



**Cp Hardware Limited & another v Bapa Limited (Commercial Appeal E051 of 2023)
[2025] KEHC 13916 (KLR) (Commercial and Tax) (26 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13916 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E051 OF 2023
MN MWANGI, J
SEPTEMBER 26, 2025**

BETWEEN

CP HARDWARE LIMITED 1ST APPELLANT

CATHERINE NJOKI NJIRAINI 2ND APPELLANT

AND

BAPA LIMITED RESPONDENT

RULING

1. The appellants/applicants filed a Notice of Motion application dated 19th December 2023 pursuant to the provisions of Sections 1A, 1B, 3A, 80 & 100 of the *Civil Procedure Act*, Order 45 of the *Civil Procedure Rules* and all other enabling provisions of the law seeking an order for review of this Court's Ruling delivered on 8th December 2023.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Ms Catherine Njoki Njiraini, the 2nd applicant herein and a Director of the 1st applicant. Ms Njiraini averred that on 8th December 2023, this Court dismissed the applicants' application for stay dated 13th March 2023, thereby allowing the respondent to proceed with execution. She noted that contemporaneously with filing of the instant Appeal, they had also filed a complaint before the Auctioneers Licensing Board against the Auctioneer, in respect to an auction held on 19th July 2022. That on 27th November 2023, the Board delivered a Ruling wherein it found that the Auctioneer had misconducted himself and failed to include all attached goods in the advertisement.
3. Consequently, the Auctioneer was ordered to account for all the goods listed on the Valuation Report, their whereabouts and how much each item was sold for. That the Auctioneer was fined Kshs.100,000/= and ordered to pay costs of Kshs.50,000/=. Ms Njiraini contended that the Auctioneer Board's Ruling came after the applicant's application for stay had been reserved for Ruling and they were only



able to obtain a copy of the said Ruling on 14th December 2023, which is after this Court had delivered its Ruling on the stay application on 8th December 2023. For that reason, they could not present the Board's Ruling earlier. Ms Njiraini asserted that in view of the above, the Board's Ruling constitutes new and important evidence warranting review of this Court's Ruling delivered on 8th December 2023.

4. In opposition to the instant application, the respondent filed Grounds of Opposition dated 10th January 2024 raising the following grounds –
 - i. That the Motion discloses no just cause for the prayer for review. No reasonable and logical grounds have been adduced to warrant the application for Review;
 - ii. That the application fails to satisfy any of the conditions set out under Order 45 Rule 1 of the Civil Procedure Rules, 2010;
 - iii. That the Ruling delivered by the Auctioneers Licensing Board in Miscellaneous Cause No. 71 of 2022 on 27th November, 2023 relates to the application dated 25th February 2023 whereas the Ruling for which the applicant desires its review relates to the application dated 13th March 2023, it therefore does not constitute discovery of new and important matter or evidence;
 - iv. That the application seeks to reopen a matter in which this Honourable Court is functus officio. Accordingly, the application invites this Honourable Court to sit on its own Appeal;
 - v. That this Honourable Court does not have jurisdiction to sit on an Appeal over its own decisions;
 - vi. That in any event, decisions of the Auctioneers Licensing Board are not binding on this Honourable Court;
 - vii. That furthermore, the Ruling by the Auctioneers Licensing Board delved into a separate subject matter from the one presented herein. The Ruling by the Auctioneer's Licensing Board only went so far as to consider the conduct of the Auctioneer therein and not whether the learned Trial Court erred in law and fact in delivering its Ruling dated 27th February, 2023, the subject matter of the Appeal and application herein;
 - viii. That the parties in the matter before Court and in the Auctioneers Board are different and therefore not important to the matter before Court; and
 - ix. That accordingly, the application is frivolous, vexatious and an abuse of the Court process. Accordingly, it should be dismissed with costs.
5. The respondent also filed a replying affidavit sworn on 10th January 2024 by Wilfred Nyangera Maranga, an Advocate of the High Court of Kenya and learned Counsel for the respondent. Mr. Maranga averred that the Auctioneers Licensing Board Ruling delivered on 27th November 2023 was in respect to an application dated 25th February 2023, while the Ruling sought to be reviewed was in respect to an application dated 13th March 2023, therefore the Board's Ruling does not constitute discovery of new and important matter or evidence. He stated that the instant application amounts to an invitation to this Court to sit on Appeal over its own decision, contrary to the principle of functus officio. Additionally, Mr. Maranga contended that the decisions of the Board are not binding on this Court, and that the Board's Ruling addressed a different subject matter concerning the Auctioneer's conduct, not the issues raised in this Appeal.
6. In a rejoinder, the applicants filed a supplementary affidavit sworn on 24th January 2024 by Ms Catherine Njoki Njiraini, the 2nd applicant herein and a Director of the 1st applicant. She contended



that the Ruling of the Auctioneers Licensing Board related to the validity of the auction and whether the Auctioneer misconducted himself by failing to follow a Court-sanctioned valuation. She stated that this Appeal challenges the Trial Court's failure to consider the application dated 25th October 2022, which sought to have the lower Court suit marked as fully settled on the basis that the attached goods were sufficient to satisfy the decretal sum. Ms Njiraini further stated that permitting further execution before this Appeal is heard and determined would prejudice the applicants.

7. The instant application was canvassed by way of written submissions. The applicants' submissions were filed on 25th January 2024 by the law firm of E.W. Ngatia & Company Advocates, while the respondent's submissions were filed by the law firm of Maranga Nyang'ute & Company Advocates on 15th January 2024.
8. Ms Ngatia, learned Counsel for the applicants referred to the provisions of Order 45 Rule 1 of the *Civil Procedure Rules* and submitted that the applicants have satisfied the conditions thereunder and urged this Court to grant the orders being sought. She contended that the Auctioneers Licensing Board in its Ruling delivered on 27th November 2023, censured the Auctioneer for failing to abide by a Court-sanctioned valuation and for not accounting for the attached goods, whereas this Court's Ruling delivered on 8th December 2023 was based on the Trial Court's failure to consider whether the attached goods were sufficient to settle the decree. She submitted that since the Board has now ordered the Auctioneer to account for the attached goods, this amounts to new and important evidence warranting consideration by this Court.
9. Counsel stated that the Board's Ruling was only issued to them after this Court delivered its Ruling of 8th December 2023, and it could not have been placed before this Court earlier. She argued that had the Board's Ruling been available earlier, it might have influenced the Court's determination on whether the applicants had met the requirements for stay of execution under Order 42 Rule 6 of the Civil Procedures Rules, 2010. Ms Ngatia asserted that the instant application was filed promptly on 19th December 2023, a few days after receipt of the Auctioneers Licensing Board's Ruling, thus the application herein was filed without any unreasonable delay.
10. Mr. Maranga, learned Counsel for the respondent referred to the provisions of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules* in support of the respondent's submissions. He submitted that the Auctioneers Licensing Board's Ruling delivered on 27th November 2023 cannot qualify as new evidence since it did not exist when the cause of action arose. He relied on the case of *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] KEELC 869 (KLR), and argued that judicial determination cannot be treated as subsequently discovered evidence. Counsel cited the Court of Appeal case of *Rose Kaiza v Angelo Mpanju Kaiza* [2009] KECA 422 (KLR) and contended that the Board's Ruling cannot be treated as newly discovered evidence since the applicants cannot show it was unavailable despite due diligence.
11. Mr. Maranga referred to the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others* [2021] KEHC 4068 (KLR) and submitted that an application for review should not be used as a means for the applicants to re-argue their initial application. Counsel relied on the Supreme Court case of *Odinga v Independent Electoral & Boundaries Commission & 3 others* [2013] KESC 8 (KLR) on the doctrine of *functus officio* and contended that the instant application improperly invites this Court to sit on Appeal of its own decision, contrary to the doctrine *functus officio*, which bars a Court from revisiting a matter once determined. He argued that this Court is not bound by the Board's decision under the hierarchy of Courts, hence the applicants' reliance on the Auctioneer's Licensing Board Ruling is irregular.



Analysis And Determination.

12. I have considered the application filed herein, the grounds on the face of it and the affidavits filed in support thereof. I have also considered the grounds of opposition and the replying affidavit by the respondent and the written submissions by Counsel for the parties. The issue that arises for determination is whether this Court should review its Ruling of 8th December 2023.

13. Review applications are provided for under the provisions of Section 80 of the [Civil Procedure Act](#) which states that -

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.

14. The said Section is elaborated under Order 45 Rule 1of the [Civil Procedure Rules, 2010](#) as follows -

Application for Review of decree or order.

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.

15. The Court in the case of [Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others](#) (*supra*) in dismissing an application similar to this one held as follows-

...section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe 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 when the decree was passed 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 whatever the ground there is a requirement that the application has to be made without un reasonable delay.
16. The applicants seek a review of this Court’s Ruling delivered on 8th December 2023 on grounds that together with this Appeal, they had filed a complaint before the Auctioneers Licensing Board regarding the auction of 19th July 2022. Further, that on 27th November 2023, the Board found the Auctioneer guilty of misconduct, ordered them to account for all attached goods and proceeds, fined them Kshs.100,000/= and awarded the applicants costs of Kshs.50,000/=. The applicants contend that they were only able to obtain the Board’s Ruling on 14th December 2023, after this Court had already delivered a Ruling dismissing their application for stay of execution, thus they could not have availed a copy of the Board’s Ruling to this Court earlier.
17. In view of the Auctioneers Licensing Board’s finding, the applicants asserted that the Board’s Ruling amounts to new and important evidence justifying review of this Court’s Ruling of 8th December 2023, because if it had been presented to this Court before delivery of its Ruling of 8th December 2023, it might have influenced this Court’s determination on whether the applicants had met the requirements for stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules*.
18. Upon perusal of the annexures attached to the applicants’ affidavit in support of the instant application, it is apparent that the Auctioneers Licensing Board’s Ruling of 27th November 2023 was dispatched to Counsel for the applicants on 11th December 2023, which is approximately four (4) days after delivery of this Court’s Ruling of 8th December 2023. This means that there was no way in which the applicants would have known about it or could have availed it to this Court before delivery of the 8th December 2023 Ruling, even with the exercise of due diligence. I am therefore persuaded that the Auctioneers Licensing Board’s Ruling of 27th November 2023 amounts to new evidence and/or information.
19. In order for an application for review to be successful, the evidence must not only be new, but it must also be important. The subject of the Ruling delivered on 8th December 2023 was an application dated 13th March 2023 by the applicants. In the said application, the applicants sought an order for stay of execution of the judgment delivered on 19th November 2021 by the Small Claims Court, in Milimani Small Claims Court Commercial Suit No. 551 of 2021. The application was mainly grounded on the fact that the Trial Court failed to consider the applicants’ application of 21st October 2021, which sought to have the matter marked as fully settled since the attached goods valued at Kshs. 997,790.00, were sufficient to satisfy the decree, but instead, the Auctioneer sold the goods for only Kshs.75,000/=, thereby subjecting them to further execution.
20. The Court in determining the applicant’s application took into consideration the provisions of Order 42 Rule 6 of the *Civil Procedure Rules, 2010* which provide for the conditions to be fulfilled before an order for stay of execution can be granted. This Court relied on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) and *Silverstein N. Chesoni* [2002] 1KLR 867, and held that execution alone does not prove substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. It further held that the applicants failed to demonstrate that they would suffer substantial



loss rendering the Appeal nugatory, whereas the respondent produced bank statements showing it is financially capable of refunding the decretal sum if the Appeal succeeds.

21. A perusal of the Ruling by the Auctioneers Licensing Board reveals that the Board did not find that the attached goods were sufficient to satisfy the decretal sum, but found that the advertisement exhibited by the Auctioneer did not capture all the goods contained in the valuation. The said Board directed the Auctioneer to account for all the goods listed in the Valuation Report, their whereabouts and the amount that each item was sold for.
22. It is my considered view that the above finding by the Auctioneer does not take away the fact that execution is a legal process, and in the face of a valid and unsatisfied decree, execution against the applicants does not in itself constitute demonstration of the applicant's likelihood to suffer substantial loss in the event that an order for stay of execution is not granted. In the premise, this Court finds that the Auctioneers Licensing Board's Ruling of 27th November 2023 would not have persuaded this Court to find that the applicants had met the requirements for stay of execution under Order 42 Rule 6 of the *Civil Procedure Rules*, even if it had been availed to this Court before the Ruling of 8th December 2023 was delivered. The Auctioneer Licensing Board's Ruling does not help the applicants in demonstrating what substantial loss they would suffer in the event that their application for stay of execution pending Appeal was disallowed.
23. In the circumstances, this Court finds that the Auctioneers Licensing Board's finding that the Auctioneer was guilty of misconduct and that the advertisement exhibited by the Auctioneer did not capture all the goods contained in the valuation, is not sufficient to demonstrate that the applicants stand to suffer substantial loss in the event that an order for stay of execution is not granted, more so because the respondents are holders of a valid and unsatisfied decree.
24. It is my finding that the Auctioneers Licensing Board's Ruling of 27th November 2023 does not amount and/or meet the threshold of discovery of new and important evidence which after the exercise of due diligence, was not within the knowledge of the applicants or could not be produced by them at the time the Ruling of 8th December 2023 was being delivered, to warrant this Court to review the said Ruling.
25. The upshot is that the applicants have not made out a case to warrant this Court to review its Ruling delivered on 8th December 2023. The application dated 19th December 2023 is found to be bereft of merits. It is dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF SEPTEMBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Ngatia for the appellants/applicants

Ms Otieno holding brief for Mr. Maranga for the respondent

Ms B. Wokabi- Court Assistant.

