Africa v Iguanya (Civil Appeal E011 of 2023)
[2024] KEHC 14775 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14775 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E011 OF 2023

FN MUCHEMI, J

NOVEMBER 21, 2024

BETWEEN

INUKA AFRICA ..... APPELLANT

AND

JOYCE WAITHERA IGUANYA ..... RESPONDENT

RULING

1. The application dated 9th September 2024 seeks for orders of setting aside, and/or review of the judgment delivered on 23rd August 2024. The application also seeks for dismissal of the respondent's case on the basis that the appellant did provide pay bill details to the respondent and further that the respondent did not adduce any evidence as to the exact goods attached and their value or in the alternative the Honourable Court remands the case to the lower court for a proper assessment on the quantity and value of the goods attached.

2. In opposition to the application, the respondent filed Replying Affidavits dated 23rd September 2024.

The Applicant's Case.

3. The applicant states that judgment was delivered on 23rd August 2024 whereby the Honourable Court dismissed the appeal with costs to the respondent.

4. The applicant states that it has no right of appeal but can only apply for review on the ground that there are errors apparent on the face of the record and for any other sufficient reasons. The applicant argues that at paragraph 39 of the said judgment, the court stated, in error, that no pay bill had been provided to the respondent however the respondent duly signed an acknowledgment of receipt of funds, clearly identifying a pay bill number to which all payments were to be made. The applicant further argues that the respondent never claimed not to have been informed of the pay bill number but actually admitted to making payments through the pay bill number.

5. The applicant further argues that the respondent did not adduce any evidence on the value of goods impounded. The respondent's claim being a special damage claim, she was bound to strictly prove the same. The applicant states that the court did not address that issue in its judgment despite being raised as a ground of appeal. Further, the applicant states that there is no evidence that the respondent owned the expectant grade cow, 100 chicken and 40 geese. Conversely, the applicant states that it adduced evidence being the auctioneer's proclamation that only two cows were impounded. Furthermore, the value of the two cows was Kshs. 120,000/- which makes it impossible for the respondent to allege that one cow amounts to Kshs. 460,000/-.

6. The applicant states that the respondent was issued with a loan of Kshs. 110,800/- on the strength of the assets that she pledged as security. The assets were valued at the time of giving security at Kshs. 120,000/-.

7. The applicant states that in the event the court maintains that the respondent did pay back her loan and the impounding and subsequent sale of pledged assets was done in error, then it is only fair and just that the respondent proves the quantity and value of the impounded goods.

The Respondent's Case

8. The respondent states that the application is an afterthought and only aimed at distortion of facts. The respondent states that the applicant enjoyed thirty days stay of execution to allow the applicant file a further appeal but the applicant failed to take advantage of the said period and currently wants to take a short cut to unfairly maintain unjust litigation.

9. The respondent argues that the applicant has not brought anything new to warrant granting orders of review. The respondent further argues that the applicant has introduced new issues which they never raised during the hearing of the case in the trial court and the appeal on the valuation of the subject livestock as the applicant withheld the information of what was auctioned. That notwithstanding, this court termed the auction as illegal.

10. The respondent states that both the trial court and the High Court have clearly pronounced themselves on the subject in issue and if aggrieved, the applicant has a right to file an appeal at the Court of Appeal.

11. The applicant filed a Supplementary Affidavit dated 25th October 2024 and states that there can be no further appeal to the Court of Appeal pursuant to Section 38 of the *Small Claims Court Act*.

12. The applicant states that the issue of valuation of the livestock has always been an issue as a matter of law. The applicant maintains that the livestock repossessed was not as described by the respondent in her pleadings and was not proved to the required standard. The applicant argues that the court inadvertently left out the loan application form filled out by the respondent which comprised of a valuation report by CIC Insurance Company which valued the collateral that the respondent provided to secure the loan granted to her. The applicant further states that the said valuation was conducted by an independent third party and accepted by the respondent. The report valued the cows that were repossessed at Kshs. 120,000/-.

13. The applicant argues that the respondent never contested the said valuation and has also not provided any alternative valuation to arrive at the figures that she claimed.

14. The applicant states that the respondent never denied seeking for and being granted a loan by itself and to date the respondent has not provided proof that she paid any money to its employees.

15. The applicant states that the respondent made regular loan repayments to the pay bill number until August 2020 long after its employee Jerusha Nyambura Mwangi resigned on 1st April 2019.

16. The applicant states that the respondent continued servicing the loan through the pay bill number provided even after its employee whom the respondent alleges to have made payments to had left employment as evidenced by the loan statements.

17. The applicant states that the respondent is intent on unjustly enriching herself as she signed a loan contract whose terms were clear, remitted payment to a point then defaulted on the loan. The applicant states that it followed due process to recover the loan which it is now unjustly suffering for.

18. Directions were issued that the application be canvassed by way of written submissions and from the record only the applicant complied by filing its submissions on 30th September 2024. The respondent on the other hand had not filed her submissions by the time of writing this ruling.

The Applicant's Submissions

19. The applicant relies on Order 45 Rule 1 of the Civil Procedure Rules and the cases of *Shanzu Investments Limited vs Commissioner for Lands (Civil Appeal No. 100 of 1993*) and National Bank of Kenya Limited vs Ndungu Njau [1997] KECA 71 (KLR) and submits that there were errors apparent on the face of the record. The applicant submits that the assertion by the court that it left out to provide the pay bill number details in the loan security documents is an error on the face of the record. From the record of appeal which contains an Acknowledgement of Receipt of Loan Funds and a summary of the terms and conditions of Inuka Africa Ltd duly signed by the respondent provides a statement indicating that all payments to the applicant must be made through the pay bill number. Thus the applicant submits that an assumption that Jerusha Nyambura supplied the pay bill number and had the right to revoke it at any time is erroneous.

20. The applicant further submits that the respondent did not provide any evidence that she paid any money to the said Jerusha who voluntarily left the applicant's employment on 1st April 2019. The applicant submits that the respondent continued to service the loan using the pay bill provided even after the said Jerusha left its employment. The applicant thus argues that the foregoing error means that the respondent knew about how to make payments and there is no evidence that she serviced her loan as expected of her and as she had contracted.

21. The applicant relies on the cases of National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd (2002) 2 EA 503 (2011) eKLR and Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd (2017) eKLR and submits that a court should not re-write a contract for parties. The respondent took a loan facility with the applicant and the respective sum was disbursed to her. The respondent signed a loan application form and Acknowledged Receipt of Funds of a sum of Kshs. 110,800/-, Summary of Inuka Africa Ltd and conditions which clearly indicated the pay bill as 895300/895301.

22. The applicant argues that the error or omission of the presence of the mpesa pay bill particulars is self-evident and does not require an elaborate argument to be established.

23. Relying on the case of Hahn vs Singh Civil Appeal No. 42 of 1983 [1985] KLR 716, the applicant submits that the court erred in failing to consider the principle of law that he who alleges must prove and that special damages must be specifically pleaded and strictly proved. The applicant argues that the respondent never provided a valuation report for the cow that was allegedly impounded. Conversely, the applicant had the cows that were security for the loan valued by CIC Insurance Company Ltd which were valued at Kshs. 120,000/-. The respondent never contested the valuation. Thus the applicant submits that there is no evidence as to how the cows are currently valued at Kshs. 770,000/-. The applicant further submits it provided evidence of what was impounded and how it was sold.

24. The applicant submits that although the respondent was awarded a sum of Kshs. 836,720/- as special damages, she did not present any evidence regarding the value of the said goods or livestock nor did she prove to the court what she owned.

25. The applicant submits that there are sufficient reasons to review the judgment as the respondent did not deny taking a loan and there is no evidence that the respondent paid the loan fully. Further, the applicant submits that the respondent has sought to unjustly enrich herself and her entire claim is based on untruths as the quantity and value of what was impounded was shown by the applicant and was not contested.

Issue for determination

26. The main issue for determination is whether the applicant has met the threshold for the grant of orders of setting aside and review.

The Law

Whether the applicant has met the threshold for the grant of orders of setting aside and review.

27. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-

Rule 1 (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 order made 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 appellant, or when, being respondent, he can present to the appellate court the case which he applies for the review.

28. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court that there has been 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. Secondly, the applicant must demonstrate to the court that there has some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.

29. In the instant application, the applicant prays for the setting aside of the orders made on 23rd August 2024 on the grounds that there is an error apparent on the face of the record. According to the applicant, the error apparent on the face of the record is that the court failed to appreciate that the applicant had provided for its pay bill number in the loan security documents and that the respondent did not adduce any evidence on the value of the goods impounded yet her claim was a special damage type of claim which required her to plead and strictly prove the same.

30. It is my considered view that the applicant has not met the threshold of the orders of review. It has not been demonstrated that any errors exist on the face of the record. The "errors" the applicant alludes to are not errors on the face of the record. As he claims. If there are any errors, the same are not self-evident and would require an elaborate argument to be established. This principle was enunciated by the Court of Appeal in *National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 211 of 1996* (UR) where it held:-

> " 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. The error or omission must be self-evident and should not require an elaborate argument to be established. "

31. Similarly in Paul Mwaniki vs National Hospital Insurance Fund Board of Management [2020] eKLR the court stated:

> 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. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provisions of law cannot be a ground for review.

32. The court went on to say:-

> The term 'mistake or error apparent' by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for purposes of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.

33. It is trite law that errors ought to be so glaring that there can possibly be no debate about it. An error which has to be established by a long drawn out process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. In my view, the applicant is relitigating its appeal as the errors it alludes to would require this court to examine the evidence again. On perusal of the grounds of appeal, it is noted that the same are hereby replicated as grounds for review and for connection of the so called "errors" The Honourable Court having already made its determination on the appeal cannot sit on its own appeal a second time. Neither can this court return the matter to the trial court to be relitigated before the trial court as prayed herein.

34. As regards review of the judgment, it could be allowed for any sufficient reason under Order 45 of the Civil Procedure Rules. The expression "sufficient reason" means a reason sufficiently analogous to those specified in the rule. Mativo J (as he then was) in Republic vs Cabinet Secretary for Interior

and Co-ordination of National Government ex parte Abulahi Said Salad [2019] eKLR cited the case of Tokesi Mambili & Others vs Simion Litsanga [2004] eKLR and held as follows:-

> In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.
>
> Where the application is based on sufficient reason it is for the court to exercise its discretion.
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> I am not persuaded that the reasons offered by the applicant amounts to sufficient reason within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1.

35. On perusal of the grounds relied on by the applicant as sufficient reasons, it is my considered view that the grounds are not analogous to the reasons stipulated in order 45 Rule 1 of the Civil Procedure Rules. Furthermore, the grounds will have the effect of re-opening the appeal afresh. Thus it is my considered view that the applicant has not met the threshold of grant of orders of review.

36. Accordingly, the application dated 9th September 2024 lacks merit and is hereby dismissed with costs to the respondent.

37. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 21ST DAY OF NOVEMBER 2024.

F. MUCHEMI

JUDGE