



Osman t/a Hanan Petroleum v Juanco Group Limited (Civil Appeal E044 of 2021) [2022] KEHC 11389 (KLR) (31 March 2022) (Ruling)

Neutral citation: [2022] KEHC 11389 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E044 OF 2021
SN MUTUKU, J
MARCH 31, 2022**

BETWEEN

MOHAMED ALI OSMAN T/A HANAN PETROLEUM APPELLANT

AND

JUANCO GROUP LIMITED RESPONDENT

RULING

1. The Appellant has brought this Notice of Motion Application dated 10th February 2022 under Section 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 26, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law. He is seeking the following orders:
 1. That this matter be certified as urgent and the orders sought herein be granted on priority basis.
 2. That this Honourable court be pleased to review Order 1 of the Orders issued on 30th November 2021 to vary the amount of Kshs 4,000,000 to an amount of Kshs 2,000,000 and further to direct that the amount be deposited with the court.
 3. That this Honourable court be pleased to issue an Order reinstating its previous orders for stay of execution of the Judgment and Orders of the Senior Principal Magistrate Court in Ngong issued on 5th August 2021 by the Honourable P. Achieng (Mrs), pending the hearing and determination of this Application.
 4. That this Honourable court be pleased to issue an Order reinstating its previous orders for stay of execution of the Judgment and Orders of the Senior Principal Magistrate Court in Ngong issued on 5th August 2021 by the Honourable P. Achieng (Mrs), pending the hearing and determination of the Appeal.
 5. That costs of this Application be provided for.



2. The ground in support of the Notice of Motion are found on the face of it and in the Supporting Affidavit sworn by the Appellant on 10th February 2022. The summary of the grounds relied on is that this court gave orders, basing on the Respondent's Application dated 15th September 2021, that the Appellant pays the Respondent a sum of Kshs 4,000,000 within 30 days as security for costs pending the hearing and determination of the Appeal; that the Appellant prepares, files and serves a Record of Appeal within 60 days of the Ruling and that the Respondent files Response within 14 days from date of service; that at the time the court made this ruling, the Appellant was unwell and had travelled abroad to seek medical attention and that his advocates on record at the time failed to inform him of the orders of the court.
3. Further grounds are that the Respondent took steps to initiate the process of executing the judgment and orders of the lower court; that the Appellant changed his advocates to the current ones who upon reading the court file informed the Appellant of the Orders of this court dated 30th November 2021. The Appellant states that he is aggrieved by those orders as he is unable to raise the amount of Kshs 4,000,000 but is able to raise Kshs 2,000,000 which he seeks to be allowed to deposit in court instead.
4. The current application was filed on 10th February 2022 under certificate of urgency. It was not certified urgent. The Appellant was directed to serve the Respondent and return to court on 17th March 2022 for directions. This is the date the court had given for the mention of this matter after delivering its Ruling on 30th November 2021 to confirm compliance with the court's orders of 30th November 2021 and for further directions.
5. On 17th March 2022, Mr. Maina for the Respondent informed the court that the Appellant had not deposited the security for costs as ordered by the court. He told the court that the court had allowed the Respondent to move the court in the event the orders of 30th November 2021 had not been complied with. Ms Shikali, holding brief for Mr. Kiprop for the Appellant, informed the court that her instructions were limited to taking directions on the Appellants Application dated 10th February 2022.
6. Mr. Maina moved the court in respect to the failure of the Appellant to obey the orders of this court. He submitted he had been served with the Application dated 10th February 2022; that the application is an abuse of the court process; that there is another application by the Appellant dated 25th August 2021 that has not been abandoned or withdrawn and that instead of prosecuting that application, the Appellant has chosen to bring this application. Mr. Maina further stated that the orders dated 26th May 2021 have lapsed and cannot be extended and that even if they were to be extended, there was no order to extend those orders on 30th November 2021; that the orders of 26th August 2021 have been overtaken by the orders of 30th November 2021 and are therefore not in existence. It was submitted that the Appellant has not demonstrated that he has established the principles for review.
7. Ms Shikali submitted that they are asking the court to reinstate its orders for stay of execution and reduction of security for costs from Kshs 4,000,000 to Kshs 2,000,000. She submitted that the reasons for seeking review are that the Appellant is not able to raise Kshs 4,000,000 for security for costs. It was submitted that they are seeking to have this figure reduced to Kshs 2,000,000 and to have the orders for stay issued on 26th August 2021 reinstated pending the hearing of the Appeal to prevent the Appeal being rendered nugatory and the Appellant will stand to suffer great loss.
8. Counsel stated that she was not aware of the Application dated 25th August 2021 but that if it is seeking similar orders, she seeks to have the same abandoned in order to proceed with the current application.
9. In a rejoinder, Mr. Maina reiterated that the application is an abuse of the court process and that there is no evidence tendered that the Appellant had been out of the country undergoing treatment.



10. It is true that on 26th August 2021, this court (Mwita, J) granted interim orders to last until 18th October 2021 when directions on the application dated 25th August 2021 were to be taken. In the interim and before that date the Application dated 15th September 2021 was filed and the file placed before the Judge on 21st September 2021. The court directed that the application be mentioned on 18th October 2021.
11. On 18th October 2021 the matter was mentioned before me. I directed that the application dated 15th September 2021, seeking security for costs, be heard first. I allowed this prayer and heard that application. It is the orders granted on 30th November 2021 pursuant to that application that the Appellant is seeking to have reviewed. Interim orders in force were extended on that date (18th October 2021). However on 30th November 2021 when I delivered the Ruling in respect of the application dated 15th September 2021, the interim orders in existence were not in existence. This court was not moved to do so and besides, there was in force the orders granted on that day.
12. The law governing review is found under Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#). Section 80 states 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 (1) of the [Civil Procedure Rules](#) 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 for an other sufficient reason, desires to obtain a review of the decree or order, may apply for review or judgment to the court which passed the decree or made the order without unreasonable delay.

13. From these provisions, it is very clear that any party coming to court to seek review must demonstrate the following:
 - (a) That there is 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) That there is a mistake or error apparent on the face of the record; or
 - (c) That there are other sufficient reasons; and



- (d) That the application must have been made without undue delay.
14. I have read the application under consideration. I have considered the brief submissions by Ms Shikali. The only reason given by the Appellant for seeking review is that he is not able to raise the Kshs 4,000,0000 for security for costs because he has spent money on treatment outside the country. There is no evidence tabled before the court for such treatment or the expenses involved. Does that argument satisfy the requirements for review? My answer is in the negative. That reason does not fit in any of the applicable principles for review under Section 80 and order 45 stated above. In my considered view I do not find any evidence of 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 a mistake or error apparent on the face of the record; or any other sufficient reasons for seeking review.
14. This application was timed in a way that it would be considered just about the same time or slightly before the lapse of the time granted to perform what was required of the Appellant. It is clear to me that the Appellant has disobeyed the orders of this court. There was a consequence of such failure. This court gave the Respondent authority to move the court in the event the order to pay security for costs was not complied with. This is the opportunity Mr. Maina seized when this matter came for mention on 17th March 2022.
15. It is also a fact that the Appellant has on record another application dated 25th August 2021 pending determination. Given that this court directed that the application dated 15th September 2021 be heard first, it was clear that the application of 25th August 2021 is still pending. Ms Shikali seemed not to be aware of it. On being reminded that there was a similar application pending she submitted that the said application can be abandoned in favour of the current application. Indeed that application sought stay of execution of the judgment of the lower court pending the hearing of the application itself and the Appeal. Interim stay was granted but this order lapsed after the Appellant's counsel failed to move the court on 30th November 2021 to extend those orders. Besides, any pending application for stay of execution was compromised in favour of pursuing the main Appeal upon payment of security for costs.
16. I think I have said enough to demonstrate that the Appellant has not demonstrated that he deserves the orders of review he is seeking. I agree with counsel for the Respondent that this application is an abuse of court process. Consequently, the same cannot stand. It is hereby dismissed with costs to the Respondent. orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF MARCH 2022.

S. N. MUTUKU

JUDGE

