

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL APPEAL NO. 38 OF 2016

HAKIKA TRANSPORT SERVICES LIMITED.....1ST APPELLANT

STEPHEN CHEPWONY.....2ND APPELLANT

VERSUS

PERIS WAKESHO MAGHEMA.....1ST RESPONDENT

FRANCIS KALUYU MUNYAGA (Legal Representative of the Estate of

BONIFACE MWAKIO KALUVU (Deceased).....2ND RESPONDENT

MACLEX MAKORI MAGABI.....3RD RESPONDENT

RULING

1. The Notice of Motion application dated 3rd April 2025 filed by the Respondents a pursuant to **Order 51 Rule 1** of the **Civil Procedure Rules, Section 1A, 1B, 3, 3A & 63 (e)** of the **Civil Procedure Act** and all other enabling provisions of the law, seek for orders that the Branch Manager Housing Finance, Mombasa Branch releases forthwith to *Kanyi J. & Company Advocates* all the funds held in Account No.

2162503401-0 in joint names of *Kanyi J. & Company Advocates* and *Isaac Onyango & Company Advocates*.

2. The application is based on the grounds in the annexed affidavit of Joseph Karanja Kanyi, that on 29th December 2016, the Respondents deposited Kshs. 743,080 into the aforementioned account to secure the performance and judgment delivered in *MSA Chief Magistrates Court Case No. 1215 of 2013, Peris Wakesho Maghema & another v Hakika Transport Services Ltd & another*. That the appeal herein from the matter was dismissed on 5th August 2022 and that on 16th June 2023, the Appellants were granted 45 days stay of execution which has since lapsed. That it is just and fair that the said funds are released to the Plaintiff/Decree Holder.
3. In response, the Appellants filed Grounds of Opposition dated 10th November 2025 that the orders sought are incapable of being granted and/or enforced considering on the basis that there are orders from the Court of Appeal over the same issue. That this court lacks jurisdiction to hear and determine the issues raised in the application or grant the orders sought.
4. That the application suffers from fundamental and material non-disclosure of ongoing appeals between the Plaintiffs and the 2nd and 3rd Defendants in the Court of Appeal. That the application offends **Article 163 (7)** of the **Constitution**, and that the application seeks to render nugatory and/or otiose the pending appeal in the Court of Appeal being *Mombasa Court of Appeal Civil Appeal No. E042 of 2024, Hakika Transport Services Limited & Stephen Chepkwony v Peris Wakesho Maghema &*

Francis Kaluyu Muyanga (as the Representatives of the Estate of Boniface Mwakio Kaluvu - Deceased) in respect of which the sums sought to be released still secures.

5. The Appellants also filed a Notice of Motion application dated 17th September 2025 under **Articles 47, 48, 50 (1) (q) and 159 (a) and (3) of the Constitution of Kenya, Section 1A, 1B, 3A, 63 and 80 of the Civil Procedure Act, Order 45 Rule (1) (b) and Order 42 Rule 6 of the Civil Procedure Rules.**
6. The Appellants pray that this court be pleased to review the orders of stay of execution issued by the ruling dated and delivered on 26th June 2025 to last until the hearing and determination of the pending appeal in the Court of Appeal, and that costs of the application be in the cause and/or provided for.
7. The basis of the application is a Supporting Affidavit of Caroline Njuguna that reiterated their position in their Grounds of Opposition dated 10th November 2025. That the filing and existence of the second appeal pending before the Court of Appeal, and the Respondents latest attempts to have the joint account liquidated and the decretal sum released to the Respondents represent new circumstances and facts which were not in existence at the time this court rendered its ruling of 23rd June 2023. That not having exhausted its constitutional right of appeal, any execution will occasion substantial and irreparable loss and damage to the Appellant since the monies involved are colossal which the Respondents have no known ability or capacity to refund.
8. As a rebuttal to the Appellants' application, the Respondents filed a Replying Affidavit sworn on 23rd September 2025 by Kioko Maundu that by the ruling

delivered on 16th June 2023, this court granted a 45-day stay of execution on condition of filing the appeal within the said period, failing to which the application would stand dismissed. That the Appellants failed to comply with filing of the appeal within the stipulated 45 days, which orders lapsed on or about 1st August 2023 and that the application of 27th September 2022 stood dismissed.

9. That the Appellants are guilty of inordinate delay which has not been explained at all and that this court is *functus officio* having already issued its orders on 16th June 2023. That the decretal sum is not adequately secured by the partial deposit in the bank, that the Respondents are entitled to fruits of the judgment and that they are capable of refunding the decretal sum should the Appellants succeed in the intended appeal.

Submissions

10. The applications were canvassed by way of written submissions. The Respondents in their submissions dated 14th November 2025 argued that the power to enlarge time is provided for under **Section 95** of the **Civil Procedure Act** and **Order 50 Rule 6** of the **Civil Procedure Rules**. That however, the power though discretionary is not limitless, as it cannot be exercised when the court becomes *functus officio*.
11. The Respondents submitted that the position was affirmed in Civil Appeal/Application No. 97 of 2008, *Caltex Oil (Kenya) Limited v Rono Limited* and reiterated in the cases of *Gateway Insurance Company Ltd v Aries Auto Sprays* (2011) eKLR and *Telkom Kenya Limited v John Ochanda (Suing on his own behalf*

and on behalf of 996 former employees of Telkom Kenya Limited) (2014) eKLR. The Respondents submitted that in the circumstance that the court had jurisdiction, the Appellants would still be required to satisfy the well settled principles governing the exercise of discretion to enlarge time as held in *Nicholas Kiptoo Arap Salat v IEBC & 7 others* (2014) eKLR.

12. The Appellants filed submissions dated 15th November 2025 and argued that their appeal at the Court of Appeal is still active and deemed to have been lawfully filed. The Appellants urged this court to apply the principle of *stare decisis*, and the hierarchy of courts as envisaged under **Article 163 (7)** of the **Constitution** and the case of *Law Society of Kenya v Attorney General & another* (Petition 4 of 2019) [2019] KESC 16 (KLR) (3 December 2019) (Judgment). The Appellants prayed that the substratum of the appeal be preserved pending the appeal at the Court of Appeal.
13. The Appellants further submitted that the right of appeal not only advances the right to fair hearing under **Article 50 (1)** of the **Constitution**, which courts are enjoined to protect and secure as held in the case of *James Ithale Akothe v Abdiwelle Ali Abdi* (2020) eKLR but also the right to access justice under **Article 48** of the **Constitution**. That the Appellant's application seeks to uphold the fundamental rights as opposed to the Respondent's application which has the consequence of negating the fundamental rights.

Analysis

14. This court has considered the Notice of Motion application dated 3rd April 2025, the Grounds of Opposition dated 10th November 2025, the Notice of Motion application dated 17th September 2025, the Replying Affidavit sworn on 23rd September 2025, and submissions by the parties. The issues for determination are:

(a) Whether this court has jurisdiction to order release of the funds

(b) Whether this court is functus officio

(c) Whether the Appellants have met the threshold for review and extension of stay

(d) Whether the Respondents are entitled to release of the funds

(e) Who should bear costs

15. On whether this court has jurisdiction, the Appellants contend that this court lacks jurisdiction owing to the pendency of an appeal before the Court of Appeal and that granting the orders sought would offend **Article 163(7)** of the **Constitution**.

16. In the case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)*** the court held that: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. However, the mere existence of an appeal does not automatically divest the High Court of jurisdiction to deal with matters incidental to its decree, unless there is a

subsisting order of stay issued by the appellate court. The Appellants have not placed before this court any order from the Court of Appeal staying execution or preserving the joint account funds. This Court therefore retains jurisdiction to determine whether its conditional stay lapsed and the consequences thereof.

18. On whether this court is *functus officio*, the Respondents argued in the affirmative on the basis of the court having already rendered its ruling on 16th June 2023. The doctrine of *functus officio* prevents a court from re-opening a matter once it has rendered a final decision, save as provided by law. The Supreme Court in *Raila Odinga v Independent Electoral & Boundaries Commission & 3 others* [2013] KESC 8 (KLR) affirmed that: -

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,” (2005) 122 SALJ 832, has thus explicated this concept:

“The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior

body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

This principle has been aptly summarized further in Jersey Evening Post Limited v A1 Thani [2002] JLR 542 at 550:

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available” [emphasis supplied].

19. In the present case, the stay granted was conditional and expressly self-executing upon non-compliance. The condition was not met. The stay therefore lapsed automatically. The court became *functus officio* with respect to that application.
20. On whether the Appellants have met the threshold for review, review is governed by **Section 80** of the **Civil Procedure Act and Order 45** of the **Civil Procedure Rules**. A party must demonstrate discovery of new and important matter, error apparent on the face of the record, or other sufficient reason.

21. The Appellants argue that the existence of a pending second appeal and the Respondents' attempt to execute constitute new circumstances. However, the filing of an appeal is not a new matter. It was foreseeable at the time the ruling was delivered. Review is not available to re-open a matter merely because a party is dissatisfied or because circumstances have changed.
22. In *Ndungu Njau v National Bank of Kenya Limited [2008] KECA 188 (KLR)*, the Court of Appeal held that: -

Neither in that application, its grounds or supporting affidavit nor in this appeal before us was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed ...

“Nor was there any submission before this court about any mistake or error apparent on the face of the record to warrant an order of review which was sought before the learned Commissioner of Assize.

...

In the case of Njagi Kanyunguti alias Karingi Kanyinjuti & 4 Others v. David Njeru Karingi – Civil Appeal No. 181 of 1998 Judges of Appeal quoted with approval what Sir Clement De Lestang V. P. said in Shah v. Mbogo [1968] E.A. 93 on the issue of the exercise of discretion thus: -

“I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its

decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration any matter which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

In our view the learned Commissioner of Assize exercised his discretion properly in this matter and with respect to counsel, the points raised to seek an order of review before the Commissioner would have properly been raised as grounds of appeal in the superior court.”

23. Further, failure to comply with a conditional order, cannot be cured by invoking review. The Appellants have also invoked the right of appeal under **Articles 48** and **50** of the **Constitution**. While the right of appeal is fundamental, it does not automatically operate as a stay. Stay of execution is discretionary and subject to conditions. The Appellants failed to comply with the conditions imposed. They cannot now seek to benefit from their own default. The application for review therefore lacks merit.
24. On whether the Respondents are entitled to release of funds, it is settled that a successful litigant is entitled to the fruits of their judgment. This position was set out in *Machira t/a Machira & Co Advocates v East African Standard [2002] KEHC 1167 (KLR)* as follows: -

“The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage. That

is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put in effect by the way we handle applications for stay of further proceedings or execution, pending appeal.”

25. There is no subsisting stay in place. The conditional stay lapsed. There is no order from the Court of Appeal preserving the deposited funds. The joint account was established solely as security pending appeal. The purpose of that security has been defeated by the Appellants’ failure to comply with the conditions imposed by this court. The Respondents are therefore entitled to release of the decretal sum.
26. On costs, it is settled that the same follows the event. That is the import of **section 27** of the **Civil Procedure Act**. The court reserves its discretion on whether to award costs to either party. There is no reason to deny the Respondent costs of this application.
27. Accordingly, the, The Respondents are awarded costs.

Determination

1. In the upshot, this court makes the following orders;
 - a. ***The Respondents’ Notice of Motion application dated 3rd April 2025 is merited and is hereby allowed.***

***b. The Appellants' Notice of Motion application dated 17th September 2025
lacks merits and is hereby dismissed.***

c. Costs to the Respondent.

Dated, signed and delivered virtually at Mombasa this 5th day of March, 2026

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HON. F. WANGARI

JUDGE OF THE HIGH COURT

In the presence of: -

N/A by the Applicant

Mr. Maundu Advocate the Respondent

Ms. Salwa, Court Assistant