



**Mohamed & another v Salim Mwadumbo t/a Mwadumbo  
& Co. Advocates (Miscellaneous Application E677 of 2022)  
[2025] KEHC 16479 (KLR) (Commercial and Tax) (7 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 16479 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E677 OF 2022**

**JWW MONG'ARE, J**

**NOVEMBER 7, 2025**

**BETWEEN**

**SHEHUNA MODHIHIRI MOHAMED ..... 1<sup>ST</sup> APPLICANT**

**NADHRA MODHIHIRI MOHAMED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**SALIM MWADUMBO T/A MWADUMBO & CO. ADVOCATES .. RESPONDENT**

**RULING**

1. The Respondent, through the Notice of Motion dated 11<sup>th</sup> March 2025 seeks to have the court review, vary, set aside, or discharge the Ruling of 3<sup>rd</sup> March 2025 that ordered him to pay the Applicants Kshs.35,000,000.00 =. The application is supported by the Respondent's affidavit sworn on 11<sup>th</sup> March 2025 and opposed by the Applicants through the replying affidavit of the 2<sup>nd</sup> Applicant sworn on 4<sup>th</sup> April 2025. The application was canvassed by way of written submissions which I have considered and I will be making relevant references to the same in my analysis and determination below.

**Analysis and Determination**

2. As submitted by the parties, the main issue for the court's determination is whether the ruling of the court of 3<sup>rd</sup> March 2025 ought to be reviewed, varied and or set aside. The parties agree that the principles governing the exercise of discretion to review a decree or order are now settled. Under section 80 of the *akn ke act 1924 3 Civil Procedure Act* and Order 45 of the Civil Procedure Rules, an Applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of new and important matter which was not available despite the exercise of due diligence or for any other sufficient reason for the court to review.



3. The Applicants' application is anchored on alleged "new, important and material evidence". On this, the Court of Appeal in *Rose Kaiza v Angelo Mpanju Kaiza* [2009] KECA 422 (KLR) held as follows:

The motion before the superior court was based on the discovery of new facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

".....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....."

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."

4. The Respondent claims that after the ruling, he managed to obtain seven RTGS transfer forms from NCBA Bank. That these documents were previously unavailable despite his efforts and were only released after the ruling and he argues this evidence is critical as it provides a clear and documented account of how the disputed funds were disbursed. That before the ruling, the Respondent had filed an application dated 20<sup>th</sup> January 2025 seeking to suspend the ruling and compel the production of bank statements. He contends that this application was not considered before the court delivered its ruling, thereby

**prejudicing his case.**

5. The Respondent uses this evidence to present an account of the total purchase price of Kshs.110,000,000.00 = from the sale of land parcel L.R. No. 36 VII 465 stating that the total received was Kshs.103,000,000.00 = and he argues that Kshs.7,000,000.00 = never reached his accounts. He states that Kshs.78,500,000.00 = was transferred directly to the 2<sup>nd</sup> Applicant's bank account, Kshs.4,500,000.00 = was used for legal fees and costs in a related tribunal case, which the Applicants acknowledged via signed discharge vouchers and that from the balance of Kshs. 20,000,000.00 =, Kshs.8,400,000.00 = was paid to another law firm, M s Abdulrahman Saad & Associates, Kshs.5,000,000.00 = was the Respondent's agreed legal fees and Kshs.6,600,000.00 = was used for the benefit of Fauz Ali Modhihiri, the Applicants' brother, for transfer costs of another property, with their alleged consent.
6. The Respondent also raises a concern regarding the 2<sup>nd</sup> Applicant claiming she is facing criminal charges related to fraud from the same transaction and he argues this undermines the legitimacy of the claim against him.



7. In response, the Applicants state that the RTGS forms from NCBA Bank, which the Applicant claims are new, were generated as early as 2016–2019 and were available before the ruling. That the Respondent failed to demonstrate due diligence in obtaining these documents earlier and that the same are uncertified and thus inadmissible under sections 78A,106B and 177 of the *akn ke act 1963 46 Evidence Act*.
8. The Applicants contend that the said evidence contains numerous contradictions, such as changing figures for example, Kshs.6,000,000 = to Kshs.6,600,000 =, discrepancies in amounts allegedly paid or received, conflicting claims about legal fees and transfer costs and the Applicants argue this is an attempt to patch up a weak case. In sum, the application is described as frivolous, vexatious, and an abuse of court process, aimed at delaying justice and the Applicants urge the court to dismiss the application with costs, arguing that it is without merit, procedurally flawed, and an attempt to re-litigate issues already decided.
9. I have gone through the pleadings and the submissions. I am inclined to agree with the Applicants that the evidence being presented by the Respondent are not really new as the same has always been available to the Respondent even before the ruling. The core "new" evidence is the seven RTGS slips showing transfers to the 2<sup>nd</sup> Applicant and others. The Respondent was already aware of these transactions as he had listed them in his earlier affidavits. The fact that he did not have the bank's own printouts at the time of the ruling is a failure of his own evidence-gathering. The court, in its ruling, explicitly noted that he failed to provide receipts and documentation to support his claims. He cannot use a review to fix a deficiency in his initial case preparation.
10. The Respondent has stated that he filed an application on 20<sup>th</sup> January 2025 to compel the bank and the Applicants to produce the very same statements he now presented. This proves he knew this evidence was crucial before the ruling and was always in existence but failed to get it in time, a fault of his own self. The Respondent has also annexed Discharge Vouchers allegedly signed by the Applicants acknowledging receipt of Kshs. 83,000,000 =. This evidence was always in his possession and as the advocate who drew up the documents and had them signed, he had these vouchers from the moment they were executed in 2018. His failure to annex them to his earlier deposition is a catastrophic litigation error, not grounds for review. A review is not a remedy for a party who did not present all available relevant evidence the first time.
11. This court made findings of fact based on the evidence before it at that time. The court found the Respondent's account of the missing Kshs.41,500,000 = unsatisfactory because there was no proof of stamp duty payments, no Client-Advocate fee agreement for the Kshs.5,000,000.00 =, no authority to pay Kshs.9,000,000 = to the Applicants' brother. Crucially, the court did not believe the Respondent had paid the Applicants Kshs.83,000,000 =, as they only admitted to Kshs.68,500,000 =.
12. I therefore take the view that the "new" evidence is an attempt to re-litigate these exact factual issues. A review is not an appeal. It is not an opportunity for a second bite at the cherry with the evidence you should have presented the first time.

### **Conclusion and Disposition**

13. In the foregoing, I find no merit in the Respondent's application dated 11<sup>th</sup> April 2025 and I dismiss the same with costs.

**DATED SIGNED and DELIVERED VIRTUALLY AT NAIROBI THIS 7<sup>TH</sup> DAY OF NOVEMBER 2025**

.....



**J.W.W. MONGARE**

**JUDGE**

In The Presence Of

Mr. Owino holding brief Mr. Wandati for the Respondent Applicant.

Mr. Oginga for the Applicant Respondent.

Amos - Court Assistant

