



REPUBLIC OF KENYA



KENYA LAW
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**P.I Samba & Co. Advocates v Bundotich (Miscellaneous Civil Application
E257 of 2021) [2025] KEHC 9658 (KLR) (Civ) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9658 (KLR)

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

CIVIL

MISCELLANEOUS CIVIL APPLICATION E257 OF 2021

JN MULWA, J

JULY 3, 2025

BETWEEN

P.I SAMBA & CO. ADVOCATES APPLICANT

AND

ZEDEKIAH BUZEKI KIPROP BUNDOTICH RESPONDENT

RULING

1. Zedekiah Buzeki Kiprop Bundotich (hereafter the Applicant) by his motion dated 22/01/2025 filed against P.I Samba & Co. Advocates (hereafter the Respondent) seeks inter alia: -
 - a. Spent
 - b. That an order of review, quashing and or setting aside the orders issued on 22/11/2024 directing the Applicant to deposit Kshs. 278,178.08/- by close of business on 25/11/2024.
 - c. That the honorable Court do order the Respondent to collect and or accept the Log Book of motor vehicle registration No. KBW 270L Subaru Station Wagon and to furnish the Applicant with her Kenya Revenue Authority (KRA) Personal Identification Number (PIN) and Identification Document (ID) to effect transfer in the National Transport and Safety Authority (NTSA) portal.
 - d. That the warrants of arrest issued in the matter be lifted forthwith.
 - e. That upon transfer the matter be marked as settled and file closed.
 - f. That the costs of the application be in the cause.
2. The motion is supported by an affidavit sworn by Zedekiah Budotich Kiprop dated 3/02/2025 whose gist is that on 21/11/2024 this Court issued an order suspending warrants of arrest issued against him



on condition that he deposits Kshs. 278,178.08/-as security by close of business 25/11/2024, which he did not comply with. However the Applicant states that the parties entered into a consent on a without prejudice basis, wherein he was to surrender physical possession of motor vehicle registration No. KBW 270L, to settle the decretal sums however the Respondent has on numerous occasions refused to collect and or effect transfer of the vehicle leaving the Applicant in limbo hence non-compliance with this Court's orders issued on 21/11/2024.

3. The Applicant further states that he is willing to effect transfer of the motor vehicle and bring the matter to a permanent closure however the Respondent has refused to issue or furnish her PIN and ID to effect transfer. He concludes by stating that it is in the interest of justice that the motion be allowed given that the live warrants of arrest are prejudicial and have far-reaching consequences.
4. The Respondent opposes the motion by way of a replying affidavit deposed by Pennynah Samba dated 07/02/2025, arguing that the motion is an abuse of the Court process with the intention of avoiding to settle the decretal sum, escalate litigation costs meanwhile cushioning the Applicant from complying with Court orders. That the Applicant's reliance on "without prejudice" communication between the parties hereto in his affidavit in support of the motion runs afoul of Section 23 of the *Evidence Act*. She goes on to depose that motor vehicle registration No. KBW 270L is already a subject of proceedings in Nairobi Milimani HC Comm. Misc. No E414 of 2021 therefore any deliberations over the vehicle would offend the law, offend economical use of judicial time and risk conflicting decisions over the same subject matter.
5. In addition, the Respondent states that the application is misconceived as it seeks to enforce a proposal or offer where there has been no acceptance hence the Respondent cannot be compelled to abide by the said proposal. She goes on to state that the motion is bad in law as it is disguised as a judicial review application and equally presented as a review application without setting out the requisite grounds on which review is premised. In summation, she deposes that it is only fair and just that the motion is dismissed with costs for being an abuse of the Court process.
6. Despite directions on disposal of the motion by way of written submissions, neither party complied with the said direction. That said, the Court has considered the rival affidavit material and postulates that the issues for determination concern:
 1. Whether the Applicant's motion is merited?
 2. Who bears the costs of the motion?

Whether the Applicant's motion is merited?

7. Ex facie, the Court agrees with the Respondent's deposition that the motion as presented is quite paradoxical as the Applicant has since invoked the provisions of Article 23 of the *Constitution*, Order 53 of the Civil Procedure Rules (CPR) and Section 9 of the *Law Reform Act* being provisions applicable to judicial review whereas the motion as presented bears semblance of a review motion pursuant to Order 45 of the CPR as read with Section 3A of the *Civil Procedure Act* (CPA). Suffice to say, were it the intention of the Applicant to present the motion. Further, the motion itself is not compliant with rules of procedure pursuant to Order 53 of the CPR. The Supreme Court in *Moses Mwigigi and 14 Others vs Independent Electoral and Boundaries Commission and 5 Others* [2016] eKLR stated regarding importance of rules of procedure that:-

"65. This court has on a number of occasions remarked upon the importance of rules of procedure in the conduct of litigation. In many cases, procedure is so clearly intertwined with the substance of a case, that it befits not the attribute



of mere technicality. The conventional wisdom, indeed, is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination, and yet it is overlooked by a litigant, the Court would not hesitate to declare the attendant pleadings incompetent.”

8. However, if the motion was presented as a review of this Court’s orders issued on 21/11/2024 pursuant to Order 45 of the CPR, by dint of the latter provision as read with Section 80 of the CPA, this Court is empowered to review its orders or judgments and make such orders as it may think fit, on conditions thereto to being -:
 - a. “Discovery of new and important matter or evidence which after due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the decree or the order made or;
 - b. On account of some mistake or error apparent on the face of the record, or
 - c. For any other sufficient reason and
 - d. That the Application has to be made without unreasonable delay”
9. The purport of Order 45 of the CPR has been the subject of numerous decisions within our jurisdiction meanwhile it has since been settled that the provision involves exercise of judicial discretion as observed in *Jason Ondabu t/a Ondabu & Company Advocates & 2 Others v Shop One Hundred Limited [2020] eKLR*. Prima facie, by the grounds amplified in support of the motion, the Applicant has not invoked any of the conditions set out in Order 45 of the CPR, to warrant this Court’s intervention by way of review.
10. Further, to contextualize the issue before the court, upon the Applicant presenting his amended motion dated 20/11/2024 under urgency, this Court (MeoliJ) considered the same ex-parte and proceeded to render itself by issuing directions as follows -:

“Having perused the physical file and upon considering the amended motion dated 20.11.2024, the Court directs that the motion be served for hearing on 31.01.2025 before Mulwa,J. in view of the imminent Court recess.

In the meantime, in order that the objects of the motion are not defeated, the warrant of arrest against the Applicant is hereby suspended, subject to the Applicant depositing into Court the sums in the warrant of arrest in execution dated 06.06.2024, that is, Kes. 278,174.08/- by COB on 25.11.2024” (sic)
11. It is the above order that forms the subject of the Applicant’s motion, to wit, judicial review proceeds appear to have been sought against. However, as earlier noted and the risk of repetition, the motion as presented is not compliant with the rules of procedure to thus warrant judicial review proceedings. And on whether review pursuant to Order 45 of the CPR would warrant in the circumstance, the motion is equally deficient of any of the requisite conditions required in order to invoke this Court’s review jurisdiction. Therefore, it would be difficult to render a determination on the motion as presented.
12. While it appears that parties were negotiating on the matter, this Court is inclined to agree with the Respondent that a party cannot be compelled towards consenting to terms it is not amenable to. In any event, as correctly deposed, the said negotiations were conducted on a “without prejudice basis” (See Annexure ZBK-1).



13. Section 23(1) of the *Evidence Act* provides that -:

“In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.”

14. The above provision has equally been litigated upon within our jurisdiction and particularly when without prejudice communication may be admissible. This Court is inclined to agree with the dicta of Shields J, in *Lochab Transport Ltd v Kenya Arab Orient Insurance Ltd* [1986] eKLR to the effect that:

“If an offer is made ‘without prejudice’, evidence cannot be given of this offer. However, if this offer is accepted, a contract is concluded, and one can give evidence of the contract and give evidence of the terms of the ‘without prejudice’ in the letter offer.”

15. Further, Halsbury’s Law of England Vol 17 at paragraph 213 states:-

“The contents of a communication made on a “Without Prejudice” basis are admissible when there has been a binding agreement between the parties arising out of it, or for the purpose of deciding whether such an agreement has been reached and the fact that such communications have been made (though not their contents) is admissible to show that negotiations have taken place, but they are otherwise not admissible.....”

16. Here, there is no evidence that there was an acceptance of the communication made in (See Annexure ZBK-1). Therefore, the use of such correspondence in the instant matter would run afoul of Section 23(1) of the *Evidence Act*, as rightly argued by the Respondent. That said, the Court’s directions on 21/11/2024 was well reasoned, and premised on the material presented before the Court at the time. Had the Applicant intended to set aside the said order or to have it varied, he would have moved the Court and not as currently presented.

17. The court has noted that the Applicant has not deposited the security ordered by the court to in its order of 21/11/2024. The orders were temporary in nature, and as rightfully stated by the court, as not to cause the object of the motion dated 20/11/2024 to be defeated. For the record and upon perusal of the proceedings in this matter it is not clear whether the Motion dated 20/11/2024, the basis of the court orders has been heard and determined. The Motion under review cannot replace the said motion.

18. The hitherto mutual settlement referred to by the Applicant has not been confirmed by the Respondent. To this argument, the Respondent states in the replying affidavit that it is a calculated move by filing the motion to continue enjoying the audience from the court without obeying its orders to provide security for due performance of the decree which is an abuse of court process.

19. In absence of a duly executed consent or agreement between the parties and duly filed to confirm variation of the court orders issued on 21/11/2024, which in any event were temporary and not complied with, the situation obtaining prior to the date of the said orders must remain and or varied upon application by either party under Order 45 of the CPR, not in the manner of the instant application.

20. The application camouflaged as a Judicial Review application in the circumstances hereto cannot be entertained. That being the case, the court is persuaded that the instant application dated 22/1/2025 is baseless and lacks merit. It is dismissed with costs.

Orders Accordingly.



DELIVERED DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF JULY, 2025

.....

JANET MULWA.

JUDGE

