



**Mutea v M'Ituru & 2 others (Miscellaneous Civil Application  
E017 of 2022) [2022] KEHC 15857 (KLR) (28 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15857 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
MISCELLANEOUS CIVIL APPLICATION E017 OF 2022  
EM MURIITHI, J  
NOVEMBER 28, 2022**

**BETWEEN**

**DAVID MUTEA ..... APPLICANT**

**AND**

**PETER MIRITI M'ITURU ..... 1<sup>ST</sup> RESPONDENT**

**CORPORAL MATHENGE ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. By an application under certificate of urgency dated August 15, 2022 pursuant to order 12 rule 7, order 51 of the *Civil Procedure Rules* and sections 1A, 3, 3A and 63 (e) of the *Civil Procedure Act*, the applicant seeks, 'That this honourable court be pleased to review out of time its orders issued on July 28, 2018 and specifically set aside and/or vary clause (c) of the said ruling the conditional order requiring the applicant to deposit a sum of Ksh 173,000/= in a joint interest earning account in the names of advocates for the parties within 14 days.'
2. The application is supported by the grounds that the applicant, aged 80 years old, is a man of straw means who ekes a living from well wishers, thus unable to raise the said sum of Ksh 173,000/= considering the current economic trends in the country. He prays the court to grant him unconditional stay of execution and allow him to file the record of appeal. He avers that there was no inordinate delay in bringing this application as his counsel was absent when the impugned orders were issued.
3. The 1<sup>st</sup> respondent strongly opposed the application vide his replying affidavit sworn on August 29, 2022. He avers that even after his advocates had written to the applicant's advocate informing them of the court orders of July 28, 2022, the appeal was not filed or the deposit made, as ordered by the court. He avers that no grounds have been raised to warrant grant of the review sought, as no explanation has been offered why the appeal has not yet been filed. In his view, the applicant is a man of means,



who has refused to comply with the court orders of July 28, 2022, and is therefore undeserving of any further accommodation by the court. He avers that the application is an appeal in disguise against the impugned orders which should have been filed before the Court of Appeal. He urges the court to bring the litigation herein to an end by dismissing the application.

4. In his further supporting affidavit sworn on September 6, 2022, the applicant contends that he filed the memorandum of appeal on August 19, 2022. He avers that the belated lodging of the memorandum of appeal was occasioned by the delayed signing of the order of July 28, 2022, which the court registry insisted must be annexed to the memorandum of appeal. He avers that although a letter informing his advocate of the court orders of July 28, 2022 was received in his office on August 3, 2022, his advocate only knew of the same on August 8, 2022.
5. In support of the application, the applicant urges that the judgment and decree in Tigania PMCC No 3/2018 delivered on September 17, 2019 was unfair, and if the orders sought are denied, his intended appeal will be rendered nugatory and/or useless. He urges that he has satisfied the test in the circumstances of this case for grant of the orders sought.
6. In opposition to the application, the 1<sup>st</sup> respondent urges that the application is brought under the wrong provisions of the law, as it ought to have been brought under order 45 rule 1 of the Civil Procedure Rules, and relies on the Court of Appeal case of *Christopher Musyoka Musau v NPG Warren & 8 others (2017) eKLR* which set the 3 conditions to be met before the jurisdiction and scope of review can be exercised. He urges that the contention by the applicant that he is man of straw means is not discovery of new and important evidence or an error apparent on the face of the record, and as such the application is an abuse of the court process which ought to be dismissed with costs. He relies on *Pancras T Swai v Kenya Breweries Limited (2014) eKLR* and *Otieno Ragot & Company Advocates v National Bank of Kenya Limited (2020) eKLR*.

#### **Determination**

7. There is no doubt that the application is premised on the wrong provisions of the law. To put the same into perspective, order 12 rule 7 provides for setting aside or varying of a judgment or an order dismissing a suit, which is distinct from the review sought by the applicant.
8. The application ought to have been brought under order 45 rule 1 of the Civil Procedure Rules which provides as follows:

' 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.'



9. These conditions were reiterated by the Court of Appeal in *Francis Origo & another v Jacob Kumali Mungala [2005] eKLR* as follows:

' It is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay.'

10. This court on July 28, 2022 heard the applicant's application dated April 4, 2022 and issued orders that –

' Leave be and is hereby granted to the firm of M/S Kaberia Arimba & Company Advocates, to come on record for the applicant herein Davia Mutea; The period of time limited to filing of the memorandum of appeal be and is hereby extended on condition that the applicant to file appeal within fourteen (14) days and the record of appeal within 60 days; There shall be a stay of execution of the judgment and decree appealed from on condition that the entire decretal sum of Kshs 173,000/= shall be deposited into an interest earning account in the joint names of the advocates for the parties within 14 days from today; In the event of default of any of the aforementioned conditions, the stay hereby granted shall lapse and be of no effect.'

11. The applicant contends that he has since filed the memorandum of appeal but he has been unable to deposit the decretal sum as directed by the court, due to his old age and lack of a source of income. Since that reason is neither discovery of new evidence nor an error apparent on the face of the record, it must be construed to fall under 'any other sufficient reason.' This court is mindful of the fact that the 1<sup>st</sup> respondent holds a lawful decree against the applicant, and in the event the intended appeal fails, the applicant will have to satisfy the said decree, by whatever means of execution, the 1<sup>st</sup> respondent will choose, including having the applicant committed to civil jail.
12. While it may be true that the applicant's counsel was absent when the impugned orders were made, it is admitted that the said counsel learnt of the existence of the orders on August 8, 2022. It has not been shown what action the applicant took thereafter to ensure compliance with the conditions for stay as ordered by the court on July 28, 2022.
13. This court notes that the applicant who is represented by counsel, avowedly on pro bono basis, has not offered any other security for the due performance of the decree of the trial court if the conditions for stay are lifted and the appeal fails.
14. However, since the memorandum of appeal has already been filed, this court finds that the interest of justice will be met by hearing the appeal on its merits and in the meantime striking a balance between the applicant's undoubted right of appeal and the 1<sup>st</sup> respondent's right to enjoy the fruits of his judgment. For whatever it will be worth, the decree-holder's remedy in the circumstances of this case is in the expedited disposal of the proceedings so that the rights of the parties are finally determined.

## Orders

15. Accordingly, the court will allow the application dated August 15, 2022 in the following terms:
1. The order for the deposit of the entire decretal sum of Ksh 173,000 in a joint interest earning account in the names of advocates for the parties is hereby set aside.



2. The applicant to file and serve the record of appeal within 60 days from the date hereof. In the event of default, the appeal will stand dismissed, and the 1<sup>st</sup> respondent shall be at liberty to execute the judgment of the trial court.
3. For expedited hearing of the appeal, the appellant shall together with the record of appeal file and serve written submissions within sixty (60) days, and the respondent shall file submissions with thirty (30) days of service.
4. The matter shall be mentioned for directions as to judgment on March 13, 2023.

Order accordingly.

**DATED AND DELIVERED ON THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**EDWARD M MURIITHI**

**JUDGE**

**Appearances**

Mr Omari Advocate for the appellant.

Ms Kaberia Advocate for the respondent.

