

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KITALE
MISC.CIVIL APPLICATION NO.E025 OF 2023

VIVIAN SHIBANDA

**T/A SHIBANDA & CO
ADVOCATES.....APPLICANT**

VERSUS

**DORCAS ILAMWENYA FEDHA.....
....RESPONDENT**

RULING

1. Before this court is an application by way of Notice of Motion dated 16/10/2025 seeking the following reliefs namely;

(i) Spent.

(ii) Spent.

(iii) That pending the hearing and determination of this application this court be pleased to review, vary, and/or set aside order No.3 of the orders made on 17/7/2025 and direct that the security sum of Kshs.250,000/- be deposited in court.

(iv) That pending the hearing and determination of the reference dated 23/4/2025 this court be pleased to review, vary and/or set aside order No.3 of the orders made on 17/7/2025

and direct the sum of Kshs.250,000/- be deposited in court.

(v) Costs be provided.

2. The grounds for this application are listed as follows;

- (a) *That this court on 17/7/2025 directed the applicant to pay Kshs.250,000/- as a condition for stay of execution pending determination of the reference dated 23/4/2025.*
- (b) *That directing the immediate payment of the said sum to the respondent is premature, unjust and contrary to provisions of the law which only contemplates security for due performance of a decree or order and not advance satisfaction of a disputed claim.*
- (c) *That the effect of such payment is placing the funds in the hands of one party before the dispute has been heard on its merits thereby amounting to partial execution of disputed costs and undermining the applicant's right to a fair hearing.*
- (d) *That well settled practice in law is to have such funds preserved in a joint interest earning account held in the names of advocates on record thereby protecting the rights of both parties until determination.*
- (e) *That the purpose of security is preservation not payment and directing outright payment to the respondent before the reference is heard tilts the balance of justice and undermines the neutrality of the process.*
- (f) *That there is an error on the face of the record as the court inadvertently directed for outright payment without considering the binding requirement under the law and without the benefit of hearing the applicant.*

- (g) That the application has been brought without undue delay and in good faith and unless the impugned order is reviewed the applicant will suffer grave prejudice and injustice.*
- (h) That if the respondent is prematurely paid and the reference succeeds the applicant faces substantial risk and hardship of attempting recovery, thereby occasioning irreparable prejudice.*
- (i) That unless this court urgently reviews and varies the order of 17/7/2025, the order will defeat the substratum of the reference, render the proceedings nugatory and undermine both the overriding objective under sections 1A and 1B of the Civil Procedure Act and the applicant's right to a fair hearing under Article 50 of the Constitution.*
- (j) That it is thus in the interest of justice that this application is heard as a matter of urgency and order for stay be granted.*

3. The application is supported by an affidavit sworn by the applicant on 16/10/2025 where she has majorly reiterated the above grounds. She avers that it is fair if the order for payment is substituted with an order of depositing the amount of Kshs.250,000/- in a joint interest account held by counsels on record pending determination of the reference filed.

4. This application is opposed by the respondent through grounds of opposition dated 20/10/2025. According to the respondent, this application is misconceived, bad in law and an abuse of court process.

5. The respondent avers that the application does not meet the requirements of Order 45 of Civil Procedure Rules and Section 80 of Civil Procedure Act.

6. That the application was filed on 16/10/2025 and the ruling the subject of the application was delivered on 17/7/2025. The respondent contends that the application was not filed promptly.
7. The respondent further contends that there is no discovery of a new and important matter or evidence, that there is no mistake apparent on the face of the record and there has been undue delay in presenting this application.
8. The respondent further contends that the application is an afterthought and the applicant is gambling with the law by taking the court in circles by filing several applications to evade payment of legal fees to the respondents who represented her and whereby the applicant has not paid a single cent.
9. That allowing the instant application will be a miscarriage of justice.
10. This court has set out both the applicant's case and the objection or opposition by the respondent. The applicant has cited the provisions of sections 1A, 1B, 3B and 80 of Civil Procedure Act and Order 45 Rule 1 and 2 of Civil Procedure Rules, Order 42 Rule 6 of Civil Procedure Rules and Order 51 of the Civil Procedure Rules. The substantive law with respect to the relief sought however is Section 80 of Civil Procedure Act and Order 45 Rules 1 and 2 of Civil Procedure Rules.

11. Before I delve into the application a brief look at the background of this matter is useful. The applicant and the respondent herein had an advocate-client relationship and it is apparent that the two differed on legal fees payable which difference culminated on the respondent filing his advocate-client bill of costs dated 18/6/2023 in this court. The assessment of costs was canvassed before the Deputy Registrar, Hon Margaret Nafula and vide a ruling dated 10/4/2025 the Taxing Officer assessed the advocate-client bill of costs at Kshs.501,995/-.
12. The applicant felt aggrieved and filed an application dated 23/4/2025 seeking inter alia stay of execution, leave to file a reference and an order to tax the bill of costs afresh.
13. This court on 17/7/2025 to fast-track the matter gave directions that the application dated 23/4/2025 be canvassed through written submissions and gave each party 14 days to file written submissions and in the meantime as a condition for stay of execution, directed the applicant to pay Kshs.250,000/- which was almost half the assessed costs to the respondent.
14. The condition for grant of stay was given pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules. That ruling is the subject of this application for review. The power or jurisdiction to review an order or decree is donated by Section 80 of Civil Procedure Act and Order 45 of the Civil Procedure Rules.

Section 80 provides;

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

15. The provisions of Order 45 Rule 1(a) and (b) of the Civil Procedure Rules provides as follows;

“(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 judgment to the court which passed the decree or made the order without unreasonable delay.”***

The powers of review going by the above provisions can only be invoked on the following grounds;

(a) When there is discovery of new matter or evidence that was not available at the time the order was made upon exercise of due diligence. An applicant cannot therefore bring up a new matter or evidence and ask for review. He/she must show that the new evidence was not within his knowledge after exercise of due diligence.

(b) The existence of a mistake or error apparent on record. The error maybe mathematical or contradictions and must be obvious that requires no detailed argument.

(c) Any other sufficient cause. This refers to compelling reason that requires the court to consider minor corrections of mistakes apparent on the face of record, in order to meet the ends of justice.

16. The applicant in this case has hinged her application on apparent error on the face of record but the grounds raised appear to me as grounds of appeal. The grounds are those grounds you expect in a memorandum of appeal, against the decision by this court to give a conditional stay of paying Kshs.250,000/- to the respondent.

This court to the extent that it considered the application for stay of execution and gave a conditional stay thereof, is now functus officio. This court certainly cannot be asked to sit on appeal on its own decision. That would amount to an abuse of court process. An application for review cannot be used to circumvent or substitute an appeal process. If the applicant

felt that the order directing it to pay half the assessed costs was premature or contrary to the law, the proper avenue was to appeal rather than prefer this application for review. The grounds cited by the applicant are grounds for appeal and not review. In the case of **Ndungu Njau -vs- National Bank of Kenya Ltd (2008) KECA 188 (KLR)** the Court of Appeal while emphasizing the 3 grounds similar to the ones cited above as the only grounds to invoke the court's discretion to review, found that the grounds cited by an appellant were grounds for appeal and did not fall within the scope of the then Order XLIV Rule 1 of the then Civil Procedure Rules.

This court for the aforesaid reasons finds that the application dated 16/10/2025 is incompetent, bad in law and an abuse of court process. The same is struck out with costs.

DELIVERED, DATED and SIGNED at KITALE this29th day ofAPRIL....., 2026.

HON JUSTICE R.K. LIMO
KITALE HIGH COURT

Ruling delivered in open court

In the presence of Chitechi for the applicant

Shibanda for the respondent

Duke/Chemosop- Court assistants

