



NMS v TS (Civil Application E076 of 2024) [2025] KECA 774 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KECA 774 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E076 OF 2024
SG KAIRU, KI LAIBUTA & GWN MACHARIA, JJA**

MAY 9, 2025

BETWEEN

NMS APPLICANT

AND

TS RESPONDENT

(Being an application for stay of execution of the Judgment of the Environment and Land Court of Kenya at Kwale (A.E. Dena, J.) dated 12th April 2024 in ELC Case No. 144 of 2021)

RULING

1. The applicant, Nereah Michael Said, moved this Court by an application dated 26th June 2024 seeking an order to stay execution of the judgment of the Environment and Land Court delivered on 12th April 2024 in ELC No. 144 of 2021. That application was determined by the Court in its ruling delivered on 27th September 2024 in which the Court made the following orders:
 - “ a) That execution of the judgment and decree delivered on 12th April 2024 in Kwale ELC No. 144 of 2021 be stayed pending hearing and determination of the appeal;
 - b. That an injunction do issue restraining the respondent from selling land parcel Nos. Kwale/Kinondo/xxxx and Kwale/Kinondo/xxxx;
 - c. That the two orders above are conditional to the title deeds to the two parcels of land namely Kwale/Kinondo/xxxx and Kwale/ Kinondo/xxxx and half of the proceeds of sale of parcel No. Kwale/ Kinondo/xxxx, in the sum of €61,000 being deposited with the trial court within thirty (30) days from the date hereof;
 - d. That in default of the deposit of the sums aforesaid, execution do issue to recover the sum of €61,000;



- e. That parties do fast track the hearing of the intended appeal;
 - f. That the costs of the application shall be in the appeal.”
2. In what appears to be an application to review those orders, the applicant has moved the Court by his application dated 17th October 2024 seeking an order for substitution of the “cash deposit of €61,000 with alternative security of depositing title deed for property No. Kwale/Matuga/xxx and certificates of Treasury Bills.” Also sought is an order for the Court to clarify the exchange applicable.
 3. The application is based on the grounds that the ELC had directed the exchange rate to be applied, and that the applicant wishes to deposit alternative securities equivalent to the said amount. Learned counsel Mr. Nicholas Abidha, in urging the application, referred to the supporting affidavit sworn by the applicant and highlighted the applicant’s written submissions. It was submitted that the Court ought to clarify the rate to enable the parties “understand the amount involved.”
 4. In the same vein, counsel submitted that the amount involved is “a huge sum”, and that efforts made by the applicant to liquidate the securities to realize the amount was “in vain”, hence the request for substitution. Counsel cited the case of *Alice Gathigia Karuku vs. Maisha Floor Mills* [2013] eKLR to support the applicant’s case for substitution of the security on account of the applicant’s inability to raise the amount in question.
 5. Mr. Kahindi, learned counsel for Thomas Schiering, the respondent, in opposing the application relied on the replying affidavit sworn by the respondent and his written submissions in urging that the application is an abuse of the court process; that the object of the application is to avoid compliance with the orders of this Court made on 27th September 2024, which are clear and unambiguous.
 6. We have considered the application, the affidavits and the written and oral submissions. The circumstances when this Court may review its own decisions are limited. As the Court stated in the case of *Benjob Amalgamated Limited vs. Kenya Commercial Bank Limited* [2014] eKLR, the residual jurisdiction of the Court to review its own decisions “should be invoked with circumspection. The Court explained:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”
 7. See also the decision of the Court in *Ushago Diani Investment Limited vs. Jabeen Manan Abdulwahab* [2019] KECA 50 (KLR).
 8. We have reproduced above the orders of the Court made on 27th September 2024 which are the subject of the present application for review. As submitted by counsel for the respondent, those orders are clear and unambiguous. There is no suggestion by the applicant that there is either a mistake or an error of any sort in those orders that would require correction. Beyond stating that she has been unable to raise



the amount ordered, the applicant has not established any basis for the Court to review the orders. As stated by the Supreme Court in *Menginya Salim Murgani vs. Kenya Revenue Authority* [2014] eKLR:

“It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

9. The application dated 17th October 2024 is devoid of merit. It is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MAY, 2025.

S. GATEMBU KAIRU, FCIARB

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, CArb, FCIArb.

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JUDGE OF APPEAL

G.W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

