REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMM NO. E556 OF 2023

IBRAHIM HUSSEIN MAHADI..…….....1ST PLAINTIFF

MAHADI ENERGY LIMITED……...2ND PLAINTIFF

MAHADI OIL (K) LIMITED……...3RD PLAINTIFF

MAHADI CONTAINER DEPOT LIMITED……..…4TH PLAINTIFF

-VERSUS-

PREMIER BANK KENYA LIMITED (previously trading as FIRST COMMUNITY BANK LIMITED)……...……DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 25th February 2025 filed by the plaintiffs pursuant to the provisions of Article 50(1) and 159(2)(d) of the Constitution, Sections 1A, 1B, 34, 63 & 80 of the Civil Procedure Act, Order 45 Rules 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and any other enabling laws. The plaintiffs seek orders for review of the Orders made by this Court on 6th February 2025, particularly the order awarding costs of the withdrawn suit to the defendant. The plaintiffs also pray for the defendant's party and party bill of costs dated 6th February 2025 to be struck out with costs, on the basis that the bill is founded on an order that ought not to have been made.

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 Mr. Ibrahim Hussein Mahadi, the 1st plaintiff herein, and the Chairman and Managing Director of the 2nd, 3rd & 4th plaintiff companies. Mr. Mahadi averred that the plaintiffs

withdrew this suit in its entirety through a Notice of Withdrawal dated 10th December 2024, expressly indicating that there would be no order as to costs, a position confirmed by their Advocate when the matter came up for mention on 6th February 2025. He stated that despite the withdrawal, the defendant's Advocate insisted on costs, prompting the Court to mark the suit as withdrawn and to award costs to the defendant, an order that has aggrieved the plaintiffs.

3. Mr. Mahadi contended that this suit was necessitated by the defendant's illegal and unlawful actions of advertising the plaintiffs' properties for sale without issuing the mandatory Statutory Notices under the Land Act. He asserted that were it not for these actions by the defendant, the plaintiffs would not have approached the Court. He stated that the contractual relationship between the parties, as set out in the letter of offer dated 21st November 2016, expressly provided that all costs, fees, and expenses, including legal costs incurred by the defendant, are payable by the plaintiffs on demand and form part of the damages payable in respect of the facilities, thereby placing the burden of such costs within the contractual framework.

4. Mr. Mahadi averred that awarding the defendant party and party costs in the suit contradicts the terms and spirit of the contract and exposes the plaintiffs to double jeopardy by requiring them to pay legal fees twice over the same facilities. He asserted that this constitutes an error apparent on the face of the record and a sufficient reason to warrant review of the Court Order of 6th February 2025. He further averred that the defendant has since filed a party and party bill of costs running into tens of millions, which if taxed, will greatly prejudice the plaintiffs, while the defendant will suffer no prejudice if the orders sought are granted since it remains contractually entitled to recover its legal costs from the plaintiffs.

5. In opposition to the plaintiffs' application, the defendant filed Grounds of Opposition dated 5th March 2025, raising the following grounds –

    i) That the application is a non-starter, frivolous and an obvious abuse of the Court process;

    ii) That the application does not meet the threshold for granting orders of review, as there is no error apparent on the face of the record or new and important evidence that was not considered by the Court in issuing its Order dated 6th February 2025;

    iii) That the error apparent on the face of the record that the plaintiffs seek to rely on is introduced through an outdated letter of offer dated 21st November 2016 which was not even produced before the Trial Court. The letters of offer in force between the patties herein are dated 24th September 2020 as admitted at paragraph 7 of the plaint dated 10th November 2023;

    iv) That the Court will need to interrogate the facts as stated at paragraph (iii) hereinabove and as such, the evidence produced by the plaintiffs cannot be deemed as an apparent error on the face of the record;

    v) That be that as it may, the contention by the plaintiffs that legal fees is payable on demand does not extinguish the jurisdiction of this Court to decide the amount of legal fees payable;

    vi) That the orders issued by Hon. Lady Justice Njoki Mwangi were final in nature and the only avenue for the plaintiffs, if they feel aggrieved, is to file an appeal;

    vii) That the application by the plaintiffs is a delaying tactic that is made in bad faith in an attempt to delay the payment of costs to the defendant; and

viii) That in view of the foregoing, the application ought to be dismissed outright and parties be directed to proceed with taxation of their bill of costs.

6. The instant application was canvassed by way of written submissions. The plaintiffs' submissions were filed on 24th October 2025 by the law firm of Prof. Albert Mumma & Company Advocates, whereas the defendant's submissions were filed by the law firm of Igeria & Ngugi Advocates on 14th July 2025.

7. Mr. Agwara, learned Counsel for the plaintiffs submitted that the plaintiffs have fully satisfied the legal prerequisites for review of the Order issued on 6th February 2025. He argued that the award of costs to the defendant constitutes a mistake and/or error apparent on the face of the record, and in the alternative, amounts to any other sufficient reason within the meaning of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2020, as explained by the Court in the case of **Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others** [2021] KEHC 4068 (KLR). Counsel invoked the maxim ***nemo debet bis vexari pro una et eadem causa,*** to emphasize that no party should be vexed twice over the same cause.

8. Mr. Agwara relied on the Court of Appeal case of **Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited, Communications Commission of Kenya & Kenya Broadcasting Corporation** [2020] KECA 633 (KLR), and contended that the impugned Order failed to take into account Clause 12 of the letter of offer dated 21st November 2016, which lay at the heart of the withdrawn dispute and expressly provided that all legal costs and expenses incurred by the defendant in relation to the facility were contractually payable by the plaintiffs on demand. He contended that as a result, awarding party and party costs exposed the plaintiffs to double jeopardy by compelling them to pay

legal fees twice over the same facility, as the defendant has already debited the plaintiffs' account for legal fees pursuant to the said Clause. Counsel asserted that this oversight amounts to an apparent error warranting review, and that the resulting prejudice constitutes sufficient reason for the Court to revisit and correct its Order in the interest of justice.

9. It was submitted by Counsel that given the unique circumstances of the withdrawn suit, the defendant was not entitled to costs. While acknowledging the general principle that costs follow the event, Mr. Agwara further submitted that the Court must exercise its discretion judiciously by considering the totality of the circumstances, including the conduct of the parties and the reasons for instituting and withdrawing the suit. He argued that this suit was instituted as a last resort to restrain the defendant's unlawful actions and was withdrawn before hearing, and as such, costs should not have been awarded against the plaintiffs. He referred to the Court of Appeal case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another** [2001] KECA 362 (KLR), and asserted that awarding costs of the suit to the defendant effectively rewrote the letter of offer.

10. Mr. Njoroge, learned Counsel for the defendant submitted that the plaintiffs have failed to meet the legal threshold for review under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010, which permit review only where there is discovery of new and important evidence, an error apparent on the face of the record, or other sufficient reason. Relying on the Supreme Court case of **Parliamentary Service Commission v Wambora & 36 others** [2018] KESC 74 (KLR), which affirmed the principles laid down by the Court in **Mbogo & another v Shah** [1968] EA, Counsel argued that review is an equitable remedy, not a right, and cannot be used as an appeal or an opportunity to re-argue a case. Mr. Njoroge dismissed the plaintiffs' reliance on

a letter of offer dated 21st November 2016 as disingenuous, as the operative and binding letters of offer are dated 20th September 2020.

11. Mr. Njoroge contended that no evidence has been produced to show that legal costs were demanded or paid under the alleged contractual clause, rendering the claim of double jeopardy speculative and unfounded. He claimed that contractual provisions purporting to shift Advocate - Client costs to bank customers, such as the plaintiffs, to bear legal costs for Advocates appointed by the defendant bank in its own capacity is void *ab initio* and unlawful, as was held by the Court in the case of **Church Road Development Co. Ltd v Barclays Bank Of Kenya Ltd & 2 others** [2007] KEHC 2451 (KLR). Counsel also disputed the plaintiffs' assertion that this suit was withdrawn due to unlawful conduct, noting that the Court had already ruled on 1st March 2024 that the defendant was lawfully entitled to auction the suit property.

12. Mr. Njoroge relied on the cases of **Pacis Insurance Company Ltd v Francis Njeru Njoka** [2018] KEHC 4855 (KLR) and **Oracle Productions Limited v Decapture Limited & 3 others** [2022] KEHC 16146 (KLR), and submitted that it is settled law that costs follow the event, and a party compelled to defend a suit is entitled to costs upon withdrawal unless otherwise agreed or ordered. He emphasized that the extensive work undertaken by the defendant's Advocates in defending the suit and interlocutory applications entitles them to costs.

ANALYSIS AND DETERMINATION.

13. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the Grounds of Opposition filed by the defendant and the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiffs have

made out a case to warrant being granted an order for review of this Court's Order made on 6th February 2025.

14. This Court's jurisdiction to review its own decisions has to be exercised within the parameters of Section 80 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 45 Rule 1 of the Civil Procedure Rules, 2010, which provide as hereunder-

> ***80. Any person who considers himself aggrieved-***
>
> ***by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed by this Act, May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.***
>
> ***Order 45 Rule 1***
>
> ***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 review of judgement to the court which passed the decree or made the order without unreasonable delay.***

15. The Court in the case of **Alpha Fine Foods Limited v Horeca Kenya Limited & 4 others** (supra), in dismissing an application for review held that -

> ***…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 the 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 unreasonable delay.***

16. From the above provisions, this Court's scope for review is very limited and does not permit the Court to sit on appeal over its own decision or to re-evaluate the merits of the case. This means that dissatisfaction with the outcome of a decision, without more, cannot form a basis for review.

17. Upon perusal of the plaintiffs' application, it is evident that it is anchored principally on two grounds; that there is an error apparent on the face of the record in awarding costs of the withdrawn suit to the defendant and that there exists other sufficient reason, in that the award of party and party costs allegedly exposes the plaintiffs to double jeopardy in light of the contractual provisions contained in the letter of offer dated 21st November 2016.

18. On the question of whether there exists an error apparent on the face of the record, the plaintiffs contended that the Court erred in awarding costs to the defendant notwithstanding the withdrawal of the suit and the plaintiffs having expressed the intention that there be no order as to costs. An error apparent on the face of the record must be self-evident and should not require elaborate argument or detailed examination of evidence to establish it. The Court in the case of **Mwangi v Wanjohi & another** [2026] KEHC 1036 (KLR) in addressing this issue held as follows-

> ***Relating to the principle of 'mistake or error apparent on the face of the record' reference is made to the case of Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243 where the Court of Appeal rendered itself in the following manner:***
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> > ***"In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or 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 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. This laid down principle of law is indeed applicable in the matter before us."

19. The award of costs upon withdrawal of a suit is a discretionary decision of the Court, guided by Section 27 of the Civil Procedure Act, which provides that costs follow the event unless the Court, for good reason, orders otherwise. Whether or not costs ought to have been awarded is therefore a matter of judicial discretion, not a clerical or manifest error apparent on the face of the record. Disagreement with the manner in which that discretion was exercised is not a proper ground for an application for review, but one for an appeal.

20. In support of the plaintiffs' application for review, the plaintiffs also relied on a letter of offer dated 21st November 2016, which they asserted governed the contractual relationship between the parties and provided for payment of the defendant's legal costs by the plaintiffs. The defendant averred that the aforementioned letter cannot be the basis of an application for review as it is an outdated letter that did not govern the contractual relationship between the parties herein and it was not even introduced as evidence in the suit, a fact which was not disputed by the plaintiffs. In light of the foregoing, I am not persuaded that the impugned letter of offer dated 21st November 2016 qualifies as new and important evidence within the meaning of Order 45 of the Civil Procedure Rules, 2010, as it pre-dates the institution of this suit by several years and was within the plaintiffs' knowledge, or at least ought to have been within their knowledge, at the time the suit was filed and prosecuted.

21. In light of the above, this Court finds that the plaintiffs cannot be heard to argue that a 2016 letter of offer constitutes newly discovered evidence that could not, with due diligence, have been produced earlier. Even assuming, without

deciding that the contractual provision relied upon existed and was applicable, its interpretation and effect would require substantive interrogation of facts and contractual obligations between the parties. Such an exercise goes beyond the narrow confines of review, as it would call upon this Court to re-examine the merits of the dispute and the contractual framework between the parties. In the circumstances, this Court finds that the plaintiffs' argument on double jeopardy has little to no probative value to the plaintiff's application for review.

22. On the question of whether there exists any other sufficient reason to warrant review of this Court's Order made on 6th February 2025, the plaintiffs averred that the award of party and party costs is unjust because they were allegedly compelled to file the suit by the defendant's unlawful conduct, and because the defendant is already contractually entitled to recover its legal costs from them. It is however noteworthy that this Court in its Ruling delivered on 1st March 2024, found that the defendant was within its rights to exercise its statutory power of sale over the suit property. I am therefore not persuaded by the plaintiffs' assertion that this suit was necessitated by an illegality on the part of the defendant. This Court is further of the considered view that the mere existence of a contractual provision on costs does not oust the Court's statutory discretion to award party and party costs, nor does it automatically amount to sufficient reason for review.

23. As to whether the defendant was entitled to an order for costs upon the withdrawal of this suit by the plaintiffs, under the provisions of Section 27 of the Civil Procedure Act, a party who is compelled to defend proceedings is ordinarily entitled to costs if the suit is withdrawn, unless there is an agreement to the contrary or the Court, in the exercise of its discretion, orders otherwise. In this case, it is not in contest that there was no consent between the parties on the issue of costs, and the defendant had incurred costs in defending the suit. I

am therefore satisfied that this Court's decision to award costs of the suit to the defendant upon its withdrawal by the plaintiffs was consistent with established legal principles.

24. I am not satisfied that the plaintiffs have demonstrated the existence of an error apparent on the face of the record, the discovery of new and important evidence, or any other sufficient reason to warrant interference with this Court's orders of 6th February 2025. What the plaintiffs seek is in substance, a reconsideration of the merits of the Court's discretionary decision on costs, which is outside the remit of review proceedings.

25. In the circumstances, this Court finds that the plaintiffs have not made out a case to warrant being granted an order for review of this Court's Order made on 6th February 2025.

26. The upshot of the foregoing is that the instant application is not merited. It is hereby dismissed with costs to the defendant.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** on this **13th** day of **February, 2026. Ruling delivered through Microsoft Teams Online Platform.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Nyakiti h/b for Mr. Agwara for the plaintiffs

Mr. Mumo for the defendant/respondent

Mr. Kimutai – Court Assistant.