



**Patriotic Group of Companies Ltd v Sewe & 15 others (Appeal
E020 of 2024) [2025] KEELRC 883 (KLR) (20 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 883 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E020 OF 2024
JK GAKERI, J
MARCH 20, 2025**

BETWEEN

PATRIOTIC GROUP OF COMPANIES LTD APPLICANT

AND

- JOHN OGANGO SEWE 1ST RESPONDENT**
- JOHN OCHIENG 2ND RESPONDENT**
- ALLAN MAJWA 3RD RESPONDENT**
- CAROLINE AUMA 4TH RESPONDENT**
- CARSTONE ODHIAMBO 5TH RESPONDENT**
- GEORGE OJOWO 6TH RESPONDENT**
- ALICE AKOTH 7TH RESPONDENT**
- JOHN OKELLO 8TH RESPONDENT**
- WILLICE ONYANGO 9TH RESPONDENT**
- NICHOLAS OKARA 10TH RESPONDENT**
- JACKLINE ATIENO 11TH RESPONDENT**
- CHARLES RAY ONYANGO 12TH RESPONDENT**
- JOHN ORIEDA 13TH RESPONDENT**
- DAVID ODHIAMBO 14TH RESPONDENT**
- CHRISTOPHER WAKHUNGU 15TH RESPONDENT**
- GEORGE OUMA OUNDO 16TH RESPONDENT**



RULING

1. Before the Court for determination is the appellant/applicant's Notice of Motion dated 28th November, 2024 filed under Certificate of Urgency seeking Orders that: -
 1. Spent.
 2. The Honourable court reviews its Orders dated 27th November, 2024 and allow the appellant's Application dated 9th July on condition that half the decretal sum is deposited in the joint interest earning account of the Respondent/Appellants advocates within 30 days from the date of the directions pending hearing and determination of this application.
 3. Spent.
 4. Spent.
 5. Spent.
 6. The costs of this application be provided for.
2. The Notice of Motion is expressed under Section 1A, 1B and 3A of the Civil Procedure Act and Order 45 Rule (1) and (2) Order 22 Rule 22 and Order 40 Rule (1) and (2) of the Civil Procedure Rules and is based on the grounds set out on its face and the Supporting affidavit of Jennifer Koech sworn on 28th November, 2024 who deposes that following the dismissal of an earlier application for stay of execution pending appeal, the respondent had instructed Moran Auctioneers to proclaim and attach the appellants property in execution while the appeal is pending.
3. The affiant deposes that she only learnt from counsel that in January 2024 that the Decree holders had obtained ex parte judgment on 23rd November, 2023 and the last mention was slated for 6th November, 2023.
4. That the Decree holders were employed as casuals and their contracts ended by effluxion of time.
5. The affiant deposes that the appellant ought not to be condemned unheard as a matter of natural justice.

Response

6. In their Replying Affidavit sworn by Mr. John Ogango served on 6th December, 2024, the affiant deposes that the appellant's Notice of Motion had not raised any ground to warrant a review of the orders dated 27th November, 2024, and the court is functus officio and cannot reconsider or sit on an apparent appeal against its own Orders made on 27th November, 2025.
7. That the Supporting Affidavit has merely repeated the averments made in the previous Notice of Motion which were adequately responded to vide the Replying Affidavit sworn on 20th September, 2024 and the Ruling delivered on 27th November, 2024.
8. The affiant further deposes that the application for review is not premised on any of the grounds provided for by law as no new and important matter or evidence had been adduced, mistake or error apparent on the face of the record or any sufficient reason to justify a review.
9. That the application is incompetent, invalid, null and void and a flagrant abuse of due process.



Appellant/Applicant's submissions

10. The Court could not trace the applicant's submissions on the CTS even after several attempts.

Respondent/Claimant's submissions

11. Counsel relied on the provisions of Section 7 of the *Civil Procedure Act* on res judicata to submit that since the application dated 9th September, 2024 was on stay pending appeal and the same was determined vide Ruling delivered on 27th November, 2024, the court is functus officio as regards the issue of stay of execution pending appeal and the applicant's option is to file an appeal in the Court of Appeal for stay of execution pending appeal.
12. As regards review of the Ruling delivered on 27th November, 2024, counsel relied on Section 80 of the *Civil Procedure Act* and Order 45 Rule (1) of the Civil Procedure Rules on the circumstances in which review may be justified, to urge that since the applicant's application lacks a substratum, the only viable option for the applicant is to appeal the Ruling dated 27th November, 2024 as the court is functus officio and cannot sit on an apparent appeal by way of the applicant's application.
13. Reliance was placed made on the sentiments of the court in Uhuru Highway Development Ltd V Central Bank of Kenya & 2 Others to urge that interlocutory proceedings are a suit for purposes of the principle of res judicata as was the Court of Appeal decision in Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others [2017] KECA 477 (KLR) concerning review. Reliance was made on the decision in Kenya Orient Insurance Co. Ltd V Otieno [2024] KEHC 16605 (KLR) and on functus officio the sentiments of the court in Zipporah Njoki Kangara V Rock and Pure Ltd & 3 Others KEELC 7063 (KLR).
14. Finally, counsel submitted that he appellant refused to offer security for stay of execution leading to the dismissal of its application and the court did not impose the condition which is not an error apparent on the face of the record or mistake.
15. The only issue for consideration is whether the applicants Notice of Motion dated 28th November, 2024 is merited.
16. A brief history of this matter suffices. When the matter was placed before the court for mention on 1st October, 2024, none of the parties was present and a mention was slated for 30th October, 2024, when only the respondent's counsel was present. A further mention was slate for 6th November, 2024 when again only the respondent's counsel was present in court and a Ruling date was set and the ruling delivered on 27th November, 2024 in the presence of both counsels and directions given on the filing of submissions for the appeal.
17. The instant application was filed on the following day and since then the applicant has filed another on 9th January, 2025.
18. In its applications dated 9th July and 9th September, 2024 the applicant sought stay Orders which the court declined on the ground that the applicant's application had not met the threshold of Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 as it was neither ready nor willing to offer security for the due performance of the decree or order of the lower court.
19. However, the court granted interim stay of execution ion 28th November, 2024 on condition that the decretal sum be deposited in an interest earning account in the joint names of the Advocates within 45 days; the applicant failed to furnish security as directed which explains the other applications on record.



20. The applicant offered an amount less than the decretal sum and at one point the respondent indulged the applicant but it did not take up the opportunity to redeem its appeal.
21. The only outstanding issue for determination is the review of the Ruling delivered on 27th November, 2024.
22. The principles that govern review of Judgments, orders, decrees and Ruling are well settled.
23. Both the provisions of Sections 80 of the *Civil Procedure Act* and Order 45 Rule of the Civil Procedure Rules 2010 are clear on the powers of the court to review its judgment or ruling. Closure home, Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024, provides:
 - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) if there is discovery of a new and important matter or evidence which, despite the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.
 - (2) ...
 - (3) ...
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
24. As to whether the application herein was made within a reasonable time, the court is satisfied that it was given that it was filed a day after the Ruling sought to be reviewed.
25. Contrary to the respondent counsel’s argument that the only option available to the applicant is an appeal, the applicant as demonstrated, has the option to review the Ruling as no appeal has been preferred.
26. In *Ndithya V Total Kenya Ltd Misc. Application E218 of 2021 [2022] KEHC 10080 (KLR) Odunga J* (as he then was) stated as follows:

It is clear from the foregoing that the review remedy is only available to a party who though has a right to challenge the decision in question by an appeal is not appealing or to whom there is no right to appeal. In other words, a person cannot exercise both the rights of appeal and review at the same time. See *Orero V Seko [1984] KLR 238*”.

See also *Serephen Nyasani Menge V Rispha Onsase [2018] eKLR*, *Martha Wambui V Irene Wanjiru Mwangi & Another [2015] eKLR* and *Multichoice (K) Ltd V Wananch Group(K) Ltd & 2 Others [2022] eKLR* among Others.
27. In the instant case, it is clear that the applicant has opted for a review.



28. The applicant argues that it had now duly offered security for costs i.e half the decretal sum to be deposited in the joint interest earning account of both Advocates and may suffer substantial loss unless the order is made.
29. Equally, the applicant states that the respondent had now instructed M/s Moran Auctioneers to proclaim and attach its goods, the trial court entered an interlocutory judgment against the applicant and dismissed the application to set aside the ex parte judgment and the appeal raises triable issues.
30. Puzzlingly, the Supporting Affidavit sworn by Jennifer Koech on 28th December, 2024 is exclusively on the merits of the appeal as opposed to demonstrating why the ruling delivered on 27th November, 2024 ought to be reviewed.
31. Relatedly, the grounds set out on the face of the Notice of Motion, highlighted above have not demonstrated why the ruling ought to be reviewed in the context of Rule 74 of the Employment and Labour Relations Court (Procedure) Rules 2024, or Order 45 Rule 1 of the Civil Procedure Rules 2010.
32. None of the provisions of Rule 74 or Order 45 has been relied upon or cited as the foundation of the application for review.
33. Does the provision of security after a Ruling justify a review of the ruling as envisaged by the provisions of Section 80 of the Civil Procedure Act, the Employment and Labour Relations Court (Procedure) Rules 2024 or Order 45 Rule I of the Civil Procedure Rules, 2010? The court is not persuaded that it is a justification or ground for review.
34. The totality of the foregoing is that it is the finding of the court that the grounds relied upon by the applicant do not qualify to be any of the circumstances envisaged by Order 45 Rule I of the Civil Procedure Rules or Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024.
35. Significantly, the respondent's counsel raised the issue that the Applicant's application res judicata and cited various authorities. Without delving into the details or the elements of res judicata, the court is not persuaded that the instant application is res judicata the earlier application, which was on stay of execution pending appeal and restraining the auctioneer and its agents as opposed to a review of the orders made by the court or the ruling itself and the issue of providing half the decretal sum as security did not arise as the application lacked a firm basis under the relevant law.
36. In the upshot, the applicant's Notice of Motion dated 28th November, 2024 is unmerited and it is accordingly dismissed with no Orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 20TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the



right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

