



REPUBLIC OF KENYA



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**Vanguard Distributors Limited v Kigo & 3 others (Civil Suit 641 of 2012)
[2022] KEHC 12271 (KLR) (Commercial and Tax) (12 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12271 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 641 OF 2012
A MSHILA, J
AUGUST 12, 2022**

BETWEEN

VANGUARD DISTRIBUTORS LIMITED APPLICANT

AND

VIRGINIA NJERI KIGO 1ST RESPONDENT

VALZ DISTRIBUTORS 2ND RESPONDENT

VIDI FABRICATION LIMITED 3RD RESPONDENT

NAIROBI TYRE MART CO. LTD 4TH RESPONDENT

RULING

1. The Notice of Motion dated October 12, 2021 was brought under the provisions of order 45 rules 1(1) of the *Civil Procedure Rules 2010*; The application was supported by the grounds on the face of it and by the sworn affidavit of James Murigi Kinyua who sought the following orders;
 - a. The court do review, set aside, discharge and/or vary the order its ruling delivered on September 30, 2019;
 - b. Costs be provided for.
2. The application despite having been served on the respondent filed no response and the application was therefore unopposed; the applicant was directed to canvass the application by filing written submissions; hereunder is a summary of the applicant's case.



Applicant's case

3. It was the applicant's case that section 80 gives the power of review while order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds
 - (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;
 - b. on account of some mistake or error apparent on the face of the record, or
 - c. for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
4. This application for review is premised on the ground that the judgment is bedeviled by a mistake or error apparent on the face of the record when the Court issuing the decree issued on June 27, 2017 failed to correctly indicate that judgment be entered in favour of the plaintiff/applicant against the defendants/respondents jointly and severally for the sum of kshs 43, 000,000/ = as clearly prayed for in the Plaint filed on October 9, 2012. It is noteworthy that the default judgment was entered against the defendants/respondents when they failed to appear and/or file a Defence within the stipulated timelines on June 14, 2017 before Hon Elizabeth Tanui (DR) despite having the firm of Kihara Njuguna & Company Advocates on record. The judgment therefore accorded to the pleadings and it was an omission on the part of the court to reflect on the decree or judgment that the same was against the defendants jointly and severally.
5. It was the applicant's submission that an error within the meaning of section 80 and order 45 was defined by the court in the case of *Jimai Electrical Services Limited vs County Government of Meru* [2021] eKLR, while relying on the case of *National Bank of Kenya Ltd vs Ndungu Njau* [1997] eKLR, as an error or omission that must be self-evident and should not require an elaborate argument to be established.
6. The applicant argued that as a consequence of the error, the court dismissed prayer no 2 in the Notice of Motion application dated December 7, 2017 to set a date for sale by public auction of the properties known as Nyandarua/Tulaga/1893- L R no 12715/8854SYOKIMAU and Nairobi Block 76/516 - Buruburu on the account that the plaintiff/applicant had not satisfied the court as to why the applicant sought to execute the judgment against all the defendants and not the 1st defendant alone, when the decree did not expressly state as such.
7. Further, prior to the delivery of the said ruling, upon directions given by this court, the plaintiff/applicant had conducted a valuation and tendered the report for the 3 properties known as Nairobi Block 76/516 Buruburu, and Nyandarua/Tulaga/1893 and L R no 12715/8854 - Syokimau, and which were all valued at kshs 11, 000,000, kshs 2, 250,00 and kshs 4, 500,000 respectively. In the event that the plaintiff/applicant executed its decree then it would realize kshs 17, 750,000/ = as part settlement of the decree orders awarded in its favour, which still does not satisfy the entire decretal sum.
8. In addition to the above, the applicant submitted that it had already tendered evidence that the 1st defendant is the proprietor of the three (3) other properties and therefore separation of the four (4) was not necessary and a judgment against either could be executed against the other.
9. It is noteworthy that the court further has power to act on its own motion to regularize formal clerical or arithmetical slips under section 99 of the *Civil Procedure Act* which provides that clerical or



arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.

10. The plaintiff/applicant submitted that there is an error or omission in expressing the manifest intention of the court which was to hold the defendants jointly and severally liable to pay the decretal sum to the plaintiff/applicant as prayed in the Plaint.
11. On the second issue for determination on costs, as provided by section 27 of the *Civil Procedure Act*, costs are granted at the discretion of the court and the said discretion must be exercised judiciously. *Halsbury's Law of England* Fourth Edition provides that the court has discretion as to whether costs are payable by one party or another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially. It must not be exercised arbitrarily but in accordance with reason and justice.
12. The applicant prayed that the court be guided by the law that costs follow the event. The plaintiff/applicant was the successful litigant who proved its case on a balance of probability and was ordinarily accorded costs and therefore prayed for the court to use its discretion and award the plaintiff/applicant costs of this application.
13. It was the applicant's position that it has satisfied all the requirements set out in order 45 rule 1 of the Civil Procedure Rules and therefore urged the court to review the orders issued vide a ruling delivered on September 30, 2019 and have the application allowed as had been prayed.

Respondent's case

14. The respondents despite being duly served with the application filed no response and were not even in attendance when the matter was set down for hearing. The application proceeded unopposed.

Issues for determination

15. The court has considered the application and the written submissions and has framed only one issue for determination which is;
 - a. Whether the court should review vary or set aside the judgment of June 27, 2017 and/or a portion of the ruling delivered on September 30, 2019;

Analysis

Whether the court should review, vary or set aside the judgment of June 27, 2017 and/or a portion of the ruling delivered on September 30, 2019?

16. In its written submissions the applicant contends that the judgment of July 27, 2017 is bedeviled by a mistake or error apparent on the face of the record when the court issuing the decree failed to correctly indicate that judgment be entered in favour of the applicant against the defendant/respondents 'jointly and severally' and this was despite the fact that this was what was prayed for in the Plaint filed on October 9, 2012.
17. The applicant further submitted that the court thereafter declined to grant it a date for the sale of the property as the decree did not expressly indicate that the judgment and decree should be executed 'jointly and severally' as against all the defendant/respondents and further states that all this is self-



explanatory and evident on the record that clearly shows the 1st defendant/respondent as the proprietor of all the other defendants and there was no justification in separating her from them.

18. The impugned paragraphs 5 and 6 of the ruling of September 30, 2019 reads as follows;

“ 5. Finally, the other two properties which the applicant intends to sell evidently belong to Virginia Njeri Kigo. She is the 1st defendant herein. The suit was filed against four defendants, the other three are artificial entities being limited liability companies. As much as the 1st defendant did not oppose sale of these properties, the applicants have not satisfied the court why they want to execute the judgment against the 1st defendant alone. In the decree extracted and signed by the honourable deputy registrar on June 27, 2017, it was clearly stated that judgment is “entered for the plaintiff against the 1st, 2nd, 3rd and 4th defendants for the sum of kshs 43,000,000/- together with costs and interest and costs of the suit.”

6. The liability is not expressed to be jointly and severally as against and between the defendants. Neither can a natural individual be liable for the company’s debt; I decline to grant prayer (2) of the subject application as it relates to the properties in Nyandarua and Syokimau Estate.

7. It is so ordered.

Dated, delivered and signed in an open court on this September 30, 2019.”

19. Indeed, this court has a power of review, but such power must be exercised within the framework of section 80 of the *Civil Procedure Act* and order 45 Rule 1.

20. Section 80 of the *Civil Procedure Act* provides as follows;

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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

21. Order 45 Rule 1 of the Civil Procedure Rules provides: -

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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”



22. The statutory grounds upon which orders for review can be obtained are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in 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 order was made. Thirdly, that there is sufficient reason to occasion the review.
23. The Court of Appeal in *National Bank of Kenya Limited vs Ndungu Njau* [1997] eKLR held;
- “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.”
24. The Supreme Court of Uganda in *Edison Kanyabwera versus Pastori Tumwebaze* (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows;
- “It is stated that in order that an error may be a ground for review, it must be one apparent on the face of the record, i.e an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record.”
25. The “error” complained of by the applicant touches on the exclusion of the words ‘jointly and severally’ in the judgment and decree; but the ruling dated September 30, 2019 issued by the Honourable Lady Justice Grace L Nzioka Court fully addressed this issue and the Ruling is clear, unambiguous, unequivocal.
26. In essence the applicant is asking this court to go back to the record to evaluate how the determination was arrived at. An error cannot be said to be apparent on the face of the record if one has to look beyond the record to see whether the judgment or decree or decision made was correct or not; and this court has no such jurisdiction to deviate and/or interfere with the decision contained in the ruling and purport to review the orders as sought.
27. In further consideration of the application, this court finds that the error is one that can be the subject of an appeal because the applicant challenges the merits of the impugned decision.
28. This court is satisfied that the application does not meet the threshold for review set out as under the provisions of section 80 of the *Civil Procedure Act* and order 45 Civil Procedure Rules; and finds the grounds in support of the application herein only support an appeal but not an application for review.

Findings and determination

29. In the light of the foregoing this court makes the following findings and determinations;
- i. This court finds that the application falls short of the conditions required for granting review orders;
 - ii. The applicant has not satisfied the salient requirements for grant of an order for review.
 - iii. The application is found to be devoid of merit and it is hereby dismissed;



iv. The applicant to bear its own costs.

It is so ordered

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 12th DAY OF AUGUST, 2022.

HON A MSHILA

JUDGE

In the presence of;

No appearance by parties

Lucy-----Court assistant

