



**Swan Carriers Limited v United Transport Agencies (Civil Appeal
E003 of 2022) [2023] KEHC 1732 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1732 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E003 OF 2022
AN ONGERI, J
FEBRUARY 23, 2023**

BETWEEN

SWAN CARRIERS LIMITED APPELLANT

AND

UNITED TRANSPORT AGENCIES RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated November 18, 2022 seeking review and varying of this court's orders issued on September 23, 2022.
2. The application is supported by the Supporting Affidavit of Kiran Shah in which it is deponed that the Appellant was willing and ready to abide with the court orders issued on September 23, 2022.
3. The Appellant avers that on October 27, 2022 the Appellant was notified by its insurer of the policy limit of Kshs 4,000,000/= in case of third-party claims and therefore the Appellant was expected to raise the balance of the decretal sum Kshs 5,152,631/=.
4. The Appellant avers that it was experiencing cash flow/financial hardship and continued to accumulate significant losses and therefore not in a position to raise the remainder of the decretal sum.
5. The Respondent filed a Replying Affidavit and a further Replying Affidavit in which it is deposed that the application was not merited under the lens of order 45 rule (1) and (2) of the Civil Procedure Rules and therefore the court should dismiss the application and allow the Respondent to enjoy the fruits of its judgment.
6. The parties filed written submissions as follows which I have considered.
7. The Appellant submitted that vide a ruling dated September 23, 2022, the court granted the Appellant a conditional stay of execution pending appeal provided that the entire decretal sum a colossal sum of



- Kshs 9,152,631/= is deposited in a joint interest earning account held by advocates for both parties within 60 days.
8. The Appellant submitted that on October 27, 2022 it was informed by its insurer that its policy limit in case of any third-party claims is Kshs 4,000,000 and any figure above that shall be borne by themselves.
 9. The Appellant conceded that whereas it was ready and willing to abide by the conditions set by the Court, it was unable to raise the balance of Kshs 5,152,631/=. The Appellant therefore sought to have the court review and vary its orders issued on 23/9/2022 and subsequently allow the Appellant deposit Kshs 4,000,000/= as security within 30 days of the ruling in the instant application.
 10. The Appellant cited the provisions of section 80 of the *Civil Procedure Act* and order 45 (1) of the *Civil Procedure Act* in support of its case, and reiterated that in the instant case the court's orders ought to be reviewed because there are sufficient reasons. The Appellant relied on the following cases *Josiah Mwangi Mutero & Anor v Rachel Wagithi Mutero* [2016] eKLR & *John Simiyu Khaemba & Anor v Cooperative Bank of Kenya & Anor* [2019] eKLR.
 11. The Appellant contended that there were sufficient reasons that warranted the court to review and vary its orders to wit; the policy limit by its insurer of Kshs 4,000,000/= in case of third-party claims thereby forcing the Appellant to raise Kshs 5,152,631/= yet it was experiencing cash flow/financial hardship and continued to accumulate significant losses and it was therefore not in a position to raise the remainder of the decretal sum.
 12. The Appellant contended that for stay of execution pending appeal is a discretionary relief and that the court should ensure that it balances the competing rights of the appellant and decree holder. The Appellant cited the case of *Tabro Transporters Ltd v Absalom Dova Lumbasi* [2012] eKLR.
 13. The Appellant contended that unless the application is allowed, they would suffer undue hardship than the Respondent as they await hearing of the intended appeal.
 14. The Appellant contended that no prejudice would be occasioned to the Respondent in the event the application were allowed, as they were ready to deposit Kshs 4,000,000/= in a joint interest earning account which covered the principal amount and costs awarded by the subordinate court, whereas, the balance of Kshs 5,152,631/= relates to the interest accrued during determination of the suit.
 15. The Appellant reiterated that the instant application was filed timeously and therefore not characterized by inordinate and/or unreasonable delay.
 16. The Respondent vehemently opposed the instant application and contended at all times the Appellant was aware of the financial implication of the judgment issued on January 27, 2022 and any assertions to the contrary were disingenuous and further that in paragraph 6 of the supporting affidavit filed alongside the application for stay of execution pending appeal stated as follows; that the Applicant was... "ready and willing to comply with all con[ditions for stay that this Honorable Court will set."
 17. The Respondent contended that the assertion that the Appellant was not aware of the limit on its insurance policy did not hold water and order 45 rule 1 of the *Civil Procedure Rules* was not meant to protect those with a negligent, carefree and lackadaisical attitude and approach to life as that of the Appellant in this case.
 18. In response to the Appellant's assertion that it was experiencing poor cash flow and/or financial hardship, the Respondent contended that the uncertified statement of accounts allegedly prepared and issued by a third party was misleading and not a sufficient indicator of the financial health of the company herein and rather that the assertion ought to be backed by financial statements, balance sheet and a profit and loss account.



19. Furthermore, the Respondent was adamant that the Appellant was a company operating in the transport sector since 1972 and currently owns a fleet of 250 vehicles of different makes, sizes, capacities and configurations with 24/7 availability and live tracking.
20. The Respondent was adamant that the instant application was inimical to its interests, did not meet the criteria for grant of relief under Order 45 rule (1) and (2) and therefore ought not to succeed.
21. The sole issue for determination is whether the applicant is entitled to review of this court's order dated 23/09/2022 requiring the Applicant to deposit the entire decretal sum.
22. The legal provision governing review is Order 45 (1) of the Civil Procedure Rules which states as follows;
 - (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 made the order without unreasonable delay.
23. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc Application No 317 of 2018 John M Mativo Judge (as he then was) culled out the following principles from a number of authorities: -
 - i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
 - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
 - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
 - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
 - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.



- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”
24. In the current case the reason for seeking review is that the amount to be deposited is limited to 4 million imposed by the Insurance Company.
25. I find that this falls under any other reason that would warrant a court to review its orders. In Sbanzu Investments Ltd v Commissioner for Lands (Civil Appeal No 100 of 1993), the Court of Appeal stated as follows; “any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by Section 80 of the Civil Procedure Act ...”
26. I hereby allow the application and direct that the applicant deposits 4 million in an interest earning account held jointly by Counsels for both parties within 30 days of this date.

RULING DELIVERED, SIGNED AND DATED THIS 23RD DAY OF FEBRUARY 2023

A. ONGERI

JUDGE

