



**Njeru v Director of Public Prosecutions & 2 others; Alahk Auto-Ke Limited (Interested Party) (Anti Corruption and Economics Crime Miscellaneous Application E004 of 2022) [2023] KEHC 1725 (KLR) (Anti-Corruption and Economic Crimes) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1725 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**ANTI-CORRUPTION AND ECONOMIC CRIMES**  
**ANTI CORRUPTION AND ECONOMICS CRIME**  
**MISCELLANEOUS APPLICATION E004 OF 2022**

**EN MAINA, J**

**MARCH 9, 2023**

**BETWEEN**

**BENSON MWANGANGI NJERU ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**OCS, INTEGRITY CENTRE POLICE STATION ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**ALAHK AUTO-KE LIMITED ..... INTERESTED PARTY**

**RULING**

1. On June 23, 2022 this court delivered a ruling by which it allowed an application filed by the Respondent herein for release of motor vehicle KCB 717H Prado to him. The motor vehicle was never released to him. Instead the Ethics and Anti-Corruption Commission/Applicant filed an application seeking review of the ruling.
2. The application is dated July 19, 2022 and is expressed to be brought under Order 22 (25) and 45 (1&2) of the [Civil Procedure Rules](#) and Section 80 of the [Civil Procedure Act](#).
3. The gist of the application as can be discerned from the grounds on its face, the supporting affidavit and annexures thereto is that the Respondent's application dated February 11, 2022 which culminated in the ruling sought to be reviewed, was supported by a defective affidavit and was therefore incompetent;



that the EACC/Applicant has now obtained evidence that the affidavit was not commissioned by the purported Commissioner for Oaths as the stamp thereon was a forgery; that the order of this court was therefore granted on the basis of forged documents and it is necessary and just that the order be reviewed and set aside.

4. The application is vehemently opposed by the Respondent. Through his replying affidavit sworn on November 25, 2022, it is the Respondent's contention that the application is premature, misconceived and it offends the provisions of Order 45 Rule 3(2) of the Civil Procedure Rules; that this court does not have the requisite jurisdiction to entertain the application as the allegations made are criminal in nature and as such should be proved beyond reasonable doubt; that the respondent had no reason to forge an attestation signature and stamp; that the charges against the Respondent at the Makadara Law Courts have no bearing whatsoever to the substratum of the impugned ruling and orders; that the Applicants have already complied with the orders and hence this application has been overtaken by events; that it will be prejudicial to the Respondent for this court to open up a matter that has been closed. Further that the provisions of Order 45 Rule 3(2) of the Civil Procedure Rules require strict proof and that as it stands this court has already rendered itself on the issue and the application is therefore not merited and it should be dismissed.
5. Parties canvassed the application through written submissions.
6. I have fully considered the application, the grounds thereof, the affidavit in support and in reply, the rival submissions, the cases cited therein and the law. The issues that arise for determination are:-
  - a. whether this court has jurisdiction to hear and determine this application.
  - b. Whether the application for review is merited.

**Issue (a) whether this court has jurisdiction to hear and determine this application.**

7. Contrary to the assertion by learned Counsel for the Respondent Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules vests this court with jurisdiction to review its own orders or decree. The only rider is that there must either: -Be discovery of new and important matter or evidence which after due diligence, was not within the knowledge or could not be produced by the applicant at the time the order was made; or A mistake apparent on the face of the record; or Any other sufficient cause.

The instant application is premised on the grounds of discovery of new and important matters which is one of the grounds upon which this court may hear an application for review. It is my finding, that the allegation by the Applicant that the order made in favour of the Respondent was obtained through an incompetent application as the supporting affidavit was not commissioned qualifies for "any other sufficient reason" and accordingly this court has jurisdiction to hear the application.

**Issue (b) - Whether the application for review is merited.**

8. Order 45 Rule 3 sets out the occasions when the court may grant or reject an application for review. It states:-

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- “45(3) Where it appears to the court that there is not sufficient ground for a review,
- (1) it shall dismiss the application.
  - (2) Where the court is of opinion that the application for review should be granted, it shall grant the same:



Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.”

9. The gist of the instant application is that the Respondent’s application dated February 11, 2022 was supported by an affidavit which was not “commissioned” hence a defective affidavit. The reason it is said the affidavit was not “commissioned” is because the Applicant has now obtained evidence that the Commissioner’s signature and stamp thereon were forged; that in fact the stamp belongs to one Grace Wambui Maina, a legal Counsel with the Plaintiff Commission, who has sworn an affidavit that though the stamp thereon is hers she did not commission the affidavit. Whereas learned Counsel for the Respondent does not dispute that fact it is his contention that the allegation of forgery is of a criminal nature and therefore it must be proved beyond reasonable doubt by a tribunal competent to try the issue but not by this court. While I agree that forgery is a criminal offence I am not persuaded that it does not concern this court to determine whether an application made before it based on an affidavit which is alleged was not commissioned by the person it purported to have commissioned it, is competent or not. That in my view is a matter that ought to concern this court given that an affidavit is evidence on oath and where it is found that the affidavit was not lawfully sworn then even the contents of the affidavit would be rendered unreliable. Of course the burden of proof required to be met by the Applicant would be lower than that in a criminal case where guilt must be proved beyond reasonable doubt. Here the court is not concerned with the culpability of the Respondent but only on the credibility of the contents of the affidavit and hence competency of the application.
10. I am satisfied from the affidavit of Grace Wambui Maina that she did not commission the impugned affidavit. There is evidence of a hand writing expert which further proves that the signature was not hers. In a statement recorded at the Ethics and Anti-Corruption Commission Learned Counsel herein on record for the Respondent intimated that the affidavit was commissioned by one Kendy Thike Mbatha of Magua & Co Advocates. The said Kendy Thike Mbatha however also recorded a statement and denied having commissioned the affidavit. He disputed that the signature and Commissioner for Oaths stamp on the affidavit were his.
11. Given the above, it is clear that the Respondent’s Notice of Motion dated July 19, 2022 was supported by an affidavit which was not properly commissioned and hence defective. Whereas Order 45 does not expressly provide that applications under that Order shall be supported by an affidavit, I do find that it would be an affront to the administration of justice to allow the ruling delivered on June 23, 2022 to stand.
12. In the premises, I am inclined to grant the application for review on the basis of the discovery of new and important evidence which was not available to the Applicant at the time the application was heard.
13. Order 45 Rule 5 provides that where an application for review is granted the court may at once order re-hearing of the case or make such order in regard to the re-hearing as it thinks fit. However, I am of the view that in the circumstances of this case it would not be in order to order a re-hearing. The order that best commends itself to me is to strike out the application in its entirety and give liberty to the Respondent to file a fresh application and I do so order.
14. I also order that the costs of this application shall be borne by the Respondent.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF MARCH 2023.**

**E N MAINA**

**JUDGE**

