

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMMM NO. E077 OF 2023

BIO-ZEQ KENYA LIMITED.....PLAINTIFF

-VERSUS-

QIAGEN Gmbh.....DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 23rd September 2025 filed by the plaintiff pursuant to the provisions of Sections 1A, 3A & 80 of the Civil Procedure Act and Order 45 Rule 1 & Order 51 Rule 1 of the Civil Procedure Rules, 2010. The plaintiff prays that this Court reviews its Orders made on 18th September 2025, which directed the plaintiff to pay the defendant's adjournment costs (sic) of Kshs.30,000/= within five (5) days from 18th September 2025. The plaintiff prays for this Court to make an Order for the plaintiff to pay the defendant's Advocates Court adjournment fees in accordance with the Attendance Scale under Paragraph 7(d) of the Sixth Schedule of the Advocates Remuneration Order, 2014, and for the Court to issue orders directing the plaintiff to settle the reviewed adjournment costs before the next hearing date.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on 25th September 2025 by Mr. Mahmoud Nganga, a Director of the plaintiff company. Mr. Nganga averred that this matter was scheduled for hearing on 18th September 2025 at 11.30 a.m., but was adjourned with costs after he was unable to attend the hearing in open Court,

despite being ready and available to proceed virtually. He stated that on that date, he had travelled to Kajiado for an unavoidable work-related engagement and that he had logged into Court as instructed by his Advocate at 9.00 a.m., in readiness for the hearing as per the cause list.

3. Mr. Nganga deposed that the Court first adjourned the defendant's case due to the unavailability of its witness, and upon inquiry, the plaintiff indicated readiness to proceed. He stated that the Court directed the plaintiff's case to proceed physically, a direction given without knowledge of the deponent's physical location in Kajiado, and contrary to the expectation that the hearing would proceed virtually. He stated that his Advocate made efforts to request for the matter to proceed virtually, or in the alternative, to seek an adjournment, including communication with the defendant's Advocate, who initially indicated no objection. He further stated that the defendant's Advocate ultimately attended Court physically, necessitating a formal application for adjournment, which resulted in the Court awarding costs of Kshs.30,000/= to the defendant.
4. Mr. Nganga contended that the award of costs was unfair and prejudicial, as this was the first adjournment of the plaintiff's case and the defendant had already been granted an adjournment without costs on the same day. He averred that it was impractical for him to travel from Kajiado to Nairobi within the time directed by the Court. He asserted that the instant application has been made in good faith, without imputing bias or misconduct, seeking an objective review of the Orders made on 18th September 2025, on the basis that the plaintiff will suffer prejudice if the Orders are allowed to stand, while no prejudice will be occasioned to the defendant if the orders being sought are granted.

5. In opposition to the application herein, the defendant filed Grounds of Opposition dated 13th October 2025, raising the following grounds -

- i) The plaintiff has not satisfied the conditions for review of a Court Order as set out under Order 45 of the Civil Procedure Act as:
 - a) There is no discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by it at the time when the Order was made.
 - b) There is no disclosed or actual mistake or error apparent on the face of the record.
 - c) There is no other sufficient reason disclosed by the applicant.
- ii) A reading of the grounds appearing on the face of the application together with the supporting affidavit will show that the Motion before the Court is a merit appeal against the Order of the learned Judge disguised as a review application which should be rejected by this Honourable Court;
- iii) In any event, the assessed costs are reasonable in the circumstances of the case, particularly in view of the provisions of Paragraph 2 as read with Paragraph 7 of the Advocates Remuneration Order, 2014, the matter having been scheduled for full hearing on the material day; and
- iv) The respondent shall refer the Court to the record of the proceedings of the 18th of September 2025 for their full tenor and effect, as to what transpired on the material day, the representations made by parties and/or their Counsel and directions issued by the Court. Any new "*evidence*" now sought to be introduced by the

plaintiff/applicant is inadmissible and ought to be disregarded with respect to the application for review.

6. The application herein was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Munyasya & Co. Advocates on 30th October 2025, while the defendant's submissions were filed on 8th December 2025 by the law firm of Muthaura Mugambi Ayugi & Njonjo Advocates.
7. Ms Munyasya, learned Counsel for the plaintiff submitted that the instant application satisfies the threshold set out under Order 45 Rule 1 of the Civil Procedure Rules, 2010, as the Orders of 18th September 2025 were made without the Court having the benefit of all material facts. She argued that the Court directed the plaintiff to pay Kshs.2,000/= to the Court and Kshs.30,000/= to the defendant's Advocate as adjournment fees (sic), yet at the time of making those Orders, it was not privy to newly discovered and important evidence, namely, the telephone records annexed to the supporting affidavit, which demonstrate that communication had taken place between the Advocates' offices on the morning of 18th September 2025 regarding the adjournment. Counsel contended that this evidence could not, with due diligence, have been produced before the Ruling was delivered, and that had the Court been aware of the said communication, it would likely have reached a different and more objective decision.
8. Ms Munyasya relied on the Court of Appeal case of **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others** [2013] KECA 282 (KLR), and submitted that the award of adjournment costs (sic) was influenced by mis-communication and cross-purposes regarding the

availability of the plaintiff's witness for a physical hearing, rather than any deliberate misrepresentation of facts.

9. On the issue of costs, Counsel cited the Court of Appeal case of **Supermarine Handling Services Ltd v Kenya Revenue Authority** [2010] KECA 373 (KLR), and argued that the Court exercised its discretion excessively and unjudicially. While acknowledging that costs are discretionary under Section 27 of the Civil Procedure Act, she asserted that such discretion must be exercised on sound principles.
10. She contended that the defendant's Advocate did not spend the whole day in Court, thus any adjournment fees (sic) payable ought to have been guided strictly by Paragraph 7(d) of the Sixth Schedule of the Advocates Remuneration Order, 2014, rendering the sum of Kshs.30,000/= excessive and unreasonable. Counsel referred to the Court of Appeal case of **Kariuki v Attorney General** [2014] KECA 713 (KLR) and stated that both parties to this suit were granted adjournments on 18th September 2025 due to witness unavailability, yet only the plaintiff was penalized with substantial costs, contrary to the doctrine of equity and fairness. She relied on the cases of **Manju Naul v George Macheho Mungai, Stephen Mungai S. Kamau & Opinder Singh Naul** [2017] KEHC 413 (KLR), and submitted that review is not meant to re-litigate matters already decided, it must be determined in light of all the circumstances of the case.
11. Mr. Nyaribo, learned Counsel for the defendant stated that the plaintiff seeks an order for review of an Order allegedly made on 15th August 2025, yet no such Order exists, as the matter was neither listed nor heard on that date, rendering the relief sought untenable, as this Court cannot review a non-existent Order. He submitted that the requirements under Order 45 of the Civil Procedure Rules, 2010, have not been satisfied, as there is no new evidence that was

unavailable with due diligence on 18th September 2025, and there is no mistake or error apparent on the face of the record. He asserted that all grounds for adjournment were fully canvassed before the Court, which exercised its discretion and assessed adjournment costs (sic) at Kshs.30,000/=, as reasonable.

12. Mr. Nyaribo contended that the plaintiff's grievance is merely dissatisfaction with the Court's exercise of discretion on costs, which is a matter for appeal rather than review. He submitted that having benefited from the adjournment granted on 18th September 2025, the plaintiff cannot selectively comply with favourable portions of the Order while rejecting the attendant costs. He further submitted that even on the plaintiff's own pleadings, there is no objection to paying adjournment costs (sic) *per se*, but only to the quantum awarded, which is not a proper ground for review but one that could only be addressed on appeal.

ANALYSIS AND DETERMINATION.

13. I have considered the instant application, 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 this Court should review its Orders made on 18th September 2025, directing the plaintiff to pay the defendant costs of Kshs.30,000/= within five (5) days from 18th September 2025.
14. A Court's jurisdiction to review its own decisions does not operate in a vacuum; it 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** [2021] KEHC 4068 (KLR), in dismissing an application for review 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 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 un reasonable delay.*

16. A Court's jurisdiction to review its own decisions is limited and is not intended to afford a party an opportunity to re-argue or appeal against a decision merely because they are dissatisfied with it.
17. The plaintiff's case is that this Court did not have the benefit of all material facts at the time it made the impugned Orders, particularly, the telephone records evidencing communication between the Advocates' offices on the morning of 18th September 2025 regarding the adjournment. The plaintiff contended that this evidence constitutes new and important matter which could not, with due diligence, have been placed before the Court at the material time. On perusal of the Court record, the proceedings of 18th September 2025 however show that the reasons for seeking an adjournment, including the unavailability of the plaintiff's witness for a physical hearing and the request for the matter to proceed virtually, were fully canvassed before the Court. The decision to grant the adjournment and to award costs of Kshs.30,000/= to the

defendant was made after hearing both parties, and the Court exercised its judicial discretion.

18. In the premise, this Court is of the considered view that the telephone records evidencing communication between the Advocates' offices on the morning of 18th September 2025, which the plaintiff now seeks to rely on merely reinforce representations made before this Court on that day. The alleged telephone records do not disclose a new factual situation that was wholly unknown or incapable of being presented with due diligence at the time the Orders were made. As such, this Court finds that the said records do not meet the threshold of new and important matter or evidence as contemplated under Order 45 Rule 1 of the Civil Procedure Rules, 2010.
19. Further, I find that there is no mistake or error apparent on the face of the record. Such an error must be obvious and self-evident, and not one that can only be established through detailed argument or a re-assessment of the merits of the decision. A perusal of the pleadings filed reveals that the plaintiff's application for review is anchored on how the Court exercised its discretion in awarding the day's costs to the defendant, particularly, in regard to the quantum of Kshs.30,000/=. Such a grievance does not disclose an error apparent on the face of the record, but rather amounts to a challenge to the merits of the Court's discretionary determination, which properly lies by way of appeal and not by an application for review.
20. As to whether there exists any other sufficient reason to warrant this Court to review its Orders of 18th September 2025, the plaintiff urged this Court to consider equity and fairness, arguing that both parties were granted adjournments on the same day due to witness unavailability, yet only the plaintiff was condemned to pay substantial costs. While this Court appreciates

the need for fairness and proportionality, it must be emphasized that the award of costs is a discretionary exercise which in this case, was guided by the circumstances prevailing at the time of the adjournment. This Court considered those circumstances on 18th September 2025, including the fact that the matter had been scheduled for hearing and that the defendant's Counsel had attended open Court ready to proceed, but the plaintiff's witness who had been directed at 9.10 a.m., to attend Court physically at 11.30 a.m., declined to attend open Court and insisted that he was ready to proceed virtually. In the premise, this Court finds that disagreement with the outcome of the exercise of this Court's discretion without more, does not amount to a sufficient reason for review.

21. In light of the foregoing, I am not satisfied that the plaintiff has 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 made on 18th September 2025. What the plaintiff seeks is in substance, a reconsideration of the merits of the Court's exercise of its discretion in awarding the defendant costs of Kshs.30,000/= as a result of the plaintiff's failure to proceed with its case, which is outside the remit of review proceedings.
22. In the circumstances, I am not persuaded that the plaintiff has met any of the statutory grounds warranting the exercise of this Court's review jurisdiction. The application before me is in substance, an attempt to re-open and re-argue the merits of the decision on costs, which is impermissible under Order 45 of the Civil Procedure Rules, 2010. If at all the plaintiff was dissatisfied by the Court's exercise of its discretion in awarding the defendant costs of Kshs.30,000/=, the only avenue available to it was to appeal against the said decision at the Court of Appeal.

23. Further, the plaintiff's witness Mr. Mohamed Nganga disobeyed the directions given to him to attend Court physically on 18th September 2025 to testify. His Advocate explained that this Court had on 10th February 2025 directed that the case would be heard virtually. It must be noted that the directions for virtual hearing were given because the defendant's witness was based in Johannesburg. The said witness was however not available to testify virtually on 18th September 2025, but Mr. Nganga who was in Kajiado could have attended physical Court within the timelines given from 9.10 a.m. to 11.30 a.m., but he opted not to.
24. In the end, this Court finds that the plaintiff has not made out a case to warrant being granted an order for review of this Court's Orders made on 18th September 2025.
25. The upshot is that the application herein is not merited. It is dismissed with costs to the defendant.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 6th day of March 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Obuya h/b for Ms Munyasya for the plaintiff/applicant

No appearance for the defendant/respondent

Ms B. Wokabi – Court Assistant.