

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
INSOLVENCY CAUSE NO. E038 OF 2024

MOHAMED

KORIYOW

MOHAMED.....PETITIONER/RESPONDENT

VERSUS

KASSIM	MOHAMUD	MAHAMED.....1ST
APPLICANT		

HASSAN	MOHAMUD	MOHAMED.....2ND
APPLICANT		

RULING

1. The court is called upon to determine the Applicants’ Notice of Motion dated 18th July 2025 filed under Order 45 Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 3(a) and 63(e) of the Civil Procedure Act, and Sections 13, 25 (2)(b), 291(i) and 295 of the Insolvency Act.
2. The Applicants seek for the Court to set aside and/or review or vary its orders of 14th May 2025, the dismissal of this Petition and costs of the application.
3. The background of the matter is that the Petitioner filed a bankruptcy petition dated 10th September 2024 on account of his inability to pay an accumulated debt worth Kshs. 52, 046,906.58. Additionally, the Petitioner filed the Notice of Motion dated 10th February 2025 wherein he majorly sought

for issuance of a Receiving Order in his Estate as well as stay of further proceedings in *Nairobi HCCOMM E010 of 2018* which then was due for notice to show cause before the Deputy Registrar.

4. When the Debtor's application dated 10th February 2025 came up on 14th May 2025, there was no appearance by the Respondents (now Applicants) and no response had had been filed despite proper service. The Court granted prayer (c) of the application, basically staying the notice to show cause by the Debtor. That led to the filing of the instant application, that is the Notice of Motion dated 18th July 2025.
5. The application is premised on the grounds on the face of it and the supporting affidavit of the 2nd Applicant sworn on 18th July 2025. He states that. He states that the Petitioner is guilty of material non-disclosure; that he owns various assets including high end motor vehicles, is the Managing Director and shareholder of several companies which own substantial property and bank accounts, and is also the owner of multimillion homes in various Estates as named and described in the affidavit.
6. According to the Applicants, the Petitioner is a man of means and hence should not use these proceedings to avoid meeting his legal obligations.
7. The application is challenged. The Debtor/Petitioner submitted a Replying Affidavit sworn by himself and claims that he has disclosed all material information and in the event the Applicants have any other relevant information,

then they are at liberty to present the same before court. That the grant of prayer (c) of his application of 10th February 2025 was as a result of the Applicants failure to attend court on 14th May 2025. The current application is said to be premature, and a disguised review and yet it does not comply with the relevant rules.

8. The application was canvassed by way of written submissions.

Analysis and determination

9. The issues that arise for determination are:

- i. Whether the Applicants have met the threshold for review, variation and/or setting aside, and*
- ii. Whether there is sufficient cause to dismiss the Petition.*

10. Order 45 Rule 1 permits review on the grounds of discovery of new and important matter or evidence, error apparent on the face of the record, or any other sufficient reason, provided the application is made without unreasonable delay.

11. The rules governing review were clearly outlined in **National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR**. The Court of Appeal stated that review is not a way for a party to rehearse its case or correct legal errors. It focuses on fixing clear mistakes or considering new evidence that could not have been produced earlier with due diligence.

12. The Applicants have not shown any new and significant evidence or pointed out any obvious mistake on the record. The complaint is mainly that the Petitioner concealed key information about his capacity to settle his debts. I agree with the Petitioner that this is an issue that can be addressed during the hearing of the petition where the Applicants can avail counter information.
13. Therefore, the request for review under Order 45 is not justified.
14. Order 12 Rule 7 gives the Court the power to set aside or change a judgment or order made in default under fair terms. This discretion aims to enable the Court to deliver justice to the parties.
15. The discretion is unrestricted but must be exercised responsibly. In **Shah v Mbogo & Another [1967] EA 116**, the Court noted that the discretion aims to avoid injustice or hardship from accidents, mistakes, or inadvertence, and not to aid someone who has deliberately tried to obstruct justice.
16. The record is clear that the Petitioner's application dated 10th February 2025 severally came before court between February and May 2025 and despite the Applicants being given multiple opportunities to file response(s), they did not do so, culminating in the granting of the order now being challenged.
17. The order being challenged was made on 14th May 2025 after the Court found that the Applicants had failed to

oppose the Petitioner's application and that no valid reason had been provided. The current application was filed on 21st July 2025, slightly over two months later. The indolence by the Applicants is not excusable.

18. In **CMC Holdings Ltd v James Mumo Nzioki Civil Appeal No 329 of 2001 [2004] eKLR** the Court of Appeal held that the discretion to set aside is meant to ensure that a litigant does not suffer injustice as a result of an excusable mistake. However, that discretion must not be exercised in favour of a litigant who has failed to demonstrate such a mistake or who has been indolent.
19. The overriding objective under Sections 1A and 1B of the Civil Procedure Act obliges the Court to facilitate expeditious and proportionate resolution of disputes. As observed hereinabove, the issues the Applicants wish to advance to counter the Debtor's petition can as well be adequately addressed during the hearing of the main petition.
20. Given all circumstances, I am not convinced that valid reasons have been provided to justify the use of this Court's discretion in favor of the Applicants.
21. Accordingly, the Notice of Motion dated 18th July 2025 is devoid of merit and is dismissed. I make no orders as to costs.

RULING delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **March** 2026.

P.M. MULWA

JUDGE

In the presence of:

Mr. Webale for Petitioner/Respondent

N/A for Applicants

Court Assistant: *Carlos*