Kariithi & 2 others v Irene Thuo t/a Renekam Enterprises & another (Civil Appeal E594 of 2021) [2023] KEHC 22664 (KLR) (Civ) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22664 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E594 OF 2021

CW MEOLI, J

SEPTEMBER 28, 2023

BETWEEN

NANCY KARIITHI ..... 1ST APPLICANT

KARRY MART LIMITED ..... 2ND APPLICANT

GEORGE KARIITHI ..... 3RD APPLICANT

AND

IRENE THUO T/A RENEKAM ENTERPRISES ..... 1ST RESPONDENT

ADAM W. NGETHE T/A GARAM INVESTMENTS ..... 2ND RESPONDENT

RULING

1. For determination is the motion dated 02.09.2022 filed by Nancy Kariithi, Karry Mart Limited and George Kariithi (hereafter the 1st ,2nd and 3rd Applicant/Applicants) seeking inter alia that the court be pleased to review and set aside its ruling dated 04.08.2022 and the consequential orders; that the notification of sale of moveable property dated 19.03.2022 be set aside; and that this court be pleased to order that the interlocutory judgment entered exparte against the Applicants on 04.05.2021 be set aside and the Applicants be allowed to defend the suit unconditionally. The motion is expressed to be brought under Section 1A, 1B, 3, 3A & 80 of the *Civil Procedure Act* and Order 45 Rules 1 of the Civil Procedure Rules, inter alia. On grounds, on the face of the motion as amplified in the supporting sworn by the 1st Applicant.

2. To the effect that this court delivered a ruling on 04.08.2022 dismissing the Applicants motion yet she had deposited monies as conditional security for an order of stay pending appeal as earlier ordered by the court, but the e-filling system failed to reflect the same. That after noticing the foregoing on the e-filing portal, her counsel made a follow up with the judiciary accounts officer who advised that

the same would reflect in due time. The deponent further states that her appeal has a high chance of success as such it is in the interest of justice that the motion is allowed else the filed appeal in the event of success, will be rendered nugatory. She emphasizes having complied with the court's orders on deposit of security of Kshs. 500,000/- expressing willingness to abide by any further conditions as may be imposed by the court in granting the prayers sought in the instant motion.

3. The 1st Applicant asserts that denial of the orders of stay of execution pending hearing of the instant appeal in the ruling delivered on 04.08.2022 was occasioned by the mistaken belief that security as ordered by the court had not been deposited and if the court were to decline her application the appeal will be rendered a mere academic exercise. She attributes delay in filing the instant motion late receipt of the copy of the delivered ruling asserting that the mistakes in the e-filing system and or counsel ought not to be visited on an innocent litigant.

4. That she had filed a memorandum of appeal though it had been erroneously marked as an annexure as such the court ought not punish her for the mistakes of her counsel on the foregoing. In conclusion, she asserted that it is in the interest of justice that she be accorded an opportunity to be heard in accordance with Article 159 of *the Constitution*. Finally stating that Irene Thuo t/a Renekam Enterprises and Adam W. Ngethe t/a Garam Investments (hereafter the 1st and 2nd Respondent/Respondents) will not be prejudiced if the prayers sought in the motion herein are granted.

5. The 1st Respondent opposes the motion by way of a replying affidavit and supplementary affidavits dated 26.01.2023 and 07.02.2023 respectively. She takes issue with the motion by asserting that the Applicants have filed numerous applications in an attempt to deny her the fruits of successful litigation and while expressing interest in settling the decretal amount, the Applicants have failed to make a deposit towards as proposed in their letter dated 21.01.2023.

6. She goes on to depose in her further affidavit, that on 30.11.2022 the Applicants were served with the notice to file the record of appeal within 21 days but have not done so or complied with directions on deposit of security. That instead of complying with court orders or adhering to their own proposals on settlement, the Applicants have persisted in filing numerous applications through different advocates in an attempt to dissipate the court's time and therefore ought not be accorded any audience before complying with court orders. In conclusion she asserts that the matter has dragged on in court for many years and that the instant motion other than occasioning prejudice is an attempt to perpetuate impunity thereby denying her the fruits of the judgment.

7. In a rejoinder by way of a further affidavit dated 24.04.2023, the 1st Applicant attacks the 1st Respondent's affidavit material by deposing that due to errors on the part of former counsel, the appeal has never been properly prosecuted; that the notice to file a record of appeal was addressed to her previous advocates six (6) months after she has changed advocates; that she duly complied with the order on deposit of security by 20.05.2022 and that the issue of reversal of the deposited funds as alluded to by the 1st Respondent is far-fetched; that through her present advocates she is keen and willing to file her record of appeal and prosecute the appeal to its logical conclusion; and that delay in concluding the matter has been occasioned by misjoinder of parties. In conclusion, she deposes that the 1st Respondent is equally guilty of filing counter applications and that it is in the interest of justice that the instant motion is allowed as prayed.

8. The motion was canvassed by way of written submissions. On behalf of the Applicants, counsel began by restating the events leading to the instant motion meanwhile condensed his submissions into three (3) cogent issues for the court's consideration. Concerning possible prejudice to the Respondents if the motion is allowed, it was contended that it was only upon delivery of the ruling of this court on 04.08.2022 that the Applicants realized that there was an accounting error in respect of the court's

order on security. That the Applicants' advocates previously on record failed to properly follow up with the court on the issue of security while the Applicants have been vigilant on their part in prosecuting the instant matter. Hence no prejudice will be occasioned on the Respondents.

9. Addressing the merits of the motion, counsel relied on the provisions of Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 & 2 of the Civil Procedure Rules, the decisions in Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300 and Alpa Fine Foods Limited v Horeca Kenya Limited & 4 Others [2021] eKLR to submit that the bone of contention is a slight error regarding the figure of Kshs. 345,000/- and that the court has power to review its ruling.

10. On the issue of delay relating to the substantive appeal, it was argued that the mistakes of former counsel ought not be visited on the innocent litigant. That the Applicants only noticed the error in respect of the said appeal upon reading the ruling of this court and thereafter instructed the present firm of advocates to timeously file the instant motion for review. The decisions in Belinda Murai & 6 Others v Amos Wainaina [1978] KLR and Phillip Chemwolo & Another v Augustine Kubede [1982-88] KLR 103 were called to aid in this regard.

11. It was further contended that the Applicants through the instant motion have demonstrated the discovery of new and important matters of evidence which despite the exercise of due diligence were not within their knowledge. In conclusion, counsel conceded to the issue of costs and urged the court to allow the motion as prayed.

12. On the part of the 1st Respondent, counsel began by underscoring the events leading up to the instant motion in asserting that the Applicants ought not to be granted audience until they purge their contempt arising from failure to comply with the conditions attached to the order of stay. It was further submitted that in filing the instant motion the Applicants are merely perpetuating impunity, with the intention of denying the 1st Respondent the fruits of her judgment. While citing the provisions of Section 107 of the *Evidence Act* and the decision in Evan Otieno Nyakwana v Cleophas Bwana Ongaro [2015] eKLR counsel contended that the Applicants have failed to discharge their burden of proof.

13. It was further argued that the 1st Applicant has the means to satisfy the decretal sum but has used a multiplicity of court proceedings to avoid settling the decretal sum and or comply with court orders. That the court is obligated to balance the respective parties' rights and that the Applicants' conduct demonstrates their attempts to deny the 1st Respondent the fruits of successful litigation. The court was thus implored to dismiss the motion with costs.

14. The 2nd Respondent failed and opted not to participate in the instant proceedings.

15. The court has considered the material before it, the history of the matter and the issues canvassed in respect of the instant motion. From the record it is evident that upon delivery of this court's ruling dated 04.08.2022, the Applicants proceeded to instruct a different firm of advocates to take up conduct of the matter. That said, this court addressed the question of the Applicants to that motion in paragraph 9 of the said ruling. It appears for all intents and purposes; the said application was made for and on behalf of the three Applicants.

16. Moving on to the substantive issues, the instant motion is chiefly anchored on the provisions of Order 45 (1) of the Civil Procedure Rules which provides that: -

> "(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."

17. A perfunctory review of the grounds and issues raised in the Applicants' motion reveals that the application is primarily premised on the ground that there was discovery of new and important matters or evidence which, despite the exercise of due diligence, was not within the Applicants knowledge or could not be produced and resulting in an error apparent on the face of the record.

18. In the court's understanding, it is the Applicants' case that the court's ruling of 04.08.2022 disallowing the earlier motion was informed by the erroneous perception that there was non-compliance with the interim conditional order on security, an error allegedly occasioned by the court e-filing system's failure to capture the full amount deposited. Particularly, it was the Applicants' contention that the total monies deposited was Kshs. 500,000/- and not Kshs. 345,000/- hence upon discovery of this new information the court ought to review its ruling delivered on 04.08.2022.

19. As to the nature of a review application, the Court of Appeal in Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited [2020] eKLR stated that an application for review involves the exercise of judicial discretion. There is a long line of authorities on the principles that govern a motion brought under Order 45 (1) of the Civil Procedure Rules.

20. Okwengu JA in Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] eKLR, the Court of Appeal pronounced herself as follows: -

> "It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
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> > "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 provision of law cannot be a ground for review." (Emphasis added)
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> In Nyamogo and Nyamogo Advocates v. Kogo [2001]1 E.A. 173 this Court further explained an error apparent on the face of the record as follows:
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> > "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error

apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

21. Further, in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR the Court of Appeal held that:

> " It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:
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> > " The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v. Consumer Education & Research Centre (1981) AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]..."

22. Where a review motion is premised on the ground of discovery of new and important matters or evidence, the Court of Appeal in Stephen Wanyoike Kinuthia (suing on behalf of John Kinuthia (Suing on behalf of John Kinuthia Marega (deceased) v Kariuki Marega & Another [2018] eKLR (Civil Appeal No. 201 of 2012) emphasized that:

> " an application based on the ground of discovery of new and important matter or evidence will not be granted without strict proof of such allegation."

23. Earlier, the same court in Pancras T. Swai v Kenya Breweries Limited [2014] eKLR, stated that:

> " The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but does not relate to ascertainment of existing law which the court is deemed to be alive to."

24. That said, the expressly stipulated grounds for review under Order 45 Rule 1 are to be read disjunctively with the limb providing for review "for any other sufficient reason". The Court of Appeal in Wangechi Kimita & Another v. Mutahi Wakibiru (1982-88) 1 KAR 977 stated with regard to the words "for any other sufficient reason" per Nyarangi JA as follows:-

> " ... I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly S.80 of the *Civil Procedure Act* confers unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the Order: See Sadar Mohamed v. Charan Singh (1959) E.A. 793".

25. Pertinent to the instant motion is this court's ruling which is the subject of the review motion. However, it appears to this court that, the Applicants did not fully appreciate the import of the said ruling of 04.08.2022. It is useful at this juncture to quote in extenso some relevant facets of the said decision. Therein, this court expressed itself in part as follows; -

> " 12. On a plain reading of Order 42 Rule 6(1) of the CPR, an order to stay execution pending appeal presupposes the existence of an appeal. The filing of an appeal is a condition precedent to the exercise of this court's appellate jurisdiction under Order 42 Rule 6 (1) of the Civil Procedure Rules. Although the provision does not expressly say so, this can be inferred from the rule. Further, an analogy can be drawn from Order 42 Rule 6 (4) of the Civil Procedure Rules which states that an appeal is deemed filed in the Court of Appeal when the notice of appeal has been given. Equally, Order 42 Rule 6 (6) of the Civil Procedure Rules states:
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> > " Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with." (Emphasis added).
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> 13. Therefore, the invocation of the jurisdiction of this court under Order 42 Rule 6 (1) or 6 (6) of the Civil Procedure Rules must be preceded by the filing of a competent appeal in the prescribed format, in this case a memorandum of appeal as envisaged in Order 42 Rule 1 CPR:
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> > " (1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> > (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."
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> 14. Until such a memorandum of appeal is filed, the court would be acting in vacuo by considering the Applicants' prayer for stay of execution pending

appeal. What is currently before this Court by way of initiating appeal in this matter, and styled as a memorandum of appeal, is an annexure marked "B". The supporting affidavit by the 1st Applicant states that she was seeking leave in relation to filing the said annexed pleading. A perusal of the annexure reveals that the subject matter of the appeal are the two rulings in the lower court relating firstly to the application for review of its earlier orders, and secondly, to objection proceedings brought by the 3rd Applicant. Under Order 43 of the CPR, an appeal does not lie as of right from the latter but in any event, the supposed memorandum of appeal which is marked as an annexure appears defective in form and cannot be deemed as a proper memorandum of appeal.

15. The Court of Appeal in Abubaker Mohamed Al-Amin v Firdaus Siwa Somo [2018] eKLR while citing with approval the decision of the High Court in Rosalindi Wanjiku Macharia vs. James Kiingati Kimani (Suing as the Legal Representative of the Estate of Martin Muiruri (Deceased)) [2017] eKLR concurred with and adopted the position that the existence of a competent appeal is the basis for the invocation of the Court's appellate jurisdiction in dealing with an application for stay of execution pending appeal.

16. Earlier, the Court of Appeal in the case of Equity Bank -Vs- Westlink MBO Limited [2013] eKLR while commenting on Rule 5 (2) (b) of the Court of Appeal Rules, whose wording is substantially similar to Order 42 Rule 6 (1) of the Civil Procedure Rules, and on Order 42 Rule 6 (6) of Civil Procedure Rules, left no room for doubt that an application for stay of execution pending appeal could only be entertained before it after the filing of an appeal or a Notice of Intended Appeal. (See also Balozi Housing Co-operative Society Limited -Vs- Captain Francis E. K. Hinga [2012] eKLR). In the circumstances, the prayer seeking stay of execution of the judgment and decree in the lower court pending the hearing and determination of the appeal has no legal anchor. However, it is the court's further view that even if the said memorandum of appeal were deemed as proper and competent, the motion by the Applicants' motion would still fail on the merits, for the following reasons." (sic)

26. The earlier application sought an "order to stay of execution of the ex-parte judgment delivered on 12th October 2018 in Nairobi Milimani CMCC No. 4912 of 2016 pending the hearing and determination of this appeal" (sic). What the Applicants by the present motion are effectively seeking is that this prayer be granted by way of reviewing the court's previous ruling. This court has held time without number that the existence of an appeal is a condition precedent for a party to invoke an appellate court's jurisdiction to grant an order of stay of execution pending appeal.

27. The ruling delivered on 04.08.2022 made an unequivocal finding that "the supposed memorandum of appeal which is marked as an annexure appears defective in form and cannot be deemed as a proper memorandum of appeal." A perusal of the court record and Case Tracking System (CTS) reveals that no competent memorandum of appeal had been filed at the time of this ruling. Suffice to say that the earlier application did not merely fail for want of compliance with the order for deposit as the Applicants appear to purport; the application was found to be fundamentally incompetent, but nevertheless, the court proceeded to make certain observations as to its purported merits. That is not a determination that is amenable to review but to an appeal.

28. That said, the review of this court's earlier ruling as sought by the instant motion if allowed, would effectively grant the stay of execution pending a non-existent appeal. Just as stay of execution could not be granted earlier in vacuo, review orders to effectively grant stay of execution cannot be granted in the absence of a competent appeal. Secondly, the prayer in the instant motion seeking to set aside what is clearly an ex parte judgment of the lower court is incompetently before this court and is misconceived. Suffice to say, without going into the merits of the review motion, that there does not exist an appeal in respect of which an order of stay of execution can be issued.

29. Finally, regarding the Applicants' alleged mistakes of the their erstwhile counsel, the Applicants cannot hide behind the dicta in Phillip Chemwolo (supra). The Court of Appeal in Daqare Transporters Limited v Chevron Kenya Limited [2020] eKLR stated that:

> " ....The adage rule that the mistake of counsel should not be visited upon an innocent litigant does not have a blanket application. Nor do we think that it has doctrinal status. The court must always look into the conduct of the party pointing the finger of blame in order to make a just decision. "

30. The Applicants own their case and are responsible for instructing counsel of their choice and following up with their case to ensure timeous and appropriate progress. Had the Applicants been diligent, they would have ensured the prompt filing of a proper appeal having admittedly discovered prior to the instant motion, the defects pointed out by this court in that regard, in its earlier ruling. In the absence of a competent foundational pleading in the matter, namely, a memorandum of appeal, the Applicants are merely wasting the court's resources by bringing multiple applications that are bereft of a legal anchor. The motion dated 2.09.2022 is yet another step of misadventure by the Applicants in this matter. It is without merit and is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF SEPTEMBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. King'ang'i

For the Respondents: Mr. Rabala

C/A: Carol