



Multiserve Oasis Company Limited v Kenya Ports Authority & another; Equity Bank Limited (Garnishee) (Civil Suit 252 of 2010) [2025] KEHC 12346 (KLR) (7 August 2025) (Ruling)

Neutral citation: [2025] KEHC 12346 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 252 OF 2010
F WANGARI, J
AUGUST 7, 2025**

BETWEEN

MULTISERVE OASIS COMPANY LIMITED PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

COMPACT FREIGHT SYSTEMS LIMITED 2ND DEFENDANT

AND

EQUITY BANK LIMITED GARNISHEE

RULING

1. The applications coming up for ruling are the Plaintiff’s Notice of Motion application dated 24/03/2025 and the 2nd Defendant’s Notice of Motion application dated 24/04/2025. I will start with the 2nd Defendant’s application.
2. The 2nd Defendant’s application sought for orders that decree of the court passed herein on 28/02/2020 together with all consequential orders be declared a nullity and be set aside/expunged from the record of the court, ex debito justitiae, that such further or other orders as are appropriate for the effective and fair administration of justice be issued, and that costs of the application be met by the Plaintiff.
3. The application was based on grounds that the Plaintiff forged and uttered false documents before this court and on which basis judgment was entered in their favour, and in seeking to set aside a decree obtained through trickery, it is not permissible to show that the court was mistaken, but it is permissible to show that it was misled.
4. In opposing the application, the Plaintiff filed Grounds of Opposition dated 19/05/2025 that no consent was given by Gikandi & Company Advocates or leave granted by the court for Chris N Mutuku & Company Advocates to act for the 2nd Defendant subsequent to the delivery of judgment



herein on 28/02/2020, that there is no Notice of Change of Advocates from Gikandi & Company Advocates to Chris N Mutuku & Company Advocates to act for the 2nd Defendant, and that the 2nd Defendant cannot be represented by both Gikandi & Company Advocates and Chris N Mutuku & Company Advocates as advocates on record.

5. The Notice of Motion application dated 24th April 2025 and the Grounds of Opposition dated 19th May 2025 were also canvassed by way of written submissions.
6. Without going to the merits of the application, I do recall that during the cause of these proceedings, this court directed that the 2nd Defendant's counsels put their house in order as far as representation of the 2nd Defendant was concerned. Despite the said directive, Mutuku Advocates proceeded to file the application in the names of his law firm. That notwithstanding, it is not in dispute that Chris N. Mutuku & Co. Advocates filed its Notice of Appointment of Advocates to act alongside Gikandi and company Advocates for the 2nd Defendant.
7. Nothing bars a party from being represented by more than one advocate. Rule 7 (1) of The Advocates (Practice) Rules states as follows;

“ An Advocate may act for a client in a matter in which he knows or has reason to believe that another advocate is then acting for that client only with the consent of that other Advocate”
8. In the absence of such consent the firm of Chris N. Mutuku & Company Advocates would have no locus to act for the 2nd Defendant. Though there is no express consent filed by the firm of Gikandi & Company Advocates, from the conduct of the counsels acting for the 2nd Defendant, the said consent is deemed to have been given.
9. Nevertheless, to have both counsels for the 2nd Defendant file pleadings in the names of the respective law firms, it becomes difficult on the filing and service of proceedings as there is no orderly conduct of litigation. It is upon the 2nd Defendant's counsel to decide who is the lead counsel for purposes of orderly court proceedings. The application is hereby struck out.
10. Even though the application was to be determined on merits, the orders being sought are premature due to the pending criminal matter, that is Nairobi HCCRRA No. E934 of 2023, where the documents in issue are subject to the criminal proceedings.
11. As to whether the firm of Mutuku Advocates needed leave of court before coming on record, Order 9 Rule 9 of the Civil Procedure Rules provides as follows;

“When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—

 - (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
12. In this proceedings, the 2nd Defendant did not change his advocates from the firm of Gikandi & Company Advocates to Chris N. Mutuku & Company Advocates, but adding an advocate to represent him. Order 9 Rule 9 above is therefore not applicable.



13. On the Plaintiff's Notice of Motion dated 24/03/2025 brought under Article 50 (1) and 164 (3) (a) of *the Constitution*, Section 3 of the *Judicature Act*, Section 80 of the *Civil Procedure Act*, and Order 45 of the Civil Procedure Rules 2010.
14. The Plaintiff seeks that the order made on 21/06/2024 by this court directing that the Notice of Motion dated 06/04/2023 filed herein by the Plaintiff held in abeyance pending the determination of Nairobi HCCRRA No. E934 of 2023, and an order directing stay of these proceedings be reviewed and set aside. The Plaintiff also seeks to have the said Notice of Motion be referred to the Presiding Judge for assignment of, and hearing by a Judge other than Hon. Lady Justice Florence Wangari, and that costs of this application be provided for.
15. The application is premised on grounds on its face and the Supporting Affidavit of Bashir Mohamed Nur dated 24/03/2025. That Judgment dated 28/02/2020 was entered in favour of the Plaintiff. That the 2nd Defendant's appeal against the judgment, being Civil Appeal No. E001 of 2021, Compact Freight Systems Limited v Multiserve Oasis Company Limited & Kenya Ports Authority was dismissed, as so was the application for review of the Court of Appeal Judgment.
16. The Plaintiff Garnishee Proceedings via the Notice of Motion dated 06/04/2024, where by an order of the court made on 21/06/2024, the said application was held in abeyance and proceedings herein be stayed pending the determination of Nairobi HCCRRA No. E943 of 2023.
17. The Plaintiff further stated that both the Court of Appeal and the High Court have through orders issued on 04/03/2025 and 26/02/2025 stopped attempts by the 2nd Defendant to frustrate execution of the decree through the institution of private criminal prosecution proceedings against the Plaintiff and its directors.
18. It was further stated that the order of 21/06/2024 by this court by was made by mistake and/or an error apparent on the face of the record as the High Court has no power to stay execution of a decree before it or execution proceedings on the basis of subsequent undetermined proceedings by the judgment debtor in a different court or the judgment debtor having lost an appeal against the judgment. The Plaintiff therefore prayed that the orders sought in the application herein are granted.
19. The 2nd Defendant filed a Notice of Preliminary Objection dated 26/04/2025 seeking to have the Plaintiff's application struck out on grounds that the Applicant has not annexed the order that is intended to be reviewed which is in contravention with Order 45 Rule 1(2) of the Civil Procedure Rules.
20. That there was inordinate delay in the filing of the application herein which is in contravention of Order 45 Rule 1 of the Civil Procedure Rules. That the matters complained of in the said application are not issues that are amenable to review as the same warrants a hearing on appeal.
21. The 2nd Defendant also filed a Replying Affidavit dated 23/04/2025 by Peter Ng'ang'a, the General Manager of the 2nd Defendant. It was stated that the orders subject to this application has not been appealed against. That proceedings in the Court of Appeal in Criminal Appeal No. E004 of 2025, still pending, it would therefore be improper to allow the Plaintiff to enjoy fruits of the judgment issued in this matter while the issue of fraud is pending before a court of law.

Analysis

22. The application was canvassed by way of written submissions. Both parties filed their rival submissions to which I have considered. I have also considered the application, supporting affidavit, the 2nd Defendant's Notice of Preliminary and the Replying Affidavit. The issues for determination are: -



- a. Whether the Applicant has met the legal threshold for an order of review on the ground of mistake and error apparent on the face of the record.
 - b. If the (i) above is merited, whether stay of proceedings orders should be lifted
 - c. What are the orders on costs
23. The Jurisdiction of this Court to grant review is well set out in the law. Section 80 of the *Civil Procedure Act* states 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”.

6. Order 45 Rule 1 of the Civil Procedure Rules provides for Review and it states as follows:

“(1) Any person considering himself aggrieved—

- (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.

- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellants, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

7. In reference to the reasoning of Kuloba J (as he then was) in *Lakesteel Supplies vs. Dr. Badia and Anor* Kisumu HCCC No. 191 of 1994 he stated as follows;

“The exercise of review entails a judicial re-examination, that is to say, a reconsideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 45 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence



again and then reverse the decree or order as that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the ruling was made.”

7. From the provisions of Order 45 (1) (b) of the Civil Procedure Rules, it must be shown that;
 - a. There was an error or omission on the part of the court that needs correction
 - b. If there was a discovery of new and important matter discovered after the order sought to be reviewed.
24. From the application and the supporting affidavit, it is stated that there was an error in the order dated 21/06/2024 that is apparent on the face of record. It was submitted by the Plaintiff that this court had no legal basis to stay proceedings in a suit concluded in the High Court and Court of Appeal, as it amounts to the reversal of the Court of Appeal decision, and also defeats the hierarchy of the courts.
25. I make reference to paragraphs 40, 43-49, 56-63 of the impugned ruling. This court analyzed the issues brought before it and made a determination on the same. there is no error that needs to be corrected. The Plaintiff is calling upon this court to reverse its findings which would amount to this court sitting on appeal in its own decision.
26. Moreover, the application for review was filed over 9 months after the ruling was made. The Plaintiff continued to take part in the subsequent court proceedings without raising issues on the ruling. The filing of this application is therefore an afterthought as the inordinate delay in its filing has not been justified.
27. I find that the Plaintiff has failed to meet the threshold for review under Order 45 (1) of the Civil Procedure Rules, and the subsequent prayers for lifting of stay orders fails.
28. On costs, both parties having been unsuccessful in their respective application, each party to bear its own costs.

Determination

29. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. That the Notice of Motion application dated 24/03/2025 has no merits and is hereby dismissed.
 - b. That the Notice of Motion application dated 24/04 2025 by the 2nd Defendant is hereby struck out.
 - c. Each party to bear its own costs.Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA, ON THIS 7TH DAY OF AUGUST, 2025.

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HON. F. WANGARI

JUDGE

In the presence of;

Mr. Havi Advocate for the Plaintiff

Mr. Gikandi and Mr. Mutuku Advocate for the 2nd Defendant

Ms. Norah, Court Assistant

