



Kimitei v Mogaka (Civil Suit 125 of 2008) [2023] KEHC 21203 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 125 OF 2008
SM MOHOCHI, J
JULY 28, 2023**

BETWEEN

B.K. KIMITEI APPLICANT

AND

RODAH MOGAKA RESPONDENT

RULING

1. The Application before Court is a Notice of Motion filed under Order 45 of the *Civil Procedure Rules* 2010, and Sections 1A, 1B, 3A, 63(6) & 80 of the *Civil procedure Act* and all enabling provisions of the law being an Application for Review and setting aside of the Judgment and Decree delivered on the November 11, 2021 in Nakuru HCC 125 of 2008 seeking the following relief(s):-
 - a. That the Application herein be certified urgent and be heard expeditiously and ex-parte in the first instance.....Spent.
 - b. That an injunction order do issue, restraining the Defendant/ Respondent, their agents, servants, employees and/or representatives or anyone working under them or for them or on their instructions from the execution of the decree and warrant issued on November 11, 2021.
 - c. That, an order of injunction do issue against the Hegeons Auctioneers, their agents, servants, employees and/or representatives barring them from attaching or interfering with assets proclaimed.
 - d. That the purported decree and warrant issued on the November 11, 2021 be vacated and set-aside.
 - e. That this Honourable Court does issue such other directions the Court may deem just and expedient to grant.
 - f. That the costs of this application be in the cause.



2. The Application is based on the following grounds inter alia: -
 - i. That on November 11, 2021 a decree in favor of the Defendant/Respondent was issued against the Applicant in Nakuru HCC 125 OF 2008;
 - ii. That the decretal sum was purportedly Kshs 114,725/= being the amount/balance of the said decree and costs still remaining unsatisfied;
 - iii. That, to realize the decretal sum, illegal warrants of attachment and sale were purportedly issued to Hegeons Auctioners authorizing them to attach the Applicant's property after giving 15 days' notice; notice that was not issued to the Applicant;
 - iv. That Hegeons Auctioneers acting on instructions from the Defendant/ Respondent, purportedly served a proclamation of attachment on the November 24, 2021 with value of the movable property being estimated at a vague value of 'over Kshs 100,000/=', without itemized fees; and
 - v. That it is in the interest of justice and fairness that the Prayers sought in the Application filed herewith be granted;
3. The Application was supported by the Affidavit sworn by Benjamin Kimitei dated December 10, 2021 under certificate of urgency and obtained ex-parte orders of temporary stay of execution on the December 15, 2021.
4. Directions as to the disposal of the Application were issued on the October 19, 2022 and it is noteworthy that ever since the filing of the Application on the December 14, 2021, the Applicant has failed and or refused to prosecute the Application and in fact has been a no-show in the five (5) occasions the matter came up in court before this ruling.
5. This matter was assigned to this Court on the February 16, 2023 where the Court further allowed the Applicant leave in their absence to file their written submission within 14 days and the Defendant/ Respondent was to serve notice upon the Applicant and a further mention for compliance was scheduled on the March 14, 2023.
6. On the March 14, 2023 the matter came up before Court, the Applicant was absent despite proof of service and the Respondent accordingly urged for the dismissal of the same. The Court thus retired to prepare its ruling without the benefit of the Applicant.
7. The Respondent in opposing the Application, relied on the Replying Affidavit of Wambeyi Makomere dated December 20, 2021 and on the authorities attached to their written submissions.
8. The Respondent contends that, this application sought an injunction from the execution of the decree and warrant issued on November 11, 2021 and an order of injunction against Hegeons Auctioneers, their agents, servants, employees and/or representatives barring them from attaching or interfering with assets proclaimed.
9. The Respondent contends that, the facts of the case are straight forward that, the substantive suit was finalized by way of dismissal for want of prosecution and non-attendance in the year 2016.
10. That the Respondent subsequently filed a bill of costs for taxation and the same was served upon the Applicant's advocate and it came up for taxation severally and on the May 19, 2017 the Applicant's advocate received a Taxation Notice and protested. The Applicant's advocates subsequently received other notices without an issue and on December 8, 2017 the Applicants' Advocates served the Respondent with an application to cease acting in the matter, dated December 7, 2017.



11. The Applicant's advocates abandoned the Application to cease acting and, on the July 24, 2018, when this matter came up for taxation, Mr Biko for the Applicant sought 14 days within which to file submissions and a date taken for August 21, 2018 to confirm compliance, which was unopposed by the Applicant. The bill was taxed and a certificate of costs issued to which the Respondent now wishes to recover.
12. The Respondent Contends that having set out the facts of the matter, refined three (3) issues for determination.

Issues for Determination

- a. Whether an injunction can be issued against a court decree?
- b. Whether the judgment of the court is subjected to review?
- c. Whether the application is merited?

Whether an injunction can be issued against a court decree ___?

13. The Respondent Contends that, the prayer for an order of injunction cannot be issued against a Court decree, that an injunction is an act in personam and not an act in rem and it cannot be Issued against a court decree. The Respondent sought reliance of Halsbury Law of England and this view was also supported in the case of *Food Corporation of India v Sukh Dea Prasaa 2009 SCC 665*. Specifically, a temporary injunction may be granted against a party to a suit and in some circumstances against any person whom a right of action exists.

Whether the judgment of the court is subjected to review?

14. The Plaintiff/Applicant's application dated December 12, 2021 is premised On Order 45 of the Civil Procedure Code which is about review. The Respondent submit that the Plaintiff/Applicant's application has in no way satisfied the conditions that will enable the court review the judgment. The conditions for review are:-
 - i. Discovery of new and important matters of evidence that the court did not have, when deciding. and
 - ii. Where there is a mistake or error apparent on the face of the record.
15. The Respondent submit that, the Applicant has not shown any new and important matters of evidence that the Court did not have, when making the judgment, as there was no judgment issued and neither has he shown that the Court has made a mistake or error apparent on the face of the record. The court in the case of [*National Bank of Kenya Limited v Ndungu Njau* \[1997\] eKLR](#) stated: -

' 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 provision of law cannot be ground for review.'

Whether the application is merited?

16. Abuse of Court process is defined as, using the legal process or court procedures to accomplish an improper or unlawful purpose. The key element of abuse of Court process is the malicious and



- deliberate misuse of regularly issued Court processes that are not justified by the underlying legal action.
17. In the case of *DONALD V SALEH (2015) 2 WLR (PT 1444) 529 PARAS G-H*, the Court held that: -
 - ' There is no hard and fast rule in determining the absence or presence of abuse of court process in any action. Rather the court is enjoined to examine each case predicated on its facts and circumstances, in order to ascertain if it exhibits an abuse of court process.'
 18. The Applicant states that he was never served with a notice of entry of judgment or a notice of proclamation. This claim rebutted as unfounded, as the Court did not issue any judgment, as the suit against the defendant was dismissed for want of prosecution thereby negating the need for the defendant to issue a notice of entry of judgment or a notice of proclamation.
 19. The Respondent submits that, notice of entry of judgment is only served when an interlocutory judgment is only served when an interlocutory judgment is issued.
 20. The Plaintiff/Applicant has applied for a stay of execution against the defendant's certificate of taxation, passed on July 6, 2021 and proclamation and attachment of the Applicant's assets due to the process being laced with illegalities and of which the Plaintiff/ Applicant claims to have been unaware of.
 21. The Respondent submit that the Applicant is engaged in abuse of the Court process, as the correct process was not followed in instances where a party wishes to object to a decision of a tax master and that, Paragraph 11 of the [Advocates Remuneration Order\(2014\)](#) provides as follows: -
 - a. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 - b. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 - c. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 22. In the case of [Odera Obar & Co Advocate Aquva Agencies Limited \[2021\] eKLR](#) stated on the issue of delay, Mohammed J (as he then was) held as follows in [George Kagema Kariuki & 2 Others v George M Gichimu & 2 Others \(2014\) eKLR](#): -
 - ' The law does not set out any minimum or maximum period of delay. All it states S marany delay should be explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favorably exercisable.'
 23. The application dated December 12, 2021 should be dismissed as is lacks merit and is an abuse of the court process and an attempt to delay execution after the suit had been correctly dismissed for want of prosecution.
 24. The Court concurs with the Respondent and adopts the three issues as framed as follows: -



- a. Whether an injunction can be issued against a court decree?
- b. Whether the judgment of the court is subjected to review?
- c. Whether the application is merited?

Analysis and Determination

25. Section 80 of the *Civil Procedure Act* Cap 21 provides as follows: -

' 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 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.'

26. Order 42 Rule 6 of the Civil Procedure Rules which provide that: -

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) The court is satisfied that substantial loss may result to the Applicant unless the order is made, and that the application has been made without unreasonable delay; and
 - (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

27. In view of the above, it is clear that the facts to be considered before granting an application for stay of execution pending appeal entails that; the applicant must demonstrate substantial loss, the application has been made without unreasonable delay and the provision of such security as the Court may impose.

28. On whether the appellant will suffer substantial loss in *James Wangalwa & Another v Agnes Naliaka Cheselo [2012] eKLR* the Court held that: -

' No doubt, in law, the fact that the process of execution has been put in motion or is likely to be put in motion, by itself does not amount to substantial loss. Even when execution has been levied and completed, that is to say the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 Rule 6 of the CPR. This is so because execution is a lawful process.'

29. The Applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in an appeal.



30. In applying the same principles in this case, the subject matter of this appeal in my understanding is not the judgement by the Trial Court but rather, taxed costs of a suit dismissed for want of prosecution which dismissal is not in contest.
31. The question that this Court therefore has to answer is what substantial loss the Applicant will suffer? if stay of enforcement of the Decree and Warrants issued on taxed costs by the Subordinate Court not made in his favour. It appears to me that the applicant has not demonstrated how he will suffer substantial loss and bearing in mind that they had earlier been granted stay of execution for over one year without any appetite in prosecuting the Application.
32. In the premises, I find that the Application is bereft of merit warranting grant of an order of stay of execution.
33. Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows:
- (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.'

34. In *Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR* it was held: -

' Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the 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 face 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.'

35. 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 J enumerated 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.
36. Moreover, the said Applicant filed an Application for review of a warrant and decree. This cannot be allowed. The taxing master made a conscious decision on taxing the bill of costs and exercised his discretion. I do not buy the argument that the taxation was laced with unspecified illegalities to qualify the Application to fall under the category of:
- ' ... 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...'
37. The case here is that of executing a decree to recover costs in a concluded matter and not one of discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the Applicant's knowledge.
38. The Application could also not pass the Test of:
- ' ...or for any other sufficient reason...' which reasons leading authorities hold must be analogous to the other grounds mentioned under the Act and rules, a reason sufficiently analogous to those specified in the rule.'



39. In the case of Evan Bwire Vs Andrew Aginda Civil Appeal No 147 of 2006 cited in the case of [*Stephen Gitbua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers \(2016\) eKLR*](#) the Court of Appeal held as follows:

' An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.'

40. The current Application falls under the above category. The effect of allowing it would amount to re-opening the case afresh. Litigation must come to an end. Parties must present all the facts, documents and evidence in Court at the appropriate time before the Court retires to write its Judgment.
41. Time and time again Courts have advised litigants that they are bound by their pleadings and that you do not prosecute your case piecemeal. What is demonstrated by the Application is a case of poor pleading which is not what was envisaged by Section 80 of the [*Civil Procedure Act*](#) nor the Rules under Order 45.
42. Finally, the Application is irregularly in Court since, it not only seeks to injunct the said decree and review the decree without basis, thereby inviting the High Court to sit as the taxing court.
43. The Court thus finds the Application as presented to constitute an abuse of the process of the Court, the same is bereft of merit and is thus accordingly dismissed with costs to the Respondent.

It is so Ordered.

SIGNED, DELIVERED AT NAKURU ON THIS 28TH JULY 2023

Mohochi S.M

JUDGE

In the presence of: -

Mr. Wambeyi Advocate for the Respondents

No appearance for Advocate for the Applicants

