



**Javison Construction Limited v Business Partners International (K) Limited & another
(Civil Case E002 of 2022) [2023] KEHC 2954 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE E002 OF 2022
LN MUGAMBI, J
MARCH 31, 2023**

BETWEEN

JAVISON CONSTRUCTION LIMITED PLAINTIFF

AND

BUSINESS PARTNERS INTERNATIONAL (K) LIMITED 1ST DEFENDANT

KENYA SHIELD AUCTIONEERS 2ND DEFENDANT

RULING

- 1 The Applicant seeks orders to have interim orders in the present suit reinstated vide the application dated October 6, 2022 brought under sections 1A, 1B, 3A and section 80 of the [Civil Procedure Act](#). The Applicant seeks the following orders:
 - a Spent;
 - b That the Honourable Court be pleased to reinstate the interim orders of temporary injunction on August 11, 2022 by Hon J Wakiaga restraining the Respondents from selling by way of public auction of Motor Vehicle Registration Number KHMA 187R, Stone Crasher machine, Fabricated Fuel Tank, Furnitures and Fittings, Machinery and Equipment situated on Land Reference Number Mwea/Wachoro/162 pending hearing and determination of the application dated August 10, 2022;
 - c That upon granting of prayer 2, the Honourable Court be pleased to review and/or vary the orders issued on August 17, 2022 directing the Plaintiff/Applicant to pay the amount of Kshs 500,000/- as security for costs;
 - d That the Honourable Court be pleased to order that the Plaintiff/Applicant to deposit the amount of Kshs 200,000 and/or in the alternative the Plaintiff/Applicant to deposit title deed whose value amounts to Kshs 500,000/-;



- e) That the costs of this application be provided for.
- 2 The application was supported by the affidavit dated October 6, 2022 sworn by James Githungo Muthee and on the following grounds:
- a That the Plaintiff/Applicant filed an application dated August 10, 2022 under certificate of urgency seeking among other orders for temporary injunction against the Respondents which application is still pending before this court;
 - b That on August 11, 2022, the Court certified the application dated August 10, 2022 as urgent and further issued a temporary injunction against the 1st and 2nd Respondents restraining them from selling by auction the movable items situated in the Land Reference Number Mwea/Wachoro/1623 pending hearing and determination of the application inter parties on condition that the Plaintiff/Applicant deposits the security costs of Kshs 500,000/-;
 - c. That on August 17, 2022, the Plaintiff/Applicant was ordered to pay Kshs 500,000 as security for costs within 7 days;
 - d. That due to the harsh business environment in the country following the COVID 19 pandemic, the Plaintiff/Applicant has been unable to raise Kshs 500,000 to pay the security of costs and the conditional order for injunction lapsed on August 24, 2022;
 - e. The Plaintiff/Applicant has only managed to raise Kshs 200,000/- and he is also ready and willing to deposit title deeds whose value amounts to Kshs 500,000/-;
 - f. That the Respondent will not suffer any prejudice if the application is allowed;
 - g. That the application has been filed without inordinate delay; and
 - h. It is in the interest of justice that this Honourable Court do reinstate the interim orders for injunction and further review the orders directing that the Plaintiff/Applicant to pay Kshs 500,000 as security for costs.
- 3 The applicant swore the supporting affidavit to the Notice of Motion amplified the facts upon from which the grounds were founded.
- 4 The 1st Respondent filed its replying affidavit on October 24, 2022. The affidavit was sworn by Michael Muthengi, the 1st Respondent's Country Manager. The 1st Respondent deposed that the Applicant filed a similar application dated September 1, 2022 and failed to attend court for the hearing causing the same to be dismissed and has not offered any explanation for the non-attendance. The 1st Respondent avers that the Applicant is undeserving of the equitable orders sought because the facts are grossly tainted by misrepresentation and falsehoods and coupled with inequitable actions on the Applicant's part. The Respondent outlined in detail the contents of an agreement dated April 29, 2022 between the Applicant and the 1st Respondent. He deposed that the plaintiff is guilty of non-disclosure of material facts and not deserving of the orders sought. That the Applicant defaulted on the payment of a deposit of Kshs 5,000,000 on June 24, 2022. That the Applicant cannot therefore come to a court of equity seeking protection from the very contract it defaulted on. That the present application was frivolous and a waste of the court's time as it did not disclose a prima facie case with chances of success and that the same should be dismissed with costs.



Submissions

- 5 During the hearing of the application on December 19, 2022, the Court directed that the application be canvassed by way of written submissions. The Applicant filed its submissions on December 29, 2022. He submitted that the main issue for determination is whether the Court should review or vary the orders issued on August 17, 2022 directing the Applicant to pay Kshs 500,000 as security as costs. The Applicant submitted that this Court has the discretion to vary or review orders as provided under Order 45 Rule 1 of the Civil Procedure Rule sand section 80 of the [Civil Procedure Act](#).
- 6 That Applicant contends that it has been unable to raise Kshs 500,000 and they are ready and willing to pay Kshs 200,000 and also deposit a title deed whose value amounts to Kshs 500,000 and the grounds raised in the application will fit in the category of any other sufficient reason that may allow this Court to review the orders. They relied on the case of [Shanzu Investments Limited vs Commissioner for Lands](#), Civil Appeal No 100 of 1993 where the Court of Appeal held that:
- “Any sufficient reason need not be analogous with the other grounds set out in the rules because such restriction would be a clog on the unfettered right given by the court by section 80 of the [Civil Procedure Act](#); and that the other grounds set out in the rule did not in themselves form a genus or class or things which the third general head could be said to be analogous.”
- 7 On whether the present application is res judicata because of a previous application dated September 1, 2022 as contended by the Respondent, the Applicant argued that the previous application was a different application since it was seeking extension of time to comply with the orders. In the written submissions filed in court on February 22, 22, it was submitted for the plaintiff as follows:
- “...We submit the two applications are not similar since the application dated 1st September, 2022 sought among others for extension of time within which the Plaintiff/Applicant was to deposit the security of costs and therefore reinstating the application dated September 1, 2022 would be an exercise in futility since the same is already overtaken by events as the orders had since lapsed...”
- It was contended by the applicant further that *res judicata* will not be applicable where a suit is dismissed for non-attendance as held in the case of [Moses Mbatia v Joseph Wamburu Kihara](#) [2021] eKLR, where the Court cited with approval the case of [Tee Gee Electrics and Plastic Company Limited v Kenya Industrial Estate Limited](#) [2015] eKLR where the Court held thus:
- “*Res judicata* bars a future suit only when the case is resolves based on the facts and the evidence or the case or when the final judgement concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of the prosecution does not give rise to judgements on the merits and therefore do not trigger the plea of res judicata.”
- 8 They urged the Court to allow the application dated October 6, 2022 be allowed with costs.
- 9 The Respondent submissions are dated January 19, 2023. They submitted on one issue for determination: on whether there are sufficient reasons for reviewing the order. That section 80 of the [Civil Procedure Act](#) gives power to the court to review orders and that Order 45 sets down the rules.



The Respondent relied on the case of *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others* [2021] eKLR where the Court held that:

“Whereas the High Court has power to review its own decisions, it must be emphasized that such power must be exercised within the framework of Section 80 of *Civil Procedure Act* and Order 45 Rule 1....It cannot be denied that the review is the creation of the statute. The power of review is not an inherent power. It must be conferred by law or by necessary implication. An appraisal of the above provisions confirms that section 80 prescribes the power of review while Order 45 stipulates the rules. However, the rules limit the grounds for evaluating requests for review. Simply put, there are definite limits to the exercise of power of review. The rules prescribe the jurisdiction and scope of review. They limit review to the following grounds:

- a Discovery of new and important matter of evidence which after the exercise of due diligence was not within knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
- b On account of some mistake or error apparent on the fact of the record: or
- c For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.

The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite evidence of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India stated:

‘the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record of for any other sufficient reason. A review cannot be claimed or asked for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercise only for correction of a patent error of law or fact which stares in the face without any elaborate argument needed for stabling it. It may be pointed out that the expression “any other sufficient reason”means a reason sufficiently analogous to those specified in the rule’

The reason for the above limitation is that it is an indulgence given to a party to get the previous decision altered on the basis of discovery of important evidence which was not within his knowledge at the time of the original hearing. So, in the fitness of things, a person, who relies on such circumstances to obtain a review, should affirmatively establish them. The latitude shown to a party by a court is conditional upon strict compliance with that requirement....”

10 That the Court of Appeal in *Pancras T Swai v Kenya Breweries Limited* (2014) eKLR, was of the view that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three grounds:

- i. That there is discovery of new and important evidence which was not available to the applicant when the judgement or order was passed despite having exercised due diligence; or
- ii. That there was a mistake or error apparent on the face of the record; or



iii. That sufficient reasons exist to warrant the review sought;

In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.”

11 The Respondent contends that the reasons adduced by the Applicant specifically that it is not in a position to raise the sum of Kshs 500,000/- a fact that was well within the knowledge of the Applicant when the order was made in August, 2022. That the Applicant waited for a period of two months before filing the present application when it had initially failed to attend court to prosecute the matter only to file this application to cause unnecessary delay in the determination of the main suit. The Respondent contends that the present application is made in bad faith with the intention of delaying the determination of the main suit and as such should not be entertained by this Court. They relied on the case of *Simba Coach Limited vs Kiriiyu Merchants Auctioneers* (2019) eKLR where the Court held that:

“In the instant suit, the applicant was fully aware of the orders of this court on the 6th of November, 2018. It was also aware of its financial status as at the same period and ought to have in the circumstances made the application as soon as possible to salvage the situation and not after the lapse of the conditional period. It is my opinion that the application was made late in the day and this imputes that the application was not made in good faith but rather the same was made delay and avert justice.”

12 While relying on the same case of *Simba Coach Limited (supra)* the Respondent submitted that the review orders sought by the Applicant had since lapsed and that this Court should not aid the Applicant in taking advantage of its own wrongdoing of not paying the contractual amount. That the Court should not aid a party that has come to court with unclean hands as espoused in the case of *Francis J K Icbatha vs Housing Financing Company Kenya* HCCV No 108 of 2005. The Respondent urged this Court to dismiss the application with costs.

Determination

13 For an application for review to be successful, this Court is called upon to consider the following as outlined under Order 45 Rule (1) of the *Civil Procedure Rules*.

- a Discovery if 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 at the time the decree was passed or the order made;
- b On account of some mistake or error apparent on the face of the record;
- c Or for any other sufficient reason; and
- d The application should be brought without unreasonable delay.

14 This order is anchored on 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 an appeal is allowed by this Act; may apply for a review of judgement to the Court which passed the decree or made the order, and the court may make such orders thereon as it thinks fit.’

15 The order that the Applicant seeks to have reviewed was issued on August 15, 2022. The Court ordered thus:

- a. That the application be and is hereby certified urgent;
- b. That the application be and served on the Respondent for interpartes hearing on August 17, 2022;
- c. That temporary injunction be and is hereby granted against the 1st, 2nd and 3rd Defendant/ Respondents restraining them selling by way of public auction of Motor Vehicle Registration Number KHMA 187R, Stone Crusher machine, Fabricated Fuel Tank, Furnitures and Fittings, Machinery and Equipment situated on Land Reference Number Mwea/Wacharo/1623 all in possession of the Plaintiff/Applicant pending hearing and determination of this application inter parties on condition that the Applicant pay the Respondents a security deposit of Kshs 500,000/= (Five Hundred Thousand).

16 During the inter parties hearing of the application on August 17, 2022, the Applicant through its counsel applied to have the order to pay Kshs 500,000 to the Respondents as security be amended and the same be deposited in Court instead. The Court obliged them amending the said order to state thus:

“The order for deposit of Kshs 500,000 is hereby interpreted to mean payment in Court. Same to be done within seven (7) days from today.”

17 The Applicant brought an application dated September 1, 2022 seeking among other orders a review of these orders made on August 17, 2022 and a variation of the same to have the Applicant pay Kshs 200,000 or deposit a title deed whose value amounts to Kshs 500,000. That application was however dismissed for non-attendance by the Applicant on September 22, 2022 prompting the Applicant to lodge the present application.

18 The Respondents, specifically the 1st Respondent is persuaded that the present application is brought in bad faith and is meant to delay the prosecution of the main suit and has urged this Court not to award a party that has not come to court with clean hands.

19 The main question is whether the Applicant has satisfied the conditions for grant of an order for review.

20 The Plaintiff/Applicant urges the Court to find that there is sufficient reason to vary/review the orders made on August 17, 2022 on the basis of economic hardship brought about by covid 19.

21 It is also important to note that the said security was imposed by the Court firstly on August 15, 22 and the parties were again before the court for inter-partes hearing on August 17, 2022. On both days, the plaintiff/applicant did not at the earliest opportunity raise the issue of any economic hardship he was facing. Instead, on August 17, 22; Applicant merely moved the Court to amend the order to deposit the money into court instead of directly paying to the Respondent as earlier ordered and the court obliged.

22 The applicant was then given seven days to comply but he did not. Instead, he filed an application on September 1, 2022 which, despite insistence that it did not seek similar orders as in the instant application, its main prayers 2 & 3 thereof are a complete replica of prayer 3 & 4 of the present application. That application was dismissed for non-attendance. Instead of the applicant seeking to



revive the application dismissed by reason of its non-attendance, it decided to bring a fresh application. I agree with the submissions of the 1st Respondent that the recourse available was the procedure provided (not under Order 9B rule 8 of the *Civil Procedure Rules, 2010* as submitted because there is no such Order at the moment), but under Order 12 rule 7 of the Civil Procedure Rules, 2010. Instituting a fresh application by just tweaking it a bit through removing the prayer that was seeking extension of time while everything remains intact else does not conceal its real intentions. The conduct of filing a fresh application to resuscitate a similar one once been dismissed for non-attendance is an abuse of the court process as it would encourage marry-go-round kind of litigation with endless cycle 2 applications at the expense of the main suit. The Court must therefore guard its processes from such potential abuse. A similar finding was reached in *Universal Bank Limited vs Parminder Singh Viridi & Another* (2006) eKLR whose facts were very similar to the present case. In the said case, the plaintiff's suit had been dismissed by the court for want of prosecution and thus filed an application seeking to set aside the order of dismissal and to reinstate the dismissed suit. However, the plaintiff did not turn up on the date fixed for hearing of the application which was dismissed for non-appearance. The plaintiff then filed another application seeking to set aside the dismissal of the suit for want of prosecution and for the suit to be reinstated. The defendant objected pointing out that the plaintiff should not have filed a fresh application similar to the first one that had been dismissed for non-appearance but should have applied to set aside/vary the orders dismissing the first application. The plaintiff counsel on the other hand contended that he was entitled to bring a fresh application since order IX 9 B rule 7 (2) only applied to suits and not applications. In upholding the objection, Justice F Azangalala held as follows::

“... I have carefully considered the preliminary objection and the submissions of counsel on the same. Having done so, I take the following view of the matter. Under Section 2 of the *Civil Procedure Act* “Suit” means all civil proceedings commenced in any manner prescribed. This definition would seem to suggest that a suit refers to institution, commencement or origination of proceedings. In this event I would not describe the Plaintiff's applications as suits as the same do not originate proceedings but are applications within proceedings already instituted or commenced. Despite this view, was the Plaintiff entitled to bring afresh application after its first application was dismissed for non-attendance? I think not. In my view, an applicant who seeks to set aside an order obtained without hearing on merits and who fails to prosecute the application is not entitled to bring a fresh application seeking the same relief. To hold otherwise would be to legitimize abuse of the process of the court. There would be no end to filing applications that are not prosecuted. Such a state of affairs would offend against the maxim that litigation should come to an end. There is evidence of such abuse in this case. The Plaintiff's application dated and filed on June 16, 2005 remains undetermined. The subsequent application dated July 12, 2005 and lodged on July 13, 005 was dismissed for non-attendance. The Plaintiff undaunted has lodged the present application without seeking any orders in respect of the previous applications. I cannot resist the conclusion that the Plaintiff is abusing the process of the court....”

- 23 Further, an application for review ought to be made without unreasonable delay. The conditional order was to be complied with within seven (7) days. Two months after the order was made, the Applicant had not sought any variation/review. In my view, taking into account the short time-frame that the order ought to have been complied with, I find that the Applicant is guilty of laches and is thus undeserving of the exercise of discretion of this court
- 24 Finally, the applicant has stated that it is unable to pay the security sum of Kshs. 500,000 yet it has land which it can deposit worth the amount. Why can't the Applicant sell the land and deposit the proceeds in court. The applicant has not explained that it has attempted the option of selling the said land and



failed, and if he indeed it turns out there are difficulties disposing it, then the security offered would not be a proper security fit for the intended purpose.

The court in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR was of the view that: -

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words “ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost...”

25) If the security given would complicate realization of costs as would arise, it would not serve the intended reason why it was being offered in the first place.

26) An analogous argument was raised *Simba Coach Ltd v Kiriiyu Merchants Auctioners* [2019] eKLR where Justice Musyoka quoted the following passage from the case of *Kyuna Investments Limited & 2 others v Florence Muyaka* [2013] eKLR;

“...The valuation report of the vehicles show that they are worth over Kshs.5 million the applicant therefore cannot argue that she cannot get deposit the Kshs. 4.8 million in court, she has assets she can sell to satisfy the court order am therefore not persuaded that she is not able to raise the security sum in cash...”

27) The upshot is that this Court finds that the present application lacks merit and its dismissed with costs which shall abide the main cause.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 31ST DAY OF MARCH, 2023.

L N MUGAMBI

JUDGE

In presence of:

Appellant- absent

Respondent- absent

Advocate for Appellant- absent

Advocate for Respondent- absent

Court Assistant- Etyang

Court

This Judgement be transmitted digitally by the Deputy Registrar to the Advocates for the Parties on Record through their respective email addresses.

L N MUGAMBI

JUDGE

