



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL APPEAL NO. 24 OF 2019**

**FRANCIS THUO KAMAU T/A SEGERO CLUB BAR.....APPELLANT/APPLICANT**

**VERSUS**

**JUSTINE PETER ODHIAMBO.....1<sup>ST</sup> RESPONDENT**

**PANVILLA COMPANY DISTRIBUTORS.....2<sup>ND</sup> RESPONDENT**

**KENYA BREWERIES LIMITED.....3<sup>RD</sup> RESPONDENT**

**Coram: Hon. Justice R. Nyakundi**

**M/S Nyairo & Co. Advocates**

**M/S Wambua Kigamwa & Co. Advocates**

**M/S Ngigi Mbugua & Co. Advocates**

**RULING**

What is before this court is a Notice of motion expressed to be brought under Order 51 Rule 14(1)(c) of the Civil Procedure Rules. The applicant seeks orders that the court be pleased to review or vary its order made on 9<sup>th</sup> March 2021 to the extent of requiring the appellant to deposit kshs. 473,931/- and substitute it with an order for the appellant to tender a bank guarantee for the said sum. The applicant also seeks orders that the period of compliance with the order on review be extended.

The application is based on the grounds that the appellant is aggrieved by the order and sufficient cause warrants a review. Further, that the application has been made without unreasonable delay. The applicant is ready to provide alternative security vide a bank guarantee.

The respondents responded to the application vide a relying affidavit and grounds of opposition. They contend that there has been inordinate delay in the application and the orders sought to be reviewed were to be complied with within 30 days from 9<sup>th</sup> march 2021. No explanation has been given for the delay. The timelines for compliance have already lapsed.

The respondents further contend that there has been no reason given to warrant review and that it cannot be predicted when the appeal will be concluded which may be after the bank guarantee expires thus leaving the respondents exposed.

Order 45 Rule 1 of the Civil Procedure Rules provides;

**1. (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.**

It is apparent that the requirements for a review of the court's orders are that;

- (a) There must be 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 decree was passed or the order was made; or**
- (b) There was a mistake or error apparent on the face of the record; or**
- (c) There were other sufficient reasons; and**
- (d) The application must have been made without undue delay.**

Upon reviewing the pleadings and submissions by the parties herein I have determined that the issue for determination is; Whether the applicant has met the requirements for review as set out under Order 45 Rule 1.

**Whether the applicant has met the requirements for review as set out under Order 45 Rule 1.**

In **Tokesi Mambili and others vs Simion Litsanga [2004] eKLR** the court held as follows:-

**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.**

**ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.**

The issue of the applicants' medical condition has been within his knowledge all along and therefore does not present new information which was not within his knowledge. He has not proven that there was a mistake or apparent error on the face of the record.

I am inclined to agree with the respondents that the bank guarantee could expire before the appeal is heard thus exposing them. Further, the applicant has not provided any proof of his financial position.

The orders the applicant seeks to review against were given on 3<sup>rd</sup> March 2021. The application was filed on 31<sup>st</sup> March 2021, 28 days after the orders were given. The orders were to be complied with within 30 days. The applicant has not explained why there was this delay. I find the period he waited to file the application mischievously convenient and therefore consider the delay unreasonable.

It cannot be said that there is a mistake or error apparent on the face of the record. It is true there is nothing in order 45 rule 1 of the Civil Procedure Rules to preclude this court from exercising the power of review which inheres in every court of plenary jurisdiction to prevent miscarriage of justice or to correct errors or mistakes committed during the making of the decision. But at a closer look of the rule denotes definitive limits to the exercise of the jurisdiction on review. Even on the condition precedent on the discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the party seeking the review must be accorded prima facie evidence to that effect. The superior court have had an occasion to interpret and construe the jurisdiction on review under Oder 45 Rule of the civil procedure rules. i.e in **Nyamogo & Nyamogo –v- Kogo(2001) EA 170, Evan Bwire –v- Andrew Nginda CA 103 of 2000 at Kisumu.**

From a comparative perspective in the case of **State of West Bengal and others –v- Kamal Sengupta (2008) 8SCC 612.** The Supreme Court of India had this to say “**the term mistake or error apparent by its very connotation signifies an error which is evident perse from the record of the case and does not require detailed examination or scrutiny and elucidation either of the facts or the legal position. If an error if not self evident and detection thereof requires long debate and process of reasoning it cannot be treated as an error apparent on the face of record for purposes of Order 45 Rule 1 of the Civil Procedure Rules. Emphasis mine.**

On a holistic appreciation of the motion before me there is no ample material for exercise of review jurisdiction to the applicant. This second bite at the cherry is unacceptable and the sum substance of the grievances raised cannot be allowed within the spectrum of review. As a consequence the motion is denied with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 17<sup>TH</sup> DAY OF FEBRUARY 2022.**

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**R. NYAKUNDI**

**JUDGE**

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