



**Mahadi Energy Limited & another v Premier Bank Kenya Limited
(Previously Trading as First Community Bank Limited) & 3 others; Kenya
Law Reform Commission & another (Interested Parties) (Constitutional
Petition E066 of 2024) [2025] KEHC 4063 (KLR) (26 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4063 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E066 OF 2024**

G MUTAI, J

MARCH 26, 2025

BETWEEN

MAHADI ENERGY LIMITED 1ST PETITIONER

IBRAHIM HUSSEIN MAHADI 2ND PETITIONER

AND

**PREMIER BANK KENYA LIMITED (PREVIOUSLY TRADING AS FIRST
COMMUNITY BANK LIMITED) 1ST RESPONDENT**

THE ATTORNEY GENERAL 2ND RESPONDENT

KENYA BANKERS ASSOCIATION 3RD RESPONDENT

CENTRAL BANK OF KENYA 4TH RESPONDENT

AND

KENYA LAW REFORM COMMISSION INTERESTED PARTY

SHA BEEL PROJECT SERVICES LIMITED INTERESTED PARTY

RULING

1. In a decision delivered by this court on 6th February 2025. I held, in paragraph 40 thereof, that:-

“In my view, the existence of the suit before the High Court in Nairobi is undisputed. Although the petitioners say that the same was withdrawn, no proof of the adoption/endorsement of the Notice of the Withdrawal by the Nairobi Court was produced. The filing of the Notice of Withdrawal of Suit does not, of itself, terminate a suit. For such a notice to be effective, it must be endorsed as an order of the court subject to such directions



as to costs as the court may give. Since it wasn't stated by the petitioners that the alleged Notice of Withdrawal had been endorsed by the Court then the only conclusion I can draw is that the Nairobi suit is pending determination."

2. In paragraph 46, I stated: -

"In light of the foregoing, I find and hold that this matter is sub judice as it is between the same parties, and the issues in both matters are similar."

3. I further held that: -

"47. Having found that this matter is sub judice, I will not delve into the other issues as they are moot."

48. In conclusion, I hereby order that this Petition shall forthwith be stayed pending the hearing and determination of Nairobi HCCOMM E556 of 2024."

4. The petitioners/applicants were aggrieved by the said decision and filed the instant application. The said application seeks, in so that as it is material, inter alia, the following orders: -

"That this honourable court be pleased to review the orders made on 6th February 2025."

5. In the affidavit in support of the application, the 2nd petitioner/applicant deposed that when this court issued its orders on 6th February 2025, it did so without the benefit of new and important information or evidence, not within the knowledge of the petitioners/applicants and or which could not be produced by them at the time of the hearing of the 1st respondent's preliminary objection on 18th December 2024.

6. This new and important information was to the effect that the notice of withdrawal dated 10th December 2024 was endorsed as an order of the court on 6th February 2025, in the morning, before this court delivered its ruling at 330 pm on the same day.

7. The 2nd petitioner/applicant attached a copy of this court's ruling and an order issued on 7th February 2024, which showed that HCCOMM No E556 of 2024 was withdrawn on 6th February 2025 with costs to the defendant. The court ordered that the file "is hereby marked as closed in so far as the main suit is concerned".

8. The 1st respondent opposed the said application vide a replying affidavit sworn by Ms Claris Ajwang Ogombo on 17th February 2025 in which it was deposed that costs were still pending in the Nairobi matter. As such, it couldn't be said that the withdrawal had been effected. It was also deposed that another matter was pending before the court in Mombasa, to wit, Mombasa HC Comm Misc. No. E037 of 2024; Mahadi Energy Ltd and Ibrahim Hussein Mahadi v Premier Bank & another (title in the counterclaim). I was urged that there was a pending application in Mombasa HCC No E015 of 2024, Khalif Yusuf v Mahadi Energy Ltd & 2 others, in which the petitioners had sought to prevent the 1st respondent from being struck out as party to the proceedings. Lastly, she stated that the petitioners/applicants lacked locus standi to seek the orders, and thus, what was sought could not be issued.

9. The 2nd interested party filed grounds of opposition dated 20th February 2025, opposing the application and praying that the same be disallowed on broadly similar grounds as those advanced by the 1st respondent.



10. Mr Peter Mumu, counsel for the 1st respondent, deponed to a further replying affidavit on 27th February 2025 in which he stated that the applicants had sought to review the orders issued by the Nairobi court on 6th February 2025. In his view, this meant that the Nairobi cause was still active.
11. The application was canvassed through both written and oral submissions. The submissions of the applicants are dated 28th February 2025. Those of the 1st respondent are dated 27th February 2025. Lastly, those of the 2nd interested party are dated 27th February 2025. The parties made oral submissions on 28th February 2025. I have considered the parties' submissions in my findings. Since they are broadly in line with what I have stated above, I will not rehash them here.
12. The court notes that the application before the court is one of review. The jurisdiction of this court to review its decision is set out in section 80 of the Civil Procedure Act, which provides that: -

“ Any person who considers himself aggrieved—

 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
13. The foregoing provision is given effect by Order 45 Rule 1 of the Civil Procedure Rules, which provides that: -

“ 1 Any person considering himself aggrieved -

 - (1) (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
14. It would appear to me that the sole issue before me is whether there is a pending matter in Nairobi or if the same was withdrawn on 6th February 2025. The withdrawal and its adoption by the Court in Nairobi is what could be said to be the discovery of a new matter.
15. At the time I delivered my decision, this court was unaware that the case in Nairobi had been withdrawn. Does this fact in itself justify the issuance of the orders sought?
16. Courts act cautiously when applications grounded on the alleged discovery of new evidence are before them. In the case of *Rose Kaiza v Angelo Mpanju Kaiza* [2009] eKLR, the Court of Appeal stated that:-

“ An application for review under Order 44 r 1 must be clear and specific on the basis upon which it is made. The motion before the superior court was based on the discovery of new



facts. However, it is not every new fact that will qualify for interference with the judgment or decree sought to be reviewed. In the words of the rule itself, it is

“.....discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed.....”

The construction and application of that provision has been discussed in many previous decisions but we shall take it from the commentary by Mulla on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, thus:

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

17. In the case of *D. J. Lowe & Company Limited v Banque Indosuez* [1998] KECA 108 (KLR) the Court of Appeal stated that:-

“Where such a review application is based on fact of the discovery of fresh evidence, the court must exercise greatest of care as it is easy for a party who has lost to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing”.

18. I note that the Commercial Court in Nairobi adopted the notice of withdrawal on 6th February 2025. In my view, it was only upon the court’s adoption of the said notice that the matter ceased to be sub judice. Although the issue of recovery of costs remained, that does not, in my view, change the fact that the substratum of the matter, which gave rise to the sub judice question, had been concluded.

19. The fact of the withdrawal was not within the knowledge of the court at the time it delivered its ruling. The same had not occurred on 18th December 2024 when the application was canvassed.

20. Whereas I agree with the 1st respondent’s counsel that it is undesirable for a litigant to incur costs in a multiplicity of suits, I note that the decisions of the courts in *Civil Suit No 431 of 2010; Patrick Kigera Mathia & another v Dr Peter Mungai Ngugi & 2 others* and *Misc. Civil Application No 117 of 2018, Benjamin Kirwa Kemboi v Samuel Kirwa Birgen*, both indicate that the court has discretion whether to stay a suit until costs are paid or not. In the circumstances of this matter, it would be in the interest of justice to proceed and conclude the same at the earliest possible opportunity rather than be bogged down in an ever-expanding web of litigation between the parties herein.

21. Regarding the application for review adverted to by Mr Peter Mumu, I note that the same is with respect to the review regarding costs. It is clear to me that what is sought isn’t the revival of the



substantive matter but rather the finding of the court that the party that withdrew the suit ought to pay costs.

22. I find and hold that the application has merit. The decision of 6th February 2025 is reviewed. Since the court did not make a finding on the merits of the applications before it, save on the issues of sub judice raised in the preliminary objection, the court will have to deliver the decision on the merits of the two applications dated 17th and 13th November 2024, but having first determined the Notice of Preliminary Objection dated 2nd December 2024, in particular, grounds (c) and (d) thereof on their merits, as these were not considered in its ruling of 6th February 2025. The ruling on the preliminary objection will be delivered on 24th April 2025.
23. In the interests of justice, the subsisting orders shall be extended until then.
24. I order that the costs of the application shall be costs in the cause.
25. Orders accordingly

DATED AND SIGNED IN MOMBASA THIS 26TH DAY OF MARCH 2025.

DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Messrs Mwanzia and Origi, for the Petitioners/Applicants;

Mr Njoroge for the 1st Respondent;

Ms Kiiru, for the 2nd Interested Party; and

Arthur – Court Assistant.

