



Williams & Kennedy Ltd v Post Bank Credit Limited (in Liquidation) Thro' Deposit Protection Fund Board Liquidator & 3 others; Gicharu (Proposed Interested Party) (Civil Suit 710 of 2009) [2022] KEHC 14179 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 710 OF 2009
A MABEYA, J
OCTOBER 21, 2022**

BETWEEN

WILLIAMS & KENNEDY LTD PLAINTIFF

AND

**POST BANK CREDIT LIMITED (IN LIQUIDATION) THRO' DEPOSIT
PROTECTION FUND BOARD LIQUIDATOR 1ST DEFENDANT**

JUMCHEM HEALTHCARE LIMITED 2ND DEFENDANT

JUMA MUCHEMI 3RD DEFENDANT

**RURAL CREDIT URBAN FINANCE LIMITED (IN LIQUIDATION) 4TH
DEFENDANT**

AND

DAVID KIMANI GICHARU PROPOSED INTERESTED PARTY

RULING

1. This is a ruling on an application by the applicant dated October 25, 2021. The same was brought under sections 1A, 1B, 3A of the *Civil Procedure Code*, Order 45 Rule 1, Order 51 Rule 1 of the *Civil Procedure Rules* and article 50, 159 2(d) of *the Constitution*.
2. The application sought for the review of the orders issued on 21/1/2019 that dismissed the applicant's application dated 26/11/2019 that had sought the stay of these proceedings and his joinder as an interested party.



3. The application was supported by the affidavit of David Kimani Gicharu sworn on 25/10/2021. His case was that the suit property herein was also the subject in ELC No. 384 of 2019 David Kimani Gicharu vs Peter Mburu Burugu & 5 Others where the plaintiff was also a party, and HCCC No. 2459 of 1997.
4. That on 4/8/2021, the court in ELC No. 384 of 2019 ordered that the hearing of that matter be expedited to determine the ownership of the suit property. That those orders were issued after the impugned ruling had been delivered thus there was a need to review that ruling as prayed.
5. The 3rd defendant filed Grounds of Opposition dated 9/11/2021. He opposed the application on the grounds that there was no new material evidence to warrant the review of the orders of 20/1/2021. That there was inordinate delay in filing the application, the issues raised therein were res judicata, and the ELC court lacked jurisdiction to direct issues pending before this Court.
6. The plaintiff/respondent opposed the application vide the replying affidavit sworn by Ng'ang'a Gicharu on 15/11/2021. He contended that the plaintiff was the rightful owner of LR. No. 5989/5/R. That this application was a disguised appeal against the ruling of 20/1/2021 for which the applicant had lodged an appeal. It was also contended that the application had not met the threshold under Order 45 of the Civil Procedure Rules.
7. The applicant filed his written submissions dated 5/1/2022, the 3rd defendant's were dated 11/1/2022 whereas the plaintiff's were dated 12/1/2022. The court has considered those submissions as well as the pleadings and evidence on record. The main issue for determination is whether the application has met the threshold for review of orders.
8. It is settled that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and section 80 of the Civil Procedure Act. This means that the Court has a power of review, but such power must be exercised within the framework of the said provisions.
9. Under the said provisions, review is to be allowed where there is 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 of the order, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. In any of these grounds, the application has to be made without unreasonable delay.
10. The court has carefully considered the application. The ground relied on is either that there is discovery of new evidence or sufficient reason. This is because what is relied on is that in ELC No. 384 of 2019, the court had ordered that the hearing of that matter be expedited to determine the ownership of the suit property.
11. With greatest respect, this court does not consider this to be any of the grounds under Order 45 of the Civil Procedure Rules. The direction issued in the said ELC No. 348 of 2019 on 4/8/2021 for the expedited trial of that suit cannot be a ground to review the impugned orders of this court.
12. To this court's mind, the issues raised in the present application are similar to those raised in the dismissed application of 26/11/2019. The same is but a disguised appeal against the subject orders.
13. In any event, there was inordinate delay in bringing the application. The impugned ruling was made in January, 2021. The alleged directions of the ELC Court were given on 4/8/2021 yet the present application took over 70 days to be lodged. To this court's mind, that was an unreasonable delay in the circumstances of this case.



14. Having not met any of the grounds for review, the application lacks merit and is dismissed with costs.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

A. MABEYA, FCIArb

JUDGE

