



REPUBLIC OF KENYA



**In re Uchumi Supermarkets Plc (Insolvency Petition 25 of 2004)
[2025] KEHC 1724 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1724 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION 25 OF 2004
F GIKONYO, J
FEBRUARY 27, 2025**

BETWEEN

**THE ATTORNEY GENERAL (ON BEHALF OF NATIONAL
TREASURY) APPLICANT**

AND

**UBA BANK KENYA LIMITED 1ST RESPONDENT
UNITED HOUSING ESTATE LIMITED 2ND RESPONDENT
KENYA BOWLING CENTERS LIMITED 3RD RESPONDENT
TOWNSVILLE HOLDINGS LIMITED 4TH RESPONDENT**

AND

UCHUMI SUPERMARKET APPLICANT

RULING

1. By a ruling delivered on 3rd November 2023, the court allowed the 1st respondent to exercise its statutory power of sale and enforce its security over all that property known as Land Reference Number 209/12593 Nairobi (the subject property).
2. The 5th respondent/ applicant now seeks in the Notice of Motion dated 28th November 2023 brought under Articles 27 and 50 of the *Constitution* of Kenya 2010, Sections 1A and 3A of the *Civil Procedure Act*, Section 80 of the *Civil Procedure Act*, Order 45 Rules 1 & 2, Order 22, Rule 25 and Order 51 Rule 1 of the Civil Procedure Rules 2010, orders to set aside, vacate, review or vary the ruling/orders made on 3rd November 2023.



3. The application is predicated on the grounds set out in the application and the supporting affidavit sworn by Prof. Njuguna Ndung'u, the Cabinet Secretary, National Treasury and Economic Planning on 28th November 2023; and those grounds have been expounded in the written submissions dated 13th November 2024.
4. The primary ground for review is 'on account of mistake or error apparent on the face of the record'. According to the applicant, the error is in the fact that the court failed to consider the applicant's objection filed on 26th October 2023 in its decision in question.
5. It was also contended that through the applicant, the Government of Kenya is the single largest creditor at Uchumi Supermarket PLC (the company) with a loan of Kshs. 1.2 Billion hence failure by this court to consider its objection is detrimental to the public and exposes the public to losses of over Kshs. 1.2 Billion.
6. The applicant relied on the Court of Appeal's decisions in *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243 describing an error on the face of the record and *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR to the effect that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court.

Responses

7. In opposition to the application, the 1st respondent filed a replying affidavit sworn by its Head of Legal, Micky Matheka on 9th December 2024 and written submissions of the same date. The salient point by the 1st respondent is that the applicant has not met the threshold for review as the applicant's failure to present its case cannot be a basis for a review of the ruling. It also asserted that the applicant was not condemned unheard. It highlighted that the court afforded the applicant numerous opportunities to file its objection but the applicant neglected to do so.
8. In addition, the 1st respondent submitted that the applicant will not suffer any prejudice if the ruling is not reviewed as the Government of Kenya, through the applicant, holds a second-ranking charge over the charged property and therefore it cannot have priority over the 1st respondent's charge and override its rights. It also postulated that in any event, if a sale did take place, the balance from the sale of the charged property would be utilized to service the debt owed to the Government and the general pool of creditors. It pointed out that this is a purely commercial matter where parties are bound by contract. It thus asserted that the 1st respondent will be greatly prejudiced if the ruling is reviewed as it will be deprived of the right to enforce its security. It further contended that if the ruling is reviewed it will compromise the consent dated 5th March 2024 between the company and the 1st respondent which has resulted in the company being able to utilize the charged property to pay its creditors.
9. In support, the 1st respondent relied on *Abasi Belinda v Fredrick Kangwamu and another* [1963] EA 557, *Abdalla & 6 others v Khansa Developers Ltd, Abiram Tuleswar Sharma v Abiram Pishak Sharmal*, (SCC p. 390, para. 3) 1 (1979) 4 SCC 389; AIR 1979 SC 1047 and *Nyamogo & Nyamogo v Kogo* [2001] 1 EA 17 and *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR.
10. The company opposed the application through its managing director, Laurence Ngao's replying affidavit of 4th November 2024. He deposed that the company and the 1st respondent entered into a consent dated 5th March 2024 to save the subject property from statutory sale and to safeguard the company and the body of creditors. He expressed the view that the consent has rendered the instant application nugatory. He also stated that a Company Voluntary Arrangement (CVA) subsists and that the applicant's interests are fully catered to.



11. It was further deposed that if the application is allowed, it will be to the detriment of the whole body of creditors who are relying on the implementation of the CVA to be able to recoup a substantial portion of the money owed to them.
12. The 2nd respondent filed written submissions dated 15th November 2024. It submitted that following the consent dated 5th March 2024 signed by it and the 1st respondent to not dispose of the subject property, there is no current threat to the subject property. Therefore, the instant application has been overtaken by events and should be dismissed.
13. The 3rd and 4th respondents, New KCC Ltd, Broadways Ltd, Legacy Spares Ltd, United Housing Estate, Bidco Africa Ltd, and National Bank of Kenya Ltd elected not to file any written submissions.

Analysis and Determination

SUBDIVISION - Issue

14. A singular issue arises from the application, the rival affidavits, written submissions and authorities cited: -

Whether the ruling dated 3rd November 2023 be set aside on account of mistake or error apparent on the face of the record.
15. Court's as discretionary powers to review its decision under section 80 of the [Civil Procedure Act](#), is guided by the grounds stated in Order 45 Rule 1 of the Civil Procedure Rules.
16. Review herein has been sought 'on account of some mistake or error apparent on the face of the record'.
17. This ground was explained in *Nyamogo & Nyamogo Advocates v Kogo* [supra] by the Court of Appeal thus: -

“An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.”
18. According to the applicant the mistake or an error on the face of the record lie in the fact that, the court did not consider the applicant's objection filed on 26th October 2023 in arriving at its decision in question. It asserted that the replying affidavit was filed on 26th October 2023 at 8:10 AM. And, so they were condemned unheard.
19. On the other hand, the 1st respondent argued that no document was filed by the State Law Office on that date and time as alleged and that the only entries for that date were 8.30 AM, 10.32 AM and 10.35 AM.



20. The court has perused the CTS record; and it shows that the State Law Office filed a replying affidavit sworn by Prof. Njuguna Ndung'u on 26th October 2023 at 20.30.11 hours. From the record of proceedings, on 27th October 2023, the Court indicated that the ruling would be delivered on 3rd November 2023 because the ruling was not ready as the parties delayed filing their documents as late as the night before.

21. The foregoing is the reality of things. But, at para. 8 of the impugned ruling, the court stated as follows:-

“ 8. I have considered the rival representations of the parties. On 18/10/2023, I was about to deliver the ruling on the present application. However, Mr. Bett, Learned Counsel for National Treasury informed the Court that he wanted to file an objection on behalf of National Treasury. I therefore set aside the proceeding for delivery of the ruling on that day and directed that Mr. Bett on behalf of the Attorney General do file his objection/ response within 3 days and I reserved the ruling for 27/10/2023. As of that day, the National Treasury had filed no pleading. Once again in deference to the principle of fair hearing, I adjourned the ruling to 3/11/2023. As at the time of writing this ruling, nothing had been filed. The wheels of justice must roll over and will await no one.”

22. Plainly manifest; the court did not consider the objection by the applicant although it had been duly filed before the ruling was delivered; a fact the court had acknowledged. Such is a mistake or error on the face of the record which does not require any or elaborate explanation to discern. Making this is a case for setting aside the ruling *ex debito justitiae*. *National Bank of Kenya Limited v Ndungu Njau* [supra]

23. Accordingly, the ruling dated and delivered on November 3, 2023 is hereby set aside *ex debito justitiae*. The application by the 1st respondent which was subject of the said ruling remains undetermined. It shall now be determined by the court on the basis of all materials filed by the parties including the applicant's objection on a date to be appointed by the court,

24. But, before I close, it is important to point out that, the court has not determined the substantive issues which were argued by the parties herein as those remain to be the issues for determination by the court in the 1st defendant's application.

25. Be that as it may, I doubt the setting aside of the ruling abrogates the 1st defendant's statutory power of sale, or compromises any lawful consent amongst the parties.

26. No orders as to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT ONLINE APPLICATION THIS 27TH DAY OF FEBRUARY, 2025.

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F. GIKONYO M

JUDGE

In the presence of: -

1. Kibet for Company

2. Ms. Murigi for Attorney General



3. Wawire for Broadway Ltd
4. Njuru for New KCC
5. Ms. Maliech for Ms. Lubano for Bidco Africa
6. Dachi for 1st Respondent
7. Kimiti for 2 Creditors, Rapta Ltd
8. Mwango for NBK
9. Bundotich for Townsville Ltd
10. Ms. Muthoni for Michuki for Legacies
11. CA - Kinyua

