



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
CIVIL CASE NO. 52 OF 2014

BETWEEN

**MIDDLE EAST BANK KENYA LIMITED
PLAINTIFF/APPLICANT**

VERSUS

**PRISCO PETROLEUM NETWORK LTD 1ST
DEFENDANT**

**CHARLES WAIHAKA KING'ORI 2ND
DEFENDANT**

**SHADRACK NDAMBUKI KOMBO 3RD
DEFENDANT**

**ELIJAH JOHN MWANGI KINYANJUI 4TH
DEFENDANT**

**NAPHTALI MUNGAI MUREITHI 5TH
DEFENDANT**

**CHRIS NYAKUNDI 6TH
DEFENDANT**

RULING

Background and Introduction

1. By a Notice of Motion dated 16th December 2024 the plaintiff, who is the applicant herein, seeks to have this Court review and set aside its Ruling delivered on 20th January 2023 (A. Mshilla, J). The

applicant further seeks an order that Lydia Wanjiru Kinyanjui & Verah Wambui Mwangi, the administrators of the estate of the deceased 4th Defendant, be substituted in the place of the deceased and the applicant be at liberty to effect any further service in execution of the decree herein.

2. The applicant avers that judgment on admission was entered against the defendants on 31st October 2014 in the sum of Kshs. 39,544,065/= together with interest and costs. Prior to execution, investigations revealed that only the 4th defendant possessed readily attachable assets. Consequently, the plaintiff obtained an order of attachment over the property known as **L.R No. 14747/19 (IR No. 48457)** situated in Murang'a County.
3. It is further contended that the 4th defendant passed away on or about 19th June 2019 while the decree was at the execution stage. Upon learning that administrators had been appointed to the estate of the deceased, the plaintiff moved the Court by way of an application dated 14th June 2021 seeking leave to substitute the 4th defendant

with his legal representatives so as to proceed with execution. That application was dismissed by this Court in a Ruling delivered on 20th January 2023, on the ground that the suit against the 4th defendant had abated. The plaintiff maintains that the Court erred in failing to consider its objection to counsel purporting to act for the deceased, and is aggrieved by what it terms a *per incuriam* decision. Although a Notice of Appeal dated 1st February 2023 was filed, no substantive appeal has yet been lodged.

4. The respondents, who are the administrators of the estate of the 4th defendant, have opposed the application. They contend that the judgment on admission of 31st October 2014 had been challenged by the 4th defendant prior to his demise through an application dated 25th June 2018. That application was heard and determined by this Court (G. Nzioka, J) who on 22nd July 2019 set aside the judgment entered against the 4th defendant. The respondents argue that the effect of that Ruling was to nullify the execution proceedings initiated against him, and therefore the applicant cannot rely on **Order 24 Rule 10 of the Civil**

Procedure Rules to assert that execution was ongoing at the time of substitution. In their view, the suit against the 4th defendant had properly abated.

5. The respondents further contend that the present application is vitiated by inordinate delay. They point out that the Ruling sought to be reviewed was delivered on 20th January 2023, yet the instant application was not filed until December 2024, nearly two years later. In their view, such unexplained delay is prejudicial and militates against the exercise of this Court's discretion in favour of the Applicant.

Analysis and Determination

6. I have considered the application, response and the written submissions filed by the parties in support of their respective positions. The cardinal issue for determination is whether the applicant has established sufficient grounds to warrant review of the Ruling delivered on 20th January 2023.
7. The jurisdiction of this Court to entertain an application for review is anchored in **Section 80**

of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80

provides that any person aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred, or by a decree or order from which no appeal is allowed, may apply for review to the Court which passed the decree or made the order.

- 8. Order 45 Rule 1** stipulates the grounds upon which review may be sought, namely, discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced at the time the decree was passed or the order made, mistake or error apparent on the face of the record; or any other sufficient reason. The applicant relies on the third ground and contends that there exists an error apparent on the face of the record warranting a review of the said Ruling.
- 9.** The applicant's prayer for review is premised upon the question of whether the suit against the 4th defendant abated upon his demise, and whether the finding of this Court was rendered per incuriam. In support of this contention, the

applicants have referred to the decision in **Maiteri & Another V Muhiutuku & Another (Suing as Legal Representatives of Joshua Kimani Kungu - Deceased), [2025] KEHC 10828 (KLR)** where the Court held as follows:

“In light of the provision cited herein above, it is my considered view that the effect of abatement of a suit is that the suit, if it was by a plaintiff ceases to exist against a defendant who dies before judgment is entered and if an application to substitute him/her is not filed. In the instant suit, it is not disputed that the defendant died after Judgment had been entered against him. Thus, Order 24 (4) is not applicable in this instance.”

- 10.** The applicant’s case is that the 4th defendant died after summary judgment had been entered against the defendants, and therefore **Order 24 Rule 10** was not applicable. It is common ground that the 4th defendant died on 19th June 2019. That fact

would mean that, for purposes of **Order 24 Rule 10**, there was indeed a subsisting judgment before his death. However, the Ruling of 22nd July 2019 had the effect of setting aside the judgment as against him, thereby reopening the proceedings and entitling him to be heard.

- 11.** In reconciling these circumstances with the provisions of **Order 24 Rule 10**, it becomes clear that while the death of the 4th defendant occurred at a time when judgment had technically been entered, the subsequent Ruling altered the legal position by vacating that judgment. The issue of abatement must therefore be considered in light of the fact that, at the time of his death, the suit against the 4th defendant had been restored to the hearing stage.
- 12.** The applicants contend that in considering the Motion, the Court imposed conditions upon the 4th defendant to deposit in Court the amount he was liable to pay under the guarantee. They argue that the 4th defendant failed to comply with this condition, and consequently, the judgment delivered on 31st October 2014 took effect and

therefore remains valid and subsisting as against him.

13. The determination of whether this assertion is correct is straightforward. Upon a careful review of the Ruling of 22nd July 2019, it is evident that the learned Judge did not impose such a condition as a prerequisite to setting aside the judgment. For the avoidance of doubt, I reproduce the relevant portion of the Ruling where the Court addressed the issue of deposit. The learned Judge stated:

“36. In conclusion of this matter, I find that, in view of the fact that there is no evidence that the Applicant was personally served with summons and/or he personally instructed the firm of Kisia & Company Advocates to represent him, it will be in the interest of justice to grant the Applicant an opportunity to be heard.

37. However, it is not in vain when the Respondent points

to the court that, the Applicant is a director in the 1st Defendant's company, which was advanced the loan facility and which he guaranteed. It is also on record that despite being aware through the evidence of Mr. Kisia that, he acted on his behalf without him instructing that firm, the Applicant has chosen not to take any action against the 3rd Defendant and/or the firm of Kisia & Company Advocates and opted to follow the Respondent.

38. I have considered the draft defence filed in the light of the entire matter and most specifically the ruling delivered on 31st October 2014 seeking for judgment on admission in favour of the Plaintiff as against the

Defendants in sum of Kshs. 39,544,065.91 and the subsequent finding in favour of the Plaintiff that the defence filed by the Defendants did not raise triable issues. I find that the Applicants draft statement of defence will be considered in the light of that ruling. It will only serve the interest of justice for both parties if the Applicant deposits the sum of money he is liable to pay under the guarantee liability. The same be deposited in court and/or in a joint interest earning account in the names of the counsels representing the Applicant and the Plaintiff. It is evident from paragraph 10 of the Plaint dated 6th February 2014 that the sum advanced was secured by individual

deeds of personal guarantee and indemnity dated 8th September 2011, whereby the 2nd to the 6th Defendants, unconditionally and irrevocably jointly and severally guaranteed the sum advanced. In that regard, and in view of the fact that, execution is ongoing against the co-guarantors it will be important to ascertain the figure that the Applicant is liable to pay before any order can be made as to the sum of money to be deposited.

- 14.** My understanding of the Ruling as delivered is that the directive to deposit monies was contingent upon a prior determination of the 4th defendant's share of liability, given that execution was already ongoing against the co-guarantors. The learned Judge expressly stated that "*...it will be important to ascertain the figure that the Applicant is liable to pay before any order can be made as to the sum of*

money to be deposited.” I have not been shown that such quantification was ever undertaken, nor that any timelines were imposed for compliance with the order. For these reasons, I am unable to agree with the applicant’s submission that the judgment entered on 31st October 2014 continued to subsist as against the respondent. The effect of the Ruling of 22nd July 2019 was to set aside that judgment and restore the respondent’s right to be heard.

- 15.** On that account alone, I find no error apparent on the face of the record to warrant disturbing the finding of this Court. Finally, I note that the present application for review was filed nearly two years after the Ruling which it seeks to challenge. No explanation has been offered by the applicants for this delay. Such unexplained lapse constitutes inordinate delay, which in any case further disentitles the applicants from the discretionary relief of review.

Disposition

- 16.** Accordingly, the application dated 16th December 2024 is dismissed with costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI
THIS 11TH DAY OF MAY 2026.**

**F. MUGAMBI
JUDGE**

Delivered in presence of:

Ms Aradi for the respondent
Peter h/b for Onyambu for applicant
Court Assistant: Lillian & Gloria

Original file copy