



**Njiraine v Co-operative Bank of Kenya (Civil Case E040 of 2021)
[2024] KEHC 9140 (KLR) (Commercial and Tax) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E040 OF 2021
FG MUGAMBI, J
JULY 26, 2024**

BETWEEN

CATHERINE NJOKI NJIRAINÉ APPLICANT

AND

CO-OPERATIVE BANK OF KENYA RESPONDENT

RULING

Background

1. This ruling determines the Motion application dated 21/7/2023 seeking to review the court's ruling dated 30/6/2023 (the ruling) wherein the court dismissed the Applicant's application dated 13/9/2021. The said application had sought injunctive orders against the respondent from exercising its statutory power of sale.
2. In the instant application, the applicant contends the court failed to consider the further submissions dated 11/10/2022 and the estoppel issue raised therein. The applicant's counsel argues that failing to consider the further submissions by the applicant is a fatal omission that amounts to an error of the face of the record.
3. The respondent opposes the application and argues that the court in its ruling dated 30/6/2023 considered the issue of estoppel and confirmed that the court lacks the jurisdiction to restructure an agreement entered into between the parties. Counsel argues there is no error apparent on the record to warrant a review of this court's ruling. Counsel argues that the court considered all the pleadings and that submissions must reflect the pleadings and unless pleaded they cannot be relied upon.



Analysis and Determination

4. I have considered the pleadings as well as the submissions presented by the parties. The main issue is whether the applicant has made out a case for the granting of an order for review.
5. The *Civil Procedure Act* Section 80 gives the court the powers to review its own decisions whereas Order 45 Rule 1 of the *Civil Procedure Rules* provides for the scope of the review. Section 80 of the *Civil Procedure Act* provides as follows:

“ Any person who considers himself aggrieved-

 - a. By a decree or order in 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. The scope of jurisdiction by the court as set out by Order 45 is as follows:
 - i. where there is discovery of new and important evidence.
 - ii. where there is a mistake apparent on the record.
 - iii. Any other sufficient cause.
7. In determining whether the applicant has met the threshold for granting an order for review, the court must address whether the failure to consider submissions constitutes an error apparent on the record and the significance of the submissions in a suit. It is well-established that submissions cannot replace evidence; their purpose is to persuade the court on specific issues. Submissions should align with the presented evidence and cannot introduce new evidence.
8. The Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Murithi & Anor*, (2014) eKLR emphasized this point and held that:

“ Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
9. I have considered the pleadings and the further submissions alongside the decision above. I agree with the respondents that the issues alleged to have been raised in the further submissions should have been pleaded and supported by evidence by way of sworn affidavit. In this instance, the applicant was attempting to introduce new issues via their submissions.
10. Furthermore, the impugned ruling was in an abridged format, and the court noted in paragraph 10 that it had considered the parties' submissions. The applicant's assertion that the court had not considered the ground of promissory estoppel most likely stems from the court not specifically mentioning it. However, even after reviewing the further submissions, the court's position in the ruling dated 30/6/2023 remains unchanged.



11. Be that as it may, and for closure, I may as well comment on the issue. The claim that the Bank's conduct in accepting the payment of proceeds from the sale of the applicant's properties created an equitable or promissory estoppel in the plaintiff's favor is untenable. Promissory estoppel prevents a promisor from reneging on a promise that the promisee has relied upon to their detriment.
12. In my view, promissory estoppel cannot be relied on to avoid a legal obligation. As an equitable remedy, promissory estoppel will not be enforced if it would result in unfairness or injustice.
13. This brings me back to the finding that the applicant does not deny the facilities were advanced by the bank and that there was a default. The restructuring of the facilities was entirely at the bank's discretion, considering the applicant's conduct. No evidence has been presented to show that the promise to dispose of the applicant's properties amounted to releasing the applicant from legal liability.
14. I agree with the Bank's submission that if the applicant is dissatisfied with this Court's finding that restructuring is not a right of a party, the appropriate recourse would have been to file an appeal, not a review.

Disposition

15. Accordingly, the Notice of Motion dated 21/7/2023 is without merit and is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 26TH DAY OF JULY, 2024.

F. MUGAMBI

JUDGE

