



**Mengich t/a Mengich & Company Advocates & another v Kandie & 3 others; Victoria Bank Limited (Garnishee); Braeburn Limited & another (Interested Parties) (Guardianship Cause 132 of 2018) [2026] KEHC 5107 (KLR) (Family) (23 April 2026) (Ruling)**

Neutral citation: [2026] KEHC 5107 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**GUARDIANSHIP CAUSE 132 OF 2018**  
**HK CHEMITEI, J**  
**APRIL 23, 2026**

**BETWEEN**

**ANDREW MENGICH T/A MENGICH & COMPANY ADVOCATES .... 1<sup>ST</sup>  
APPLICANT**

**BERNARD KIBATI T/A KIBATI & ASSOCIATES ADVOCATES .... 2<sup>ND</sup>  
APPLICANT**

**AND**

**CHEPCHUMBA LOKI KANDIE ..... 1<sup>ST</sup> RESPONDENT**

**KIPTUI KANDIE ..... 2<sup>ND</sup> RESPONDENT**

**KIPRUTO KANDIE ..... 3<sup>RD</sup> RESPONDENT**

**KIGEN KANDIE ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**VICTORIA BANK LIMITEED ..... GARNISHEE**

**AND**

**BRAEBURN LIMITED ..... INTERESTED PARTY**

**NORA PROPERTIES LIMITED ..... INTERESTED PARTY**



## RULING

1. This ruling relates to the application dated 26<sup>th</sup> October, 2025 filed by the Applicants, Andrew Mengich T/A Mengich & Co. Advocates and Bernard Kibati T/A Kibati & Associates Advocates, seeking for orders that:
  1. Spent.
  2. This Honourable Court be pleased to set aside, vacate and/or review the orders made on the 26<sup>th</sup> September, 2022 terminating, dismissing or closing the court file and all consequential orders and reinstate the Applicants application dated 25<sup>th</sup> September, 2018 and 20<sup>th</sup> November, 2018 in the interests of justice.
  3. This upon reviewing, varying and setting aside the orders of 26<sup>th</sup> September, 2022, the Honourable Court be pleased to give directions to Applicant's application dated 25<sup>th</sup> September, 2018 and 20<sup>th</sup> November, 2018 for disposal on priority basis.
  4. That Prayer 3, 4 and 5 of the Applicant's application dated 20<sup>th</sup> November, 2018 be allowed as prayed in the interests of justice.
  5. That in alternative the Respondents and/or their personal representative be summoned to appear in court to produce dividends received from 1st Interested Party and/or show cause why execution should not issue for failure to comply with previous orders of settlement of costs in the interests of justice.
  6. Such other and further orders do issue in the interests of justice.
2. The application is based on the grounds on its face and supporting affidavit sworn by Andrew K. Mengich on 16<sup>th</sup> October, 2025 who avers inter alia that the Applicants had filed earlier applications seeking garnishee orders to recover decretal sums arising from taxed costs and that the parties subsequently recorded a consent on partial settlement of those costs. The annexed consent required the Respondents to settle the outstanding balance, particularly from funds held in the garnishee account linked to the 1<sup>st</sup> interested party.
3. It is further deponed that despite the existence of these consent orders and clear directions for settlement, the Respondents have failed to honour their obligations, prompting the present application.
4. That the dismissal or closure of the suit on 26<sup>th</sup> September, 2022 occurred without affording the Applicants an opportunity to be heard and attributes their non-attendance to inadvertence rather than deliberate default. He maintains that the Respondents had agreed to settle the outstanding sums upon receipt of funds from the 1<sup>st</sup> interested party but have reneged on that undertaking.
5. Additionally, it is contended that the Applicants were not served with the notice to show cause due to office closure and that reinstatement is necessary to enable enforcement of the outstanding decretal sums and to safeguard the Applicants' entitlement to legal fees.
6. The application is not opposed and no written submissions have been filed.



## Analysis And Determination

7. I have carefully considered the application and established that the main issue for determination is whether the Applicants have satisfied the threshold for review and/or setting aside of the orders of 26<sup>th</sup> September, 2022 under Order 45 of the Civil Procedure Rules, or alternatively, whether sufficient cause exists to warrant reinstatement of the suit in the interests of justice.
8. While the application is unopposed, it is trite that the court must independently interrogate its merits, as an unopposed application is not automatically meritorious.
9. In *Mohansons Food Distributors Ltd & another v Kenya Commercial Bank Limited & another* [2021] eKLR the court stated as follows:

“(8) Although the application is unopposed, it is the duty of the Court to nevertheless subject it to a merit evaluation in accord with the applicable laws and principles. Indeed, in *Gideon Sitelu Konchellah vs. Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR the Supreme Court of Kenya held that:

“...as a court of law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter [Emphasis mine]. We see no such jurisdictional issue in the application before us. Hence we have proceeded to consider the facts before us as against the jurisprudence for grant of stay orders set by this Court...”

10. In *Anwar Ali & another v Monica Muthoni & another* [2021] eKLR the court stated as follows:

“8. Further, Order 45(1) of the Civil Procedure Rules, 2010 provide the conditions under which a court can allow an application for review. The Court of Appeal in the case of *Pancras T. Swai –vs- Kenya Breweries Limited* (2014) eKLR reiterated the conditions set by Order 45 and held that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds: -

- i. That there is discovery of new and important evidence which was not available to the Applicant when the Judgment or order was passed despite having exercised due diligence; or
- ii. That there was a mistake or error apparent on the face of the record; or
- iii. That sufficient reasons exist to warrant the review sought.
- iv. In addition to proving the existence of the above grounds, the Applicant must also demonstrate that the application was filed without unreasonable delay.



9. From the above conditions, it is clear that the prayer for review in the instant application is premised on the first condition.

In the case of Turbo Highway Eldoret Limited –vs- Synergy Industrial Credit Limited [2016]eKLR Sewe J. cited the case of Rose Kaiza –vs- Angelo Mpanjuiza [2009]eKLR, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

10. It is therefore clear that the discovery ought to be of new and important evidence which after due diligence was not within the knowledge of the party or could not have been produced when the decree was being made.

In the case of D. J. Lowe & Company Ltd –vs- Bonquo Indosuez, Nairobi Civil Application No.217 of 1998, the Court of Appeal sounded a caution in such applications and stated that:-

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

11. The Applicants principally anchor their case on alleged inadvertence in failing to attend court and the existence of a consent which has allegedly not been honoured. The annexures, particularly the consent orders, amended orders and certificates of costs, prima facie establish that there existed a binding agreement between the parties and that part payment of the decretal sums was effected.
12. However, the Applicants have not demonstrated that the conditions for review under Order 45 have been met. There is no disclosure of new and important evidence that was unavailable at the time of dismissal, nor is there any error apparent on the face of the record. The explanation for non-attendance, though plausible, falls within the realm of excusable mistake rather than a ground for review and must therefore be considered under the broader discretionary power of the court to set aside orders.
13. Further, an analysis of the evidence on record reveals a gap between the existence of the obligation and proof of breach.



While the documents confirm entitlement to taxed costs and a structured mode of settlement, they do not conclusively demonstrate that funds were received by the Respondents from the 1<sup>st</sup> interested party or that the Respondents willfully defaulted thereafter.

14. The absence of evidence such as bank statements, demand notices or correspondence evidencing refusal to pay weakens the Applicants' assertion of deliberate non-compliance. Consequently, the claim of breach remains inferential rather than evidentially established, thereby undermining the basis for coercive relief such as execution or summons to show cause.
15. Notwithstanding the foregoing deficiencies, I find that this court must balance procedural justice against substantive justice. The dismissal of the matter effectively shuts out the Applicants from pursuing recovery of certified costs, which are not disputed and are supported by court-sanctioned instruments. Given that the explanation for non-attendance is not shown to be intentional and that no prejudice has been demonstrated by the Respondents, it would be disproportionate to permanently deny the Applicants an opportunity to be heard.
16. In the premises the application is allowed in terms of prayers (2) thereof and the applications dated 25<sup>th</sup> September 2018 and 20<sup>th</sup> November 2018 be fixed for hearing.
17. Costs in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 23<sup>RD</sup> DAY OF APRIL 2026.**

**H K CHEMITEI**

**JUDGE**

