



Regional City Suppliers Ltd v Mefo Investment Group Limited (Civil Appeal E082 of 2023) [2023] KEHC 26081 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E082 OF 2023
EM MURIITHI, J
NOVEMBER 30, 2023**

BETWEEN

REGIONAL CITY SUPPLIERS LTD APPELLANT

AND

MEFO INVESTMENT GROUP LIMITED RESPONDENT

(Being an appeal from the Ruling and Order delivered by Hon. L. W. Maina (RM) on 23/5/2023 at Meru SCCCOM/ E073 of 2023)

RULING

1. By a statement of claim dated 1/3/2023, the Respondent herein, the Claimant in the trial court, sued the Appellant herein, the 1st Respondent in the trial court, seeking payment management fees of Ksh.700,000.
2. The Appellant herein, in its response to the claim dated 10/3/2023 admitted to only owing the Respondent herein a sum of Ksh. 219,300.
3. Upon full hearing of the claim, the trial court awarded the Respondent Ksh. 559,300 together with costs and interest.
4. The Appellant filed 2 applications dated 2/5/2023 and 4/5/2023. The 1st application dated 2/5/2023 sought stay of execution of the judgment of 18/4/2023 pending the hearing and determination of the 2nd application which sought review, the setting aside and/or variation of the said judgment.
5. The applications were heard together where the trial court, vide its ruling of 23/5/2023 rendered thus, "Since the Application dated 4th May, 2023 is being determined by this Ruling, the said Application is overtaken by events and the Court marks it as dismissed with no orders as to costs... The Applicant herein claims that he has discovered new evidence that he did not have during the trial being the legal Notice 56 of 2020 and all other legal notices attached therein (1-4) – and the newspaper extracts 5 and



7. The Respondents argues on their part that is a public document that was in the public domain and accessible to all and hence the Applicant cannot claim that it is new evidence. Indeed, for the Court to allow this Application, the Applicant has the responsibility to prove that the said notices were only accessible after the exercise of due diligence, and that the same were not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. On perusal of the said special issue notice, they were issued on the year 2020, after the COVID-19 pandemic hit the republic, the said notices had a nationwide effect and all citizens were affected by the notices in one way or another, the said notices were easily accessible and remain easily accessible before, during and after trial. In any case, the Applicant herein was represented by a learned Counsel during trial and would not claim to not have knowledge of the notices. The Applicant herein cannot claim that the gazette notices and newspaper extracts reporting on the notices were not available, within his knowledge and would not have produced them. This Application must thus fail. Consequently, the Court finds the applications dated 2nd May, 2023 and 4th May, 2023 lack merit and are therefore dismissed with costs to the Claimant.”

The Appeal

6. On appeal, the Appellant filed its memorandum of appeal on 30/5/2023 raising 9 grounds as follows:
1. The Trial Magistrate erred in law and fact by dismissing the Appellant’s Notice of Motion Applications dated 2nd May 2023 and 4th May 2023 with costs for lack of merits.
 2. The Trial Magistrate erred in law and fact in refusing to admit the new, relevant, important and crucial evidence brought before her by the Appellant in accordance with Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 41 of the *Small Claims Court Act*, No. 2 of 2016.
 3. The Trial Magistrate erred in law and fact in finding that the Gazette Notices and newspaper extracts were easily accessible before, during and after trial.
 4. The Trial Magistrate erred in law and fact in holding that the Gazette Notices and newspaper extracts were available and within the knowledge of the Appellant before, during and after the trial.
 5. The Trial Magistrate erred in law and fact in holding that the Gazette Notices were accessible to the Appellant after the exercise of due diligence, and that the same were within its knowledge or could have been produced by it at before the decree was passed or the order was made.
 6. The Trial Magistrate erred in law and fact in failing to factor in the relevance, importance, substantiality, significance, bearing and materiality of the new evidence to the issues determined during trial and reviews stages.
 7. The Trial Magistrate erred in law and fact in failing to consider the reasons that the Appellant gave on its Notice of Motion Application dated 25th April 2023 seeking to change its Advocate on record from Gatari Ringera & Co. Advocates to Orego & Odhiambo Advocates.
 8. The Trial Magistrate erred in law and fact in refusing to hold that the Advocate’s fault and responsibility in failing to table and file the new, important, crucial, material, substantial and relevant documents during trial should not be visited upon the Appellant.
 9. The Trial Magistrate erred in law and fact in burdening the Appellant with the payment of the judgment sum totaling to Kshs. 559,300/= together with costs and interest at court rates yet it was the then Advocate on record who failed to table and file the new, important, crucial and relevant documents sought to be adduced during the review stage.



Submissions

7. The Appellant urges the court to reconsider the evidence adduced and analyze it so as to reach its own independent conclusion, and cites *Okeno v Republic* (1972) EA 32 and *Gitobu Imanyara & 2 Others v Attorney General* 920160 eKLR. It urges that the instant appeal raises arguable and triable issues that warrant determination by this court, and cites *Kenya Commercial Bank Limited v Nicholas Ombija* (2009) eKLR and *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* (2013) eKLR. It urges that the judgment sum payable by it is contrary to public policy since it was expected to pay the management fees from profits made from running, operating and managing Meru County Club, Bar and Restaurant, yet during the subsistence of the said Legal Notices, the Club was closed and inoperative. It urges that it ought to have been precluded from payment of management fees for the entire period when Legal Notices No. 56 and 163 were in force. It pleads with the court not to visit the omissions and/or blunders of the former Advocate upon it as seen in *Lucy Bosire v Kehancha Division Land Dispute Tribunal & 2 Others* (2013) eKLR. It invites the court, in the spirit of fostering and promoting *the Constitution*, to admit the Legal Notices as its evidence, and allow the appeal with costs. It relies on *Shanzu Investments Limited v Commissioner for Lands* (1993) eKLR, *Omulele & Tolo Advocates v Mount Holdings Ltd* (2018) eKLR, *Millicent Wambui v Nairobi Botanica Gardening Limited* (2013) eKLR and *Branco Arabe Espanol v Bank of Uganda* (1999) 2 EA 22 to buttress its submissions.
8. The Respondent urges that the appeal is grossly misadvised, a futile voyage, a misadventure and the epitome of abuse of the court process whose fate is dismissal with costs. It submits that review under section 41 of the *Small Claims Court Act* does not include setting aside of a regular judgment.

Analysis and Determination

9. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle v Associated Motor Boat Co. & others* [1968] E.A. 123).
10. From the grounds of appeal, the sole issue for determination is whether the dismissal of the application for review dated 4/5/2023 was justified.
11. Review is provided for under Order 45 Rule 1 of the Civil Procedure Rules as follows:

“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. Those conditions were reiterated by the Court of Appeal in *Francis Origo & another v Jacob Kumali Mungala* [2005] eKLR as follows:

“It is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be



produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.”

13. Section 41 of the [Small Claims Court Act](#) provides for Review of orders or awards of the Court, as follows:

“(1) An Adjudicator may, on application by any aggrieved party or on his or her own motion, review any order of the Court on the ground that— (a) the order was made ex-parte without notice to the applicant; (b) the claim or order was outside the jurisdiction of the Court; (c) the order was obtained fraudulently; (d) there was an error of law on the face of the record; or (e) new facts previously not before the Court have been discovered by either of the parties. (2) The application referred to under subsection (1) shall be made within thirty days of the order or award sought to be reviewed or such other period as the court may allow.”

14. The Appellant adduced numerous legal notices which it terms as new evidence which was not within its knowledge during trial. The court has taken the liberty to look at the said legal notices and notes that they were all issued in 2020 and 2021 whilst this claim was filed much later in 2023. There is nothing on record to show that the Appellant was unaware of the existence of the said legal notices in 2023 when it filed its response to the claim.

15. This court is satisfied that the legal notices allegedly referred to by the Appellant as new evidence were all along within its knowledge and does not therefore fall within the realm of review.

16. The dismissal of the application for stay dated 2/5/2023 was proper because it was pegged upon the determination of the application for review dated 4/5/2023.

Orders

17. Accordingly, for the reasons set out above, the court finds no merit in the Appellant’s appeal and it is dismissed.

18. The respondent shall have the costs of the appeal.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF NOVEMBER 2023.

EDWARD M. MURIITHI

JUDGE

