



Maxwell Auto Techs Limited v David & another ((Suing thro' legal representative and the administrator of the estate of Jeremiah Muli Daniel); David (Third party) (Civil Appeal E039 of 2022) [2022] KEHC 14336 (KLR) (25 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14336 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E039 OF 2022
RK LIMO, J
OCTOBER 25, 2022**

BETWEEN

MAXWELL AUTO TECHS LIMITED APPELLANT

AND

ELIZABETH NDUNGE DAVID 1ST RESPONDENT

ALEX KALEKI KIOKO 2ND RESPONDENT

**(SUING THRO' LEGAL REPRESENTATIVE AND THE ADMINISTRATOR OF
THE ESTATE OF JEREMIAH MULI DANIEL**

AND

MBUBA KINYWA DAVID THIRD PARTY

RULING

1. The appellant/applicant has moved this court through a notice of motion dated October 13, 2022 for the following orders namely:
 - i. Spent
 - ii. That this hon court be pleased to vary the orders granted on the September 19, 2022 and thereafter enlarge or extend time within which to comply with the said court orders pending the hearing and determination of this application.
 - iii. That this hon court be pleased to extend and/or grant interim orders of stay of execution of the judgement/decree issued by hon MK Mwangi-Chief Magistrate Mwingi Law Courts on the 3rd of August, 2022 pending hearing and determination of intended appeal.



- iv. That upon reinstatement and enlargement of time, this hon court do vary the orders issued on September 19, 2022 to allow the appellant issue a bank guarantee from Family Bank for the specific amount for the entire period of the appeal in place of part payment to the 1st respondent.
 - v. Spent.
 - vi. That this hon court be pleased to issue any other orders that it may deem fit, just and expedient in the interest of justice and that costs be in cause.
2. This application is based on the following grounds listed on the face of the application.
- a. That this court on September 19, 2022 ordered the appellant to pay the 1st respondent half of the decretal amount (Kshs 2,240,000) within 21 days from the date of order and provide bank guarantee in respect of the balance or deposit of the said balance in joint interest earning account.
 - b. That the appellant's underwriter had undertaken to provide security in form of bank guarantee for a specific amount as per motor vehicles *Third Party Risks Act* (cap 405 –section 5 (b))
 - c. That the orders issued on November 19, 2022 exceeds the provisions of section 5(b) of cap 405.
 - d. That the appellant was unable to comply with the conditions for stay of execution on time due to financial constraints currently attributed to recent wit of Covid 19 that sealed down business thus he is unable to raise the amount as ordered by court.
 - e. That owing to the said financial constraints, the appellant has approached this court to vary/ review its orders issued on September 19, 2022 and instead direct the appellant to issue bank guarantee for specific sum of Kshs 3 million pending determination of the appeal herein.
 - f. That the appellant is apprehensive that in the likely event that the appeal on liability succeeds, the 1st respondent being a person of unknown means will not be able to refund the part payment ordered by this court.
 - g. That he appellant believes he was not liable for the accident and therefore, this court should vary its orders.
 - h. That the appellant's underwriter was ready and willing to provide security in form of bank guarantee from Family Bank Limited to statutory limit under section 5(b) of cap 405.
 - i. That the orders issued on September 19, 2022 has made it difficult for the appellants underwrite to provide security and hence the basis for revision of the conditions for stay of execution.
 - j. That apart from financial difficulties, the appellant asks this court to consider that his appeal is on both quantum and liability.
 - k. That the applicant is apprehensive that the 1st respondent may levy execution.
 - l. That the appellant stands to suffer substantial and irreparable loss as there's likelihood that the applicant will be unable to recover the decretal sum herein from the respondent.
 - m. That unless the orders sought are granted, the 1st respondent will execute and render this application nugatory.



- n. That this application has been made without delay and that it is in the interests of justice to grant the orders sought herein.
3. The applicant through counsel further submits that the amount to be paid is huge arguing that the respondent may not be able to refund Kshs 2.2 million.
 4. The applicant further urges this court not to disallow his application on a technicality submitting that the 1st respondent objection to this application is based on a technicality. He has cited the provisions of articles 159 of the *Constitution of Kenya* in urging this court to overlook procedural technicalities and instead invoke its inherent jurisdiction to dispense justice.
 5. The 1st respondent has opposed this application. The 1st respondent contends that the application is fatally defective because the ruling and/or order sought to be reviewed has not been attached contrary to section 80 of *Civil Procedure Act* and order 45 rule 1 of *Civil Procedure Rules*.
 6. Secondly, the 1st respondent contends that this application is *res judicata* owing to a ruling of this court on a similar application dated September 9, 2022.
 7. Thirdly, the 1st respondent contends that the applicant has raised no reasonable ground for review and terms this application vexatious, scandalous and an abuse of court process.
 8. The 1st respondent also contend that this application does not meet the requirements of order 42 rule 6(2) faulting the offer for security as no security because the guarantee is unsigned by Family Bank.
 9. This court has considered this application and the response thereof. This is an application for review under section 80 *Civil Procedure Act* and order 45 (1) of *Civil Procedure Rules*.
 10. Section 80 *Civil Procedure Act* states;

“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.”
 11. The procedural aspect is provided under order 45 rule 1 of the *Civil Procedure Rules* which 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 an 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 order without unreasonable delay.” (Emphasis added).
 12. The above provision means that for a party to invoke revisionary powers of this court, he must satisfy the following conditions namely;



- i. There must be a discovery of a new and important matter/evidence.
 - ii. That new matter/evidence was not within the applicant knowledge upon due diligence on his part at the time the order/decreed was made.
 - iii. An error or an obvious mistake apparent on record.
 - iv. Any other sufficient cause.
 - v. That the application for review is made timely.
13. Before I embark on the above conditions, I will set out the issues in this matter which are: -
- i. Whether the applicant has met conditions for review.
 - ii. Whether the application is *res judicata*.
 - iii. Whether the application is defective

i. Whether the Application is Defective.

The 1st respondent has pointed out the applicant has failed to annex the order/ruling upon which he has sought for review. The same is undisputed but the applicant contends that the omission is not fatal.

14. I have seen the decision cited by the 1st respondent to wit *Suleiman Murunga versus Nilestar Holdings Ltd & anor* [2015] eKLR which held that such omission is fatal.
15. I have however looked at both the provisions of section 80(1) *Civil Procedure Act* and order 45(1) of *Civil Procedure Rules* and my reading appears to lean towards the contrary position. Order 45 (1) has not expressly stated that an order or decree must be annexed to the application for review. The conditions stipulated are as set out above. In my view, where a party seeks to review an order/decreed made by the same court that order is part of the proceedings and it would be giving undue weight to technicalities if it was to be held that an order on record must be extracted and annexed to an application for it to be reviewed.
16. The position taken by this court is embolded by a Court of Appeal decision in *Peter Githaiga and another versus betty Rashid* [2016] eKLR where the court held that failure to annex an extracted order sought to be reviewed was not fatal because the rules do not expressly state so.
17. This court, from the foregoing finds that failure by the applicant to annex a copy of the extracted order he seeks to have it reviewed is not fatal. This application in the premises is not defective on that ground.

(ii) Whether the Applicant has Satisfied Conditions for Review.

18. This court has already set out the conditions to be satisfied as stipulated under order 45 (1) of *Civil Procedure Rules*. The applicant has listed grounds from (a) and (d) apart from meeting the condition for filing the application timely, the other grounds in my considered view appear misplaced.
19. The applicant contends that the orders issued on November 19, 2022 exceeds jurisdiction of this court on the provisions of section 5 (b) motor vehicles *Third Party (Risks) Act* cap 405 which contents presents two issues namely;

Firstly, there is no order issued on November 19, 2022 and this court has not issued to take effect on a future date and specifically on November 19, 2022.



Secondly, assuming that the applicant meant the orders issued by this court on September 19, 2022, the only viable option for the applicant is to challenge jurisdiction of this court on monetary or original jurisdiction through an appeal or through judicial review.

20. The other reason given that the insurer is facing financial difficulties due to Covid, is not new matter that was not within the knowledge of the applicant when he presented his application dated September 19, 2022. Covid situation apart from what the court has said, is now behind us. This court finds it a lame excuse rather than a financial good or sufficient cause. If anything the difficult financial position if any is contractual matter between the applicant and his underwriter. The 1st respondent is not privy to it and has nothing to do with it. I am also persuaded by the 1st respondent's contention that liability appears to be a dispute between the appellant and the 3rd party/2nd respondent. His inability to refund therefore, is a non-issue at this stage. As a matter of fact, this court finds the appeal dated August 30, 2022 on record unsigned which could be an oversight but having noted it at this stage, it is only fair to point it out to enable the applicant to take remedial steps to rectify the anomaly.

(ii) Whether this Application is *Res Judicata*

21. The application dated September 19, 2022 cited *inter alia* that it was grounded on the fact that the appeal herein stands high chances of success (notwithstanding the anomaly noted on the memorandum of appeal filed), the fact that the applicants stands to suffer irreparably unless stay is granted because the 1st respondent is unlikely to be in a position to refund if the appeal succeeds and the fact that it was ready to offer security in form of a bank guarantee.
22. This court considered all the issues in the application dated September 19, 2022 and rendered itself. Having adjudicated upon the issues raised and rendered myself on the same, cannot revisit the same issues because they are *res judicata*. Under section 7 of [Civil Procedure Act](#), the applicant is estoppel from bringing up the same issues again for re-litigation in this same court.
23. The only error or obvious mistake on the face of the record probably is the omission by the applicant to sign the memorandum of appeal either by himself or through an advocate. At this as things stand, there is no competent appeal on record. The applicant is at liberty to move this court to rectify the anomaly but for now, I find the application dated October 13, 2022 incompetent and bad in law for being *res judicata* and I also find no merit on it for the aforesaid reasons. The same is struck out with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 25TH DAY OF OCTOBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

