the parties and without necessarily delving into the merit of the case, this amount bears a direct relationship to the actual scale of the plaintiff's documented involvement in the project and provides meaningful security for any potential claim.
49. As a result, the application dated 23rd June, 2025 is partially allowed in the following terms:
 - a. Order 50(b) of this Court's Ruling dated 13th June 2025 is hereby varied to read as follows:

"The Defendants shall, within fourteen (14) days of this order, deposit the sum of Kenya Shillings Six Million Seven Hundred Thousand (Kshs. 6,700,000.00) into an interest-bearing



escrow account with a reputable financial institution recognized by the Central Bank of Kenya, to be jointly managed by the advocates for the parties, with withdrawals requiring mutual consent or leave of this Court." Or in the alternative in a reputable financial institution with signatories from the Plaintiff/Applicant and the Respondents.

- b. All other orders contained in the Ruling of 13th June 2025 remain in full force and effect.
- c. In the interest of expeditious disposal of this matter and to avoid further procedural disputes, the following strict case management directions are hereby issued:
- d. That the suit so filed should be expedited for hearing as a fast track
- e. That the Respondents have 5 days to file the necessary disclosures and pleadings touching on the main suit.
- f. That a pre-trial conference under Order 11 of the CPR be held on the 1.8.2025
- g. The costs of this application to abide the outcome of the suit.

50. Orders accordingly.

SIGNED, DATED AND DELIVERED VIA EMAIL AND CTS AT ELDORET THIS 24TH DAY OF JULY 2025.

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R. NYAKUNDI
JUDGE

