



REPUBLIC OF KENYA



KENYA LAW
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**Sapani v Bank of Africa Kenya Limited (Civil Appeal E721 of 2022)
[2023] KEHC 2870 (KLR) (Civ) (29 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E721 OF 2022**

**JK SERGON, J
MARCH 29, 2023**

BETWEEN

BRENDA ELIZABETH WAKA SAPANI APPLICANT

AND

BANK OF AFRICA KENYA LIMITED RESPONDENT

RULING

1. The applicant herein has brought the Notice of Motion dated December 15, 2022 supported by the grounds laid out on its face and the facts stated in her affidavit. The applicant sought for the following orders:
 - a. Spent
 - b. The Honourable Judge do review the Order made on December 2, 2022 requiring the applicant to deposit Kshs 1,000,000/= in a joint account, within 45 days for the stay orders to take effect.
 - c. The costs of this application be provided for.
2. The respondent opposed the Motion by filing the Grounds of Opposition dated February 22, 2023 and put forward the following grounds:
 - a. That the present application is incompetent, bad in law, frivolous, hopelessly incompetent and incurably defective and ought to be struck out in limine.
 - b. That the application is irregularly in Court since the applicant has not annexed a formally extracted and certified copy of order or ruling in respect of which the review is sought.



- c. That there is no discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the order was made.
 - d. That the ground advanced by the applicant that she is unemployed is not new and cannot be a basis for review of order under Order 45 of the Civil Procedure Rules, 2010 since she was aware of her financial status all along.
 - e. That there is no mistake or error apparent on the face of the record of the order and ruling delivered on December 2, 2022.
 - f. That there no sufficient reasons advanced by the applicant which had not been advanced earlier
 - g. That the law frowns upon litigation by instalment approached by the applicant and this court should dismiss the present application.
 - h. That the present application is devoid of merit in its entirety and hence the same should be dismissed with costs to the respondent.
 - i. That it is in the interest of justice that the orders sought herein be dismissed in its entirety.
 - j. That accordingly, the appellant's application dated December 15, 2022 be dismissed with costs for lack of merit as it is grounded on falsehood in its grounds.
3. I have considered the grounds set out on the body of the Summons; the facts deponed in the affidavit filed in support and the grounds of opposition.
 4. A brief background of the matter is that the respondent instituted a suit before the Chief Magistrate's Court-Milimani Commercial Courts, against the appellant and sought for the sum of Kshs 9,966,867/=, which represented the recovery of the allegedly unpaid loan amount plus court costs and interest.
 5. The respondent entered an appearance but did not file or serve any defense. On January 19, 2021, the respondent filed an application for summary judgment. On August 31, 2021, the application was dismissed and summary judgment was entered because there was no viable defense on record.
 6. The applicant subsequently approached this court by way of the application dated September 8, 2022 and sought for an order for leave to appeal out of time against the ruling and order dated August 31, 2022 as well as an order of a stay of execution pending the appeal.
 7. This court heard the application and granted the applicant leave of 14 days to file an appeal out of time and granted the order for stay on condition that the applicants deposit Kshs 1,000,000/= in an interest earning account in the joint names of the advocates or firms appearing in this appeal within 45 days.
 8. The applicants now seek to review the above ruling through this instant Motion.
 9. The applicant avers that she is currently unemployed, has no income, and is unable to raise Kshs 1,000,000/= in the allotted 45 days. Despite her consistent efforts and sufficient qualifications, she has not been able to find meaningful employment, and the projects she has worked on have not been able to generate an income.
 10. The applicant further avers that the respondent will not be prejudiced in any way if the orders sought are granted and on the other hand, she will suffer irreparable loss if the orders given are vacated because



of her inability to raise Kshs 1,000,000/= and will be committed to civil jail as sought by the respondent in the lower court.

11. The germane principles to guide this court in deciding whether to review its earlier ruling are found under Order 45 of the [Civil Procedure Rules, 2010](#) and reaffirmed under Section 80 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, both cited in the submissions by the appellants, and set out in the manner below:

“ 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.”

12. The following are the instances in which a court can review a decision already in place:

- a. the discovery of new and important matter or evidence, or
- b. some mistake or error apparent on the face of the record, or
- c. any other sufficient reason.

13. From my study of the instant Motion, it is clear that the applicant is relying on fact that She cannot raise Kshs 1,000,000/= in the given 45 days because she is now unemployed, has no source of income, and cannot work. She has been unable to find meaningful job, and the projects she has worked on have not been able to bring in money despite her persistent efforts and acceptable qualifications.

14. Discussing the scope of review, the Supreme Court of India in the case of [Ajit Kumar Rath vs State of Orisa & Others](#), 9 Supreme Court Cases 596 at Page 608.had this to say:-

“ 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 or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being 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”



15. In *Sadar Mohamed vs Charan Singh and another* [1963]EA 557] that:-
- “Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter).”
16. In *Tokesi Mambili and others vs Simion Litsanga* [2004] eKLR] the Court of Appeal held:-
- i. 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. (Emphasis added)
 - ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
17. 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. My finding is fortified by the holding in the case of *Evan Bwire vs Andrew Nginda* Civil Appeal No 103 of 2000, Kisumu, (2000) LLR 8340, where the court held that ‘an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.
18. In light of the jurisprudence outlined above, I have concluded that the applicant’s arguments do not meet the criteria for one of the grounds listed in Order 45 Rule 1 of the *Civil Procedure Rules*.
19. In light of the foregoing conclusions, I find that the grounds relied upon by the applicant are ineligible to constitute grounds for review, therefore the applicant’s application does not fall under the purview of the grounds listed in Order 45 Rule 1 of the *Civil Procedure Rules*. In the end, the application filed by the applicant dated December 15, 2022, is without merit, it is dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 29TH DAY OF MARCH, 2023.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

