Mahadi Energy Limited & another v Premier Bank Kenya Limited (Previously Trading as First Community Bank Limited) & 3 others; Kenya Law Reform Commission & 2 others (Interested Parties) (Constitutional Petition E066 of 2024) [2025] KEHC 14104 (KLR) (7 October 2025) (Ruling)

Neutral citation: [2025] KEHC 14104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION E066 OF 2024

G MUTAI, J

OCTOBER 7, 2025

BETWEEN

MAHADI ENERGY LIMITED .... 1ST PETITIONER

IBRAHIM HUSSEIN MAHADI .... 2ND PETITIONER

AND

PREMIER BANK KENYA LIMITED (PREVIOUSLY TRADING AS FIRST COMMUNITY BANK LIMITED) .... 1ST RESPONDENT

ATTORNEY GENERAL .... 2ND RESPONDENT

KENYA BANKERS ASSOCIATION .... 3RD RESPONDENT

CENTRAL BANK OF KENYA .... 4TH RESPONDENT

AND

KENYA LAW REFORM COMMISSION .... INTERESTED PARTY

SHA BEEL PROJECT SERVICES LIMITED .... INTERESTED PARTY

ULTRA EUREKA FARM LIMITED .... INTERESTED PARTY

RULING

1. This court delivered its ruling in respect of the notice of motion dated 7th November 2024, on 29th September 2025. I shall hereafter refer to the said application as "the contempt application". In the said ruling, the court found at paragraph 36 as follows:-

> " My finding, therefore, is that the petitioners/applicants have not discharged the evidentiary burden to the required standard. I am not satisfied that there was deliberate and willful disobedience of the court orders. I also doubt whether the 1st respondent's omission, upon being served with the court order, can amount to a breach of the court order. It is therefore my finding that the 1st respondent's officials are not in contempt of the court orders."

2. In disposing of the application, the court, at paragraph 37, stated as follows:-

> " Flowing from the foregoing, the orders that commend themselves to me are the following: -
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> a. The Notice of Motion dated 7th November 2024 is hereby dismissed;
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> b. Conservatory orders are hereby lifted; and
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> c. Matter to be set down for hearing of the main petition on a priority basis".

3. The petitioners/applicants are aggrieved by the said ruling and filed the notice of motion dated 30th September 2025 seeking to review the ruling. The said application seeks the following orders:-

   a. Spent;

   b. Spent;

   c. That this honorable court be pleased to review the orders made on 29th September 2025;

   d. That on review of the orders made on 29th September 2025, the honorable court be pleased to reinstate the conservatory orders made on 25th October 2024 in respect of the petitioners/ applicants dated 18th October 2024;

   e. That the honorable court be pleased to set the petitioners' application dated 18th October 2024 for hearing on a priority basis; and

   f. That the costs of the application be borne by the 1st respondent.

4. The grounds upon which the application is based are set out in the body of the motion, as well as in the supporting affidavit of Mr Ibrahim Hussein Mahadi, sworn on the same date. Mr Mahadi contended that this court, while dismissing the contempt application dated 7th November 2024, also lifted the conservatory orders, issued in this matter on 25th October 2024, in respect of the petitioner's application dated 18th October 2025, despite the fact that the said orders were to last until the hearing and determination of the subject application. It was further contended that the conservatory orders were the subject of an application dated 31st October 2024, which seeks to have them set aside. For this reason, the application dated 18th October 2024 was still pending, as were the 1st respondent's applications dated 31st October and 13th November 2024.

5. The petitioners/applicants contended that the orders made on 29th September 2025 contradicted those of 25th October 2024 and amounted to dismissing the application dated 18th October 2024, and

concomitantly allowing the application dated 31st October 2024, without hearing the parties on the merits. The orders that the court made on 29th September 2025, it was further stated, were made in error, amounted to an error apparent on the face of the record, and therefore are amenable to review. It was further contended that the petitioners/applicants were exposed to irreparable harm as they were in danger of losing the suit properties through further sales, transfers, and dealings of the said properties. The application, therefore, sought orders for the preservation of the suit properties and for the parties to be heard substantively on the petitioners' application dated 18th October 2024, and in respect of all the pending applications.

6. The application is opposed. The 1st respondent filed a replying affidavit, sworn on 3rd October 2025, by Meimuna Abdullahi Mohamed, the Head of Legal at Premier Bank, in which she deposed that the application lacked merit, was frivolous, and amounted to an abuse of the court process. Ms Mohamed contended that the petitioners /applicants lacked locus standi to obtain conservatory orders regarding the suit properties as the same were sold on 14th August and 4th September 2024 and that their equity of redemption was extinguished upon the fall of the hammer at the public auction, pursuant to the provisions of Section 98 (8) of the *Land Act*, 2012 as read with section 104 (4) of the *Land Act*. She contended that the remedy available to the chargors, that is, the petitioners/applicants, was an action for damages.

7. Ms Mohamed deposed that the court exercised its discretion to discharge the conservatory orders upon finding that the officials of the 1st respondent were not guilty of contempt of court and upon noting that the equities of the case did not justify continuation of orders that had already been overtaken by events. She further deposed that the court wasn't bound to await formal hearings or interlocutory motions, where subsequent events render such motions otiose, or where justice so demands.

8. Ms Mohamed further deposed that the conservatory orders issued on 25th October 2025 were actually discharged on 6th February 2025. Upon the filing of a fresh application dated 10th February 2025, the court granted interim orders, which were discharged on 29th September 2025.

9. She stated that there was therefore no cause for the ruling delivered on 29th September 2025 to be reviewed. It was thus urged that the notice of motion dated 30th September 2025 had no merit and that the same be dismissed with costs.

10. The second interested party opposed the application vide a replying affidavit sworn by Mr Suleiman Abdullahi Omar on 31st October 2025. Mr Omar deposed that the 2nd interested party was the bona fide legal owner of the subject properties, having purchased them at a public auction conducted on behalf of the 1st respondent.

11. Mr Omar deposed that the court found that the properties were sold on 14th August and 4th September 2024, and transfers were pending at the Lands Office for registration. For that reason, he averred that it would be illegal for the court to issue conservatory orders in respect of properties whose ownership the court itself had already recognized as having passed to third parties, including the second interested party. The deponent stated that the petitioners' interests were extinguished at the fall of the hammer and that there was therefore no danger of further losses.

12. Mr Omar deposed that a grant of conservatory or interim relief is a discretionary remedy and not a matter of right. The conservatory orders were expressly vacated and or discharged by this court on 6th February 2025, wherein it was held that the subsisting interim orders were "untenable" and "discharged forthwith."

13. The petitioners /applicants filed a further affidavit sworn by the 2nd petitioners/applicants, Mr Ibrahim Hussein Mahadi, in which he deposed that on 4th October 2025, the 1st respondent and 2nd interested party attempted to evict them from LR No 4689/MN/VI (CR 46162) with the aid of Officer Commanding Chaani Police Station and hired goons. In the said premises, the 1st petitioner and its sister company, Mahadi Container Depot Ltd, operate a container depot and cargo transportation business. Currently, there are over 3,000 containers and dozens of lorries belonging to their customers on the premises. The invasion had led to losses amounting to US$70,000 and further charges for failure to repatriate over 200 containers that were due to be loaded onto awaiting vessels.

14. Mr Mahadi contended that the petitioners challenge the constitutionality and the legality of Islamic banking, the charge instruments, the deed of settlement, and all auctions and transfers done subsequently thereto. He deposed that lifting of conservatory orders without a hearing exposed them to the risk of loss of the suit properties permanently and would turn the petition into an academic exercise, as no compensation has been sought in the petition. He further deposed that the responses filed herein did not address the issue of review but merely rehashed the arguments made previously in respect of the application for conservatory orders.

15. Mr Mahadi contended that protection granted to a purchaser by section 99 (1) of the *Land Act* protected a purchaser of a charged property who has obtained title in good faith and for value and that there was no protection in cases of fraud, misrepresentation or dishonest conduct on the part of the change, of which the purchaser has actual or constructive knowledge. It was deposed that the 2nd interested party had notice of the 1st respondent's alleged fraud, misrepresentation, and dishonest conduct, and was an active participant in it; therefore, it was not a buyer in good faith and for value.

16. He deposed that that upon obtaining the impugned court orders that 1st respondent and 2nd interested party were in a hurry to register the transfers and attempted to evict the petitioners on 4th October 2025 from the suit premises, to defeat any court orders that the court may give in respect of the application for review and that they were trying to use and order obtained on 7th February 2025 to evict petitioners/ applicants from the subject promises.

17. The deponent averred that the decision of the court to lift the conservatory orders was an error on the part of the court which should be remedied by reinstating the interim conservatory orders and hearing the parties on the merits in respect of the pending substantive applications.

18. The 2nd interested party filed a further replying affidavit, sworn by Suleiman Abdullah Omar on 6th October 2025, in which he deposed that upon delivery of the court's ruling on 6th February 2025, he instructed Allan Samuel Otieno of Next Genn Auctioneers to take possession of the suit promise. Pursuant to the said instructions, the auctioneer moved to court under MCCCMISCC No E051 of 2025 for the requisite orders, which were allowed on 7th February 2025. Mr Omar deposed that the orders he obtained were regular, as the conservatory orders had been discharged by then. When the orders were issued on 11th February 2025, he suspended the execution. Upon the delivery of the ruling on 29th September 2025, he instructed the auctioneer to execute the earlier orders, which, in his view, were completed on 3rd October 2025.

19. Mr Omar deposed that contrary to what was alleged, LR No 4689/MN/VI (CR 40162) belongs to the 2nd interested party and further that there was a new security contract with Armytex International Security Services, who had taken over the premises.

20. He stated that the 2nd interested party was a purchaser of the property, that the petitioners' equity of redemption had been extinguished, and that the petitioners' remedy lay in damages.

21. The application was canvassed by way of oral submissions made by the parties' counsels on 6th October 2025. The submissions mirror the averments made in the various depositions filed on behalf of the parties.

22. Mr Mogaka, for the petitioners, urged that the court was in grave error to lift the conservatory orders, as the effect of the said action was to deny the petitioners their right to a fair hearing under Article 50 of the *Constitution*, which right could not be derogated from. He submitted that the court ought to allow the application. Counsel relied on the decision of the Court of Appeal in the case of Chumo Arap Songok v David Kibiego Rotich [2006] KECA 106 (KLR) and urged that the status quo as of 25th October 2024 be maintained.

23. Mr Mwanzia, co-counsel for the petitioners, agreed with Mr Mogaka. He urged that the dismissal of the contempt application could not amount to allowing the application for discharge of the conservatory orders. He stated that the contempt application had a prayer for inhibition, which the court was within its discretion to dismiss. However, the court could not discharge the conservatory orders issued on 25th October 2025 while determining the application dated 7th November 2024. Mr Mutisya prayed that the previous orders issued on 25th October 2024 be reinstated.

24. Mr Njoroge, for the 1st respondent, contended that the application had no merit as the conservatory orders were discharged on 6th February 2025. In his view, the orders that the court discharged on 29th September 2025 were those issued on 11th February 2025. He submitted that conservatory orders could not be issued in favour of a party who does not own the property. Counsel contended that the court had discretion to issue, vary, or discharge orders and that what was done was lawful. He relied on the case of National Bank Ltd v Ndungu Njau [1997]eKLR in support of his submissions that it would be impermissible for the court to sit on an appeal against its own decision.

25. Ms Kiiru averred agreed with the submissions of Mr Njoroge and averred that 2nd interested party was a purchaser for value. She urged that for a review to issue, there had to be a glaring error that didn't require a lengthy process of reasoning or explanation. Ms Kiiru submitted that the only subsisting orders were those of 11th February 2025, which were discharged on 29th September 2025. She agreed with Mr Njoroge that the court had discretion to issue or discharge orders. She reiterated that the properties now belonged to the 2nd interested party and that the remedy available to the petitioners/applicants was damages.

26. In response, Mr Mogaka urged this court to review its orders and reinstate the conservatory orders that were issued on 25th October 2024.

27. I have considered the notice of motion dated 30th September 2025, the responses thereto, as well as the submissions of the parties. The issue, as I discern it, is whether the court made an error apparent on the face of the record and, if so, whether it should review the orders of 29th September 2025 by reinstating the conservatory orders issued on 25th October 2024.

28. Review of a decree or order is provided for in section 80 of the *Civil Procedure Act*. The said section states that:-

> " Any person who considers himself aggrieved:-
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> (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 the judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

29. Order 45, Rule 1 of the Civil Procedure Rules provides that: -

> "(1) Any person considering himself aggrieved: -
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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."

30. The review application in this case is based on what the petitioners/applicants say is an error apparent on the face of the record, to wit, that this court discharged conservatory orders issued on 25th October 2024 without hearing the parties, and by dint of that, allowed the 1st respondent's application seeking to discharge the orders suo moto. It is contended that the court's decision allowed the 1st respondent and the 2nd interested party to alter the situation on the ground and thereby defeat the petition.

31. What amounts to an error apparent on the face of the record? Has an apparent on the face of the record been disclosed in this case?

32. In the case of the National Bank of Kenya Limited v Ndungu Njau [1997] KECA 71 (KLR), the court expounded on what an error apparent on the face of the record is. The Court stated that:-

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

33. A similar finding was made in the case of Nyamogo and Nyamogo Advocates v Kogo [2001]1 EA 173, where it was held that:-

> "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where

there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review, although it may be for an appeal."

34. In the case of Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR, it was held by the Court of Appeal that:-

> "It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny, and elucidation either of the facts or the legal position. It is prima facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at the record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal, adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pages 2335-36, as follows:
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>> "The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in Mulla, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v Consumer Education & Research Centre [1981] AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law, Chhajju Ram v Neki [1922] 3 Lah. 127]..."

35. Having set out what amounts to an error apparent on the face of the record, I must now determine if that is the case in this matter. To do this, I will refer to the record.

36. On 25th October 2024, Lady Justice Olga Sewe issued conservatory orders in terms of prayer 2 of the notice of motion dated 18th October 2024, "pending the hearing and determining of the application." Her Ladyship fixed the matter for directions on 31st October 2024. On 31st October 2024, parties appeared in court. The 1st interested party had, in the meantime, filed an application dated 31st October 2024 seeking to discharge the interim orders. Upon hearing the parties, the court ordered that the applications dated 18th and 31st October 2025 would be canvassed together by way of written submissions. The court provided timelines for filing and serving written submissions. Mention was fixed before the duty court on 28th November 2024.

37. Vide and application dated 7th November 2024, the petitioners/applicants sought an order of inhibition against the subject properties. The court granted an order of inhibition and added Shabeel Project Services Ltd as an interested party to these proceedings. The application also sought to have the directors of the 1st respondent punished for contempt of court. This is the application that was the subject of the impugned decision.

38. On 6th February 2025, this court delivered a ruling vide which it ruled that this matter was subjudice the Nairobi HCCCOMM E556 of 2024, which it found to be between substantially the same parties over the same subject matter. In the paragraph, the court stated that:-

> " having been obtained in a petition, I have found as being subjudice, the subsisting interim/ conservatory orders are untenable. The same are hereby discharged forthwith."

39. The petitioners/applicants filed a notice of motion dated 10th February 2025 seeking a review of the orders made on 6th February 2025 on the ground that at the time the court delivered its ruling, the Nairobi matter had been withdrawn. This court issued several orders on 11th February 2025, of which Order No. 3 is relevant, as it preserved the subject properties pending the hearing of the notice of motion dated 10th February 2025.

40. On 26th March 2025, this court delivered its second ruling, vide which it allowed the application for review and ordered that the subsisting applications be heard once the preliminary objection dated 2nd December 2024 was heard and determined. The Court, at paragraph 23 of the said ruling, stated that:-

> " In the interest of justice, the subsisting orders shall be extended until then."

41. An attempt by the petitioners/applicants to stay the orders granted on 26th March 2025 was denied by this court on 9th May 2025. This decision was the court's third ruling in the proceedings. The court then proceeded to hear the contempt application dated 7th November 2024. This court delivered its verdict on 29th September 2025, in which it dismissed the application dated 7th November 2024, vide which the petitioners/applicants sought to have the directors of the 1st respondent punished for contempt of court. The Court lifted the conservatory orders.

42. The court notes that the impugned ruling was in regard to the application dated 7th November 2024. The effect of the dismissal of the said application was that the orders of inhibition that were made pursuant to the said application, and were then subsisting, would be discharged. This is what the court intended.

43. I note that the applications dated 18th October and 13th November 2025 are still subsisting and have not been determined by the Court. Due to the multiplicity of applications and counterapplications, the court, at paragraph 37(c), made an honest error in directing that the main petition be heard on a priority basis when the said applications are still pending.

44. In National Bank of Kenya Ltd v Ndungu Njau (supra), the Court of Appeal stated as follows:-

> " A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error must be self-evident and should not require an elaborate argument to be established…"

45. The error that this court made falls within the ambit of the said definition. In the circumstances, I allow the application. I reinstate the conservatory orders issued on 25th October 2024, pending the hearing and determination of the notice of motion applications dated 18th October and 13th November 2024, which applications shall be heard together on a priority basis.

46. Costs are at the discretion of the court. I order that the costs shall be in the cause.

47. It is so ordered.

DATED AND SIGNED AT MOMBASA, THE 7TH DAY OF OCTOBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Mogaka, Mr Mwanzia, and Mr Origi, for the Petitioner/Applicants;

Mr Njoroge and Mr Mumu, for the 1st Respondent;

Ms Kiiru, for the 2nd Interested Party; and

Arthur - Court Assistant.