



**Kiilu v Osoro (Suing as legal representative of the Estate of Deborah Shisiah Osolo) & another (Civil Appeal E001 of 2021) [2023] KEHC 24679 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24679 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E001 OF 2021  
FROO OLEL, J  
OCTOBER 30, 2023**

**BETWEEN**

**STANLEY MUTHAMA KIILU ..... APPELLANT**

**AND**

**DAVID.A OSORO (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF  
DEBORAH SHISIAH OSOLO) ..... 1<sup>ST</sup> RESPONDENT**

**GRACE WARUIRU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**A. Introduction**

1. The application before this court for determination is the Notice of Motion application dated 22<sup>nd</sup> May 2023 brought pursuant to provisions of Section 1A, 1B, 3A, 63(e) and 80 of the [civil procedure Act](#), Order 45 Rule (1) of the Civil Procedure Rules and all other enabling provision of law. By the said application, the Appellant/applicant seeks to review by way of recalculation the amount that makes half of the decretal sum from Kshs 3,353,388/= to Kshs 1,676,694/= and that this court be pleased to vary its orders issued on 25.04. 2023 to allow the applicant to provide the requisite security by way of title deed or a bank guarantee. The application is supported by a supporting affidavit of the Appellant Stanley Muthama Kiilu dated 22<sup>nd</sup> May 2023.
2. The applicant states that this court granted conditional stay pending appeal vide its ruling dated 25<sup>th</sup> April 2023 on condition that he deposits half of the decretal sum in a joint interest earning account within 45 Days of the said ruling. The applicant depones that the said ruling was an error as the court calculated the amount using 100% of the decretal sum yet as per the trial court judgement, he was to pay half the decretal sum and the 3rd party was to pay the other half of the decretal sum. He had tried to raise the cash in vain but was willing to deposit security in the form of a title deed worth the amount



ordered. It was in the interest of justice to grant the prayers sought as no prejudice would be occasioned to the respondent if the orders sought were granted.

3. The Respondent did oppose this application vide, their Replying affidavit sworn by one John Webo Asakhulu dated 13<sup>th</sup> June 2023. He did state that the applicant failed to comply with the orders of this court dated 25<sup>th</sup> April 2023, to deposit half of the decretal sum within 45 days as directed and had moved court in bad faith to review the said orders. The applicant had failed to disclose any new and important matter or evidence the basis upon which the court could exercise its discretion in his favour, nor was there any new matter which was not within the applicant knowledge or could not be produced by him at the time when the order was passed.
4. The application as filed was fatally defective as the security proposed to be substituted was not identified by disclosing the parcel number and acreage, nor was there any land search and/or any valuation annexed to show that the said security existed and it was free from any encumbrance's and its value. The said application was thus bereft of merit and should be dismissed by the court.

## **B. Determination**

5. I have carefully considered the Application, Supporting Affidavit, the Respondent's relying affidavit and the only issue for determination is whether this court should review its orders issued on 25<sup>th</sup> April 2023 to reduce the amount of the decretal sum to be deposited to Kshs.1,676,694/= and further whether the said orders should be reviewed to allow the applicant to deposit security by way of a title deed and/or bank guarantee.
6. On the first issue, Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules provides as follows: -

Section 80. Review

“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.”

[Order 45, rule 1.] Application for review of decree or order.

1. Any person considering himself aggrieved—

(1)

- 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.



- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”
7. From the above provisions, it is clear that while Section 80 of the Civil Procedure Act grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.
8. The Court of Appeal had the following to say in an application for review in the case of National Bank of Kenya Ltd vs Ndungu Njau.
- “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.”
9. The statutory grounds, may also be add instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see *Serengeti Road Services -v- CRBD Bank Limited* [2011] 2 EA 395. Also, to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see *Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited* (supra).
10. On the 1<sup>st</sup> issue, there is no mistake or error apparent on the face of the record. The judgment of the trial Magistrate at Kithimani SPMCC No 310 of 2016 dated 18<sup>th</sup> November 2021, did order the applicant to pay half the decretal of Ksh.3, 353,388/=, while the 3<sup>rd</sup> party was also to pay the other half of the said decretal amount. The ruling of this court dated 25<sup>th</sup> April 2023 took cognizance of the said fact and ordered the appellant to deposit 50% of the decretal amount. This court’s order was very clear and in line with provisions of Order 42 rule 6 of the civil procedure rules. There is therefore no basis for the court to further reduce the said sum to Kshs 1,676,694/=.
11. The applicant has also sought for an order to allow the applicant to deposit the requisite security by way of title deed or a bank guarantee. This calls for an exercise of discretion. In the Court of Appeals decision of *Richard Nchapai Leiyang vs IEBC & 2 others Civil Appeal 18 of 2013* it was observed as follows:
- “We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice” (Emphasis added)
12. The applicant has not annexed the title deed, or lease certificate which he intends to deposit as security. Furthermore, he has not annexed the said parcel current land search and valuation report from a registered land valuer to enable the court make its decision’s based on solid facts. This is not an oversight



but a deliberate ploy by the applicant to shift goal posts but unfortunately for him, no court decision can be made in vacuum. Similarly, he has not annexed any proof that he is able to get any bank guarantee to cover the decretal sum he is to pay. Where there is no explanation offered, the court cannot exercise its discretion in favour of the applicant.

### **C. Disposition**

13. The application dated 22<sup>nd</sup> May 2023 is therefore wholly misconceived and is without merit. The same is dismissed with costs to the Respondent.
14. The costs are assessed at Kshs 20,000/= all inclusive.
15. It is so ordered.

**RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 30<sup>TH</sup> DAY OF OCTOBER, 2023.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Teams this 30<sup>th</sup> day of October, 2023.

**In the presence of;**

.....for Applicant

.....for Respondents

.....Court Assistant

