



**Assets Recovery Agency v Yves & another (Civil Application E023 of 2023)
[2026] KEHC 2599 (KLR) (Anti-Corruption and Economic Crimes) (27 February 2026) (Ruling)**

Neutral citation: [2026] KEHC 2599 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
CIVIL APPLICATION E023 OF 2023
LM NJUGUNA, J
FEBRUARY 27, 2026**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

FUMBISHA ILUNGA YVES 1ST RESPONDENT

KENYA POST OFFICE SAVINGS BANK 2ND RESPONDENT

RULING

1. What is before the court for determination is the application dated the 17th September, 2025 brought under Section 1A,1B, 3,3A and Section 80 of the *Civil Procedure Act*, and Order 45 of the Civil Procedure Rules, and Articles 48 and 50 of *the Constitution*. It is premised on the grounds on the body of the same and it's supported by the annexed affidavit sworn by Raphael Lekolool.
2. In the application, the applicant seeks the following orders;
 1. Spent.
 2. That this Honourable court be pleased to review and/or vary and/or set aside the ruling of Hon. Lady Justice Esther Maina dated 17/10/2024.
 3. That the cost of this application be provided for.
3. The applicant avers that, vide the court ruling dated the 17th October, 2024, the 1st respondent was found liable and ordered to refund Ksh.3,729,052.96 which he withdrew during the pendency of the preservation order gazetted on the 16th June, 2023, after the court observed that he is the one who benefitted from the funds.



4. The applicant avers that in the said ruling, the court directed that, Assets Recovery Agency (ARA) be at liberty to execute against the 1st respondent, in the event that he is unable to pay and/or deposit the funds in a bank account that was to be advised by the ARA and that, in the foregoing, there was no indication that there was a condemnation on the part of the 2nd respondent to refund and/or pay the funds withdrawn by the 1st respondent.
5. That the court also directed ARA to pursue the 1st respondent for purposes of recovering the funds and that the ruling was explicit that ARA was to demonstrate all efforts made towards recovering these funds from the 1st respondent, and that any attempts to recover these funds from the 2nd respondent was to be the last resort. That, ARA has failed to demonstrate the efforts that it has made towards recovering the money.
6. The applicant states that it was the 1st respondent's testimony that he is a businessman carrying out his trade in Kenya, and that he is married to a Kenyan and to that end, the ARA had sufficient avenues of pursuing recovery proceedings against him.
7. The applicant contends that it had no knowledge of any pending application for an order of forfeiture by the time the preservation order expired, and that had it been served with the order, it would have been liable to refund a lesser amount noting that as at 14th September, 2023 the subject account had a balance of Ksh. 1,850, 024.40
8. The ARA filed a replying affidavit sworn by Bernard Gitonga. He avers that the preservation order was issued on 5th June, 2023, in Misc. application E011 of 2023 (ARA Vs Fumbisha Ilunga Yves) seeking to preserve Ksh. 3,732,199.84 held in account No. 07XXXXXXXXXX75 in the name of the 1st respondent, and the same published in the Kenya Gazette and served on all persons known to have an interest in the funds the subject matter of the order.
9. That the orders were Gazetted on the 16th September, 2023 after which the 90 days' period started to run, and the same would have expired on the 16th September, 2023 if ARA had not instituted forfeiture proceedings, but it filed the proceedings on the 14th September, 2023, and upon serving the 1st respondent, he informed them that he had already accessed the money on the 11th September, 2023 which was during the subsistence of the preservation order.
10. ARA avers that the applicant was in breach of the preservation orders issued on the 5th June, 2023 in contravention of provisions of Proceeds of crime and Anti- Money Laundering Act, and on the 8th April, 2024, the Agency filed an application citing the applicant, and the 1st respondent for contempt of court with respect to the funds that had been withdrawn during the pendency of the preservation orders.
11. That in determining the contempt of court application, the court found the applicant and the 2nd respondent to be in contempt of court and directed the 1st respondent to be held personally liable to refund the funds within 21 days of the date of the ruling and in the event of default, ARA would be at liberty to execute against his property.
12. Further, the court directed that in the event that the ARA finds it completely impossible to recover the funds from the 1st respondent, the applicant will be required to refund the ARA, and thereafter recover from George Onyango who is the head of securities whose misconduct led to the dissipation of the funds.
13. The ARA avers that it made all reasonable efforts to recover the funds from the 1st respondent but was unsuccessful as he is a foreigner with no known income or assets in the country, and on the 7th January,



2025, it wrote a demand to the applicant demanding refund of the funds as per the ruling of the court, but the applicant has ignored the ARA's letters despite numerous reminders.

14. The ARA states that the argument of the applicant not being aware of the existence of the preservation order does not hold any water as the court order can only be revoked or lifted by issuance of another order revoking the previous one, and in any event, preservation orders continue to be in force once forfeiture application is filed.
15. That the issues raised by the applicant are Res-judicata as the court has already made a determination and none of the respondents filed an appeal. Further, that the application is an afterthought and there has been an inordinate delay in filing this application and therefore, the same is an abuse of the court process and a waste of judicial time.
16. The 1st respondent filed a replying affidavit in which he has averred that the applicant's application is an afterthought and the same is misconceived as the court has already delivered substantive finding and final orders. That the applicant's attempt to re-open the matter through a review application lacks both merit and the threshold required by the law.
17. The 1st respondent avers that the power of review is discretionary and should not be exercised as a substitute for appeal or a second bite at the cherry. That the applicant must satisfy the court that the strict criteria under section 80 and Order 45 of the *Civil Procedure Act* and Rules, respectively, have been met and that the application was brought with due diligence.
18. He contends that the application is bereft of any new evidence which meets the strict test for review and the bare assertion that the ARA has not demonstrated any attempts to recover the funds from him is factually and legally inadequate. That the ARA has already acknowledged his impecuniosity and structured fallback in the orders, and has communicated its intention to recover the funds from the applicant as per the court judgement. Further, that the applicant's assertion that it was not aware of the application for forfeiture when the preservation order lapsed, is implausible and in any event, it does not constitute discovery of new and material evidence which is required for review.
19. That the applicant has not explained any delay in bringing the application or why any material relied upon was not available prior to the judgement. Further, the applicant has not produced any evidence from any witness or the officer of the bank of any attempt of making enquiries of the 1st respondent, any attempt to engage with ARA to forestall recovery proceedings or full particulars evidencing the balance and the precise basis on which the Bank says it should not be regarded as a potential fallback for recovery.
20. That the 2nd respondent ought to have taken timely steps when the preservation order was made and to place any material before the court and not to wait until the court has pronounced itself and seek to re-open the matter in review without meeting the Statutory test.
21. The application was disposed of by way of written submissions.

Applicant's/2nd Respondent's Submissions

22. The applicant identified only one issue for determination to wit;

Whether the applicant has met the threshold for Review of the order of this court made on the 17th October, 2024.
23. The applicant submitted that it has mustered the legal threshold for grant of review and/or setting aside of the impugned order in the ruling delivered on 17th October, 2024. It contended that the court's



- finding that the 1st respondent was influenced to withdraw the funds by an officer of the bank who is not a party to the proceedings is irrelevant since this is not a criminal trial.
24. That ARA has not demonstrated compliance with the orders of this court issued on the 17th October, 2024. It has not sworn an affidavit or filed a report on the attempts made to recover the funds from the 1st respondent upon default in refund.
 25. That the 3rd party officer of the bank, George Onyango, whom the court found guilty of misconduct is not a party to the proceedings giving rise to the impugned ruling. As such, it is unfair and unjust to condemn a party unheard as this contravenes the principles of natural justice and the right to be presumed innocent until contrary is proven which is protected under Article 50(2) (a) of *the Constitution*. As such, the orders should be set aside. Reliance was placed on the cases James Kanyitta Nderitu & another vs Marios Philotas Ghikas & another (2016) KECA 470 (KLR) and that of Sangram Singh vs Election Tribunal, Kotah, AIR 1955 (supreme court of India).
 26. The applicant averred that the court failed to take into account key factors that it ought to have considered before apportioning liability upon the applicant and the 1st respondent to wit;
 - a. The age of the 3rd party, George Onyango
 - b. The time remaining before the said 3rd party reaches retirement age
 - c. Whether the 3rd party was a permanent and pensionable employee
 - d. The amount of salary that he was earning.
 27. The applicant relied on the case of AVH Legal LLP vs Rabala & 8 others (Civil Appeal (application) 117 of 2018 (2023) KECA (KLR) (3 March 2023) in which the court found that the applicant had demonstrated exceptional grounds to warrant grant of orders for review and setting aside. Further, the court affirmed that it had residue jurisdiction to re-open a decided case in appropriate and exceptional cases which include when the judgment or ruling;
 - a. Was obtained by fraud or deceit
 - b. Was a nullity
 - c. Was given under a mistaken belief that the parties had consented to it
 - d. Was given in the absence of jurisdiction
 - e. The proceedings were such as to deprive the decision or judgement of the character of a legitimate adjudication
 - f. It was rendered with fundamental irregularity.
 28. Similarly, the case of Rupa Ashok Hurra vs Ashok Hurra; writ petition (civil) 509 of 1997 (Supreme court of India) was relied upon in support of the same proposition that, situations may arise, in the rarest of the cases, which would require reconsideration of a final judgement to set right miscarriage of justice complained of.

Asset Recovery Agency's/Respondent's Submissions

29. The respondent identified two issues for determination to wit;
 - a. Whether the review/variation/setting aside application has met the threshold.
 - b. Who should pay the costs of the application.



30. The respondent submitted on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, and cited the case of Republic vs Public Procurement Review Board & 2 others (2018) eKLR and that of Republic vs Advocates Disciplinary Tribunal Ex-parte Apollo Mboya (2019) eKLR on the principles that should govern an application for review.
31. The respondent submitted that the court has discretion under Section 80 and Order 45 to review or set aside its orders, but the discretion must be exercised judiciously and only where sufficient cause is shown. That the applicant filed the application with undue delay hence the same is an afterthought as it was filed 11 months since the ruling was delivered.
32. The respondent further submitted that even if the element of delay were to be excused, the applicant has not presented any new evidence, error apparent on the face of the record or sufficient reason to justify review of the orders. That the application seeks a rehearing of issues already adjudicated upon, which falls outside the narrow ambit of review contemplated under Section 80 of the *civil Procedure Act* and Rule 45 of the civil Procedure Rules.
33. That the applicant has not established any ground for re-opening the case and that the proper remedy would have been an appeal against the ruling. Reliance was placed on the cases of Saham Assurance Company Limited vs Shimoli (Civil Suit No. 2 of 2018 (2022) KEHC 14372 (KLR) and that of Kogi Wamwere vs Attorney General (2004) eKLR.

1st Respondent's Submissions

34. The respondent identified one issue for determination to wit;
 - a. Whether the applicant has met the legal threshold for review/setting aside/variation of the orders issued on the 17th October, 2024.
35. The respondent submitted on Section 80 and Order 45 of the *Civil Procedure Act* and the Civil Procedure Rules respectively, on the grounds of review and cited the cases of;
 - a. National Bank Limited vs Ndung'u Njau (1977) eKLR
 - b. Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR
 - c. Nyamogo & Nyamogo Advocates vs Kogo (2001) KLR
 - d. Benjoh Amalgamated Limited & another vs Kenya Commercial Bank (2014).
36. The respondent averred that the applicant's application is devoid of merits, amounts to an abuse of court process, and fails to meet the strict threshold for review. That the applicant has failed to explain the delay in bringing the application or to demonstrate promptitude, which is a mandatory consideration under Order 45 of the Civil Procedure Rules. That what is before the court is a classic attempt to obtain a second bite at the cherry and to convert the court to an appellate court over its own decision which is impermissible in law and inimical to the principle of finality of litigation.

Analysis and Determination

37. The court has considered the application and the supporting affidavit, the responses thereto and the submissions filed by the parties herein. In my considered view, the only issue for determination is;

Whether the applicant has met the legal threshold for review/setting aside or variation of the orders issued on the 17th October, 2024.



38. The remedy of review is provided for in Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. Section 80 Provides as follows;

“ 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

39. Order 45 Provides;

“ 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 a review of judgement to the court which passed the decree or made the order without unreasonable delay.”

40. These provisions have been interpreted by the courts on various occasions and in various decisions. See the case of Republic vs Public Procurement Review Board & 2 others (2018) KLR.

41. In the case of Republic vs Advocates Disciplinary Tribunal Ex-parte Apollo Mboya (2019) eKLR, Mativo J (as he then was) culled out the following principles from a number of authorities;

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule I and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of the record justifying exercise of power under Section 80.
- iv. An erroneous order/ decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/ judgement of a coordinate or Larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.



- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ Tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or error, which is prima-facie visible and does not require any detailed examination. In the present case, the Petitioner has not been able to point out any error apparent on the face of the record.

Section 80 of the *Civil Procedure Act* provides for a substantive power of review by a civil court and consequently by the appellate court. The words occurring in Section 80 means subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Act* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1. The power of a civil court to review its judgement/decision is traceable in Section 80 CPA. The grounds on which review can be sought are enumerated in order 45 Rule 1.

- 42. The court of appeal in the case of National Bank of Kenya Limited vs Ndung'u Njau (1997) eKLR empathically held that a review may not be granted on the ground that the court proceeded on an incorrect exposition of the law or that another Judge could have reached a different conclusion.
- 43. Similarly, in the case of Pancras T. Swai vs Kenya Breweries Limited (2014) eKLR the court of appeal underscored the fact that a review is not an appeal in disguise and that an error apparent on the face of the record must be self-evident and not one that requires elaborate argument to establish.
- 44. The Supreme court in the case of Benjoh Amalgamated Limited & another vs Kenya Commercial Bank limited (2014) eKLR warned against the misuse of review jurisdiction to achieve substantive re-litigation under the guise of public interest.
- 45. In the present application, the grounds relied by the applicant are that it is a public institution, that the ARA/respondent has not shown that all attempts have been made towards recovering the funds from the 1st respondent and that it had no knowledge of any pending application for an order of forfeiture by the time the preservation order expired.
- 46. The applicant/2nd respondent in its submissions raised the issue of a 3rd party who was not a party to the proceedings and relied on the case of Rupa Ashok Hurra (supra). It also invited the court to be guided by the Indian case AVH Legal LLP vs Raballa (supra) on the exceptional grounds to warrant to review or setting aside.
- 47. I have looked at the application and the grounds in support thereof. The issues raised by the applicant are matters that were within its knowledge when the application that led to the orders that were issued on the 17th October, 2024 was heard and the orders issued. None of those matters are said to be new evidence which has been obtained or which has come to their knowledge after the ruling of the court.
- 48. The applicant has not alleged that there is an error apparent on the face of the record. The issues of public interest and the allegation that the applicant was not aware of the order are not new matters. On the issue of the order affecting a 3rd party and the alleged illegality, that is a matter for appeal and not review. What the applicant is asking this court to do is to sit as an appellate court against a decision of a court of concurrent jurisdiction which has no basis in law.



- 49. Lastly, the court has taken note of the delay of eleven (11) months which is almost a year since the impugned ruling was delivered. It is interesting to note that the applicant has not even made an attempt to explain the delay. I find that the delay is unreasonable and the same has not been explained.
- 50. In the premises and for the reasons that the court has given hereinabove, I find that the application has no merits and it is hereby dismissed with costs.
- 51. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS DAY OF 2026

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L.M. NJUGUNA

JUDGE

DELIVERED AND COUNTERSIGNED THIS 27TH DAY OF FEBRUARY 2026

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B.M. MUSYOKI

JUDGE

