



Suraya Property Group Limited & another v W & K Estates Limited & 2 others (Commercial Case 314 of 2010) [2025] KEHC 463 (KLR) (Commercial and Tax) (27 January 2025) (Ruling)

Neutral citation: [2025] KEHC 463 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 314 OF 2010
JWW MONG'ARE, J
JANUARY 27, 2025**

BETWEEN

SURAYA PROPERTY GROUP LIMITED JUDGMENT DEBTOR

AND

W & K DEVELOPERS LIMITED RESPONDENT

AND

W & K ESTATES LIMITED 1ST DEFENDANT

ISAAC KAMAU NDIRANGU 2ND DEFENDANT

ELVIN WAMBUI KAMAU 3RD DEFENDANT

RULING

1. The Applicants, being the directors of Suraya Properties Group, the 1st Respondent/Judgment Debtor, filed the Notice of Motion dated 6th August 2024, seeking orders to review/vary and set aside the orders issued on 2nd July 2024, and allow the Applicants to file a Response to the Decree Holders' Notice of Motion dated 14th September 2021, and to attend court for examination.
2. The application is premised on the grounds outlined in the annexed affidavit of 6th August 2024 by PETER MURAYA and primary and further written submissions dated 27th and 28th August 2024. The Applicants contend that the orders of 2nd July 2024, lifting the corporate veil of SURAYA PROPERTIES GROUP, are prejudicial to their right to be heard because they were not allowed to present the Company's books of accounts and other documents relating to its operations and to be examined on the Company's means to satisfy the decree of Kshs. 18,765,060/-.



Response:-

3. The Defendants/ Decree Holders/ Respondents opposed the application through a Grounds of Opposition dated 23rd August 2024 and written submissions dated 9th September 2024. Their core argument is that the Applicant had ample time within the last 3 years to respond to the Application dated 14th September 2021. As such, it would be highly prejudicial to the Respondents if the application is allowed as the impugned orders of 2nd July 2024 were made in default after the Applicants failed to comply with previous Court Orders given by the Court in the presence of and with the full knowledge of their Advocates.

Analysis and Determination:-

4. I have considered the application, the response and the parties' respective written submissions. The issue for determination is whether the Applicants have met the threshold for the setting aside of the orders of 2nd July 2024.
5. The Court has the discretionary power to review or set aside an order under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. In exercising the discretion, the Court considers whether there was an error on the face of the record, discovery of new or important matter or sufficient reason.
6. In this case, the Court summoned the Applicants to appear and a date for cross-examination was set for 8th May 2024. On that date, Mr. GACHAGA appeared for the Applicants following a change of advocates. The Court directed the Applicants to file a response to the application dated 14th September 2021 within 14 days and the mention was slated for 2nd July 2024.
7. On 2nd July 2024, Mr. KASYOKA holding brief for Mr. GACHAGA sought 7 more days to file a response. However, the Court was of the view that the Applicants had been given sufficient time to file their response and thus gave the impugned orders.
8. The Court notes that there have been numerous delays by the Applicants in responding to the Respondent's application of 14th September 2021. The delays have been highlighted by the Respondent in its response. They are also manifest from the record.
9. On the 2nd July 2024, the Court also noted that the Applicants had failed to adhere to the Court's directions of 8th May 2024 to file a response within 14 days. The Applicants also failed to file a response in the over 60-day period between the two dates.
10. The Court is alive to the maxim that 'equity aids the vigilant not the indolent' cited by the Respondent. However, the Court also appreciates the Constitutional imperative that is the right to be heard. See Article 50 of *the Constitution*.
11. The above calls for the balancing of the scales of justice. The Respondents have asserted that they stand to be prejudiced due to delay in enjoying the fruits of their judgments. Nonetheless, the paramount factor to be considered is that the Applicants are entitled to be heard.
12. In County Assembly of Kisumu & 2 others *v Kisumu County Assembly Service Board & 6 others Civil Appeal Nos. 17 & 18 of 2015* (Consolidated) [2015] eKLR the Court of Appeal observed that:-

“72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the



well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative."

Disposal:-

13. The upshot is that the Applicants have demonstrated a sufficient reason for review. The Application dated 8th August 2024 is allowed but with conditions due to the Applicant's past conduct.
 1. The orders issued on 2nd July 2024 are set aside on the condition that the Applicants file their Replying Affidavit to the Application dated 14th September 2021 within 7 days. If the Applicants do not comply, the orders of 2nd July 2024 shall be reinstated.
 2. The Applicants shall bear the costs of the application dated 6th August 2024.
 3. Hearing of the application dated 14th September 2021 to be set on priority basis.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JANUARY 2025

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J.W.W. MONG'ARE

JUDGE

In the Presence of:

1. Mr. K'opere for the Decree Holder/Respondents.
2. Mr. Githumbi for the Applicants.
3. Amos - Court Assistant

