



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC CIVIL APPLICATION NO.21 OF 2020

ABSA BANK PLC (FORMERLY BARCLAYS

BANK OF KENYA LTD).....APPLICANT

-VERSUS-

FRANCIS MISOGA MEMA....RESPONDENT

R U L I N G

1. Before me is a Motion on Notice dated 12/2/2021 brought under *section 1A, 1B 3 & 3A of the Civil Procedure Act and Orders 45 Rule 1 and 51(1) of the Civil Procedure Rules 2010*.
2. The application seeks, among other things, a review and/or setting aside of the court's ruling delivered on 27/1/2021 granting a conditional stay of execution pending appeal. That consequently an order do issue directing the deposit of the decretal sum of Kshs. 3,000,000/- in a joint interest earning bank account in the names of **Muriu Mungai & Company Advocates LLP and Nkirote & Njiru Advocates**.
3. The grounds for the application are set out in the body of the Motion and the supporting affidavit sworn on 12/2/2021 by **Samuel Njuguna**, the Legal Officer of the applicant. These include; that the Miscellaneous Application had initially been filed in the Civil Appeals Division of the High Court as **Miscellaneous Civil Application No.E218 of 2020** but was transferred to the Commercial and Tax Division by Kamau J. where it was assigned the case number **Miscellaneous Civil Application No.21 of 2020**; that the court directed the parties to file written submissions with the ruling set for 27/1/2021. However, the applicant's lawyers had already filed the submissions on the E-filing platform on 13/11/2020 under the case number **E218 of 2020** instead of **Miscellaneous Civil Application No.E21 of 2020**.
4. That at the time of the said filing, it was unnoticed that the submissions had been filed under the wrong case number thereby leading the Court to deliver the ruling without the benefit of the applicant's submissions.
5. The applicant avers that the court heavily relied on the valuation report for the property known as **Kakamega/Lugovo/319** in its ruling. The property was valued at 3,200,000/- and was relied on as proof of the respondent's ability to repay the decretal sum if the appeal is successful. The applicant is apprehensive that once the respondent is paid part of the decretal sum as ordered, he may proceed and encumber the said property rendering the appeal nugatory.
6. In the premises, the applicant prays for a review and/or setting aside of the orders of 27/1/2021 limited to the directive that the applicant pays Kshs. 1,500,000/- to the respondent and lodges a Bank Guarantee on the balance. The applicant avers that it is willing to deposit the entire decretal sum in a joint interest earning account in the names of the firms of the respective parties. That there is imminent risk of execution as the period for the deposit of Kshs. 1,500,000/- and the bank guarantee of the balance has since lapsed on 17/2/2021.
7. Vide a Replying Affidavit sworn on 22/2/2021, the respondent strenuously opposed the application. He contends that the application is frivolous and an abuse of the court process as the court has already rendered its ruling and there are no valid grounds for review. That the applicant is cherry picking which orders it ought to obey since it complied with the order directing it to file an appeal within 14 days but has refused to comply with the orders requiring payment of Kshs. 1,500,000/- and the bank guarantee for the balance pending appeal.
8. The respondent further contends that regardless of the fact that the applicant's submissions were filed in the wrong case file, they suffered no prejudice as the Court considered all the applicable principles of law and all the evidence adduced by both the parties before rendering its decision on 27/1/2021.

9. Further in its application dated 17/7/2020, that the applicant averred that they were ready and willing to provide security as the Court may direct but it seems that that was never its intention. Therefore, since the applicant has disobeyed the orders of 27/1/2021, the court ought to allow the respondent to proceed with execution.

10. In conclusion, it is contended that in its ruling, the Court had considered the issue of whether the respondent was a man of straw and had analyzed the valuation report. Therefore, the order that half the decretal sum be paid to the respondent through their advocates while the rest be secured by a bank guarantee was well founded and fair in the circumstances. That the applicant should have preferred an appeal against the ruling rather than this application.

11. The Court has considered the depositions, submissions and evidence on record. This is an application for the review and/or setting aside of the Ruling delivered on 27/1/2021. **Order 45 of the Civil Procedure Rules** provides: -

“(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 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”.

12. From the foregoing, a review may be granted by the court if there is a discovery of new and important matter of evidence, if there is a mistake or error apparent on the face of the record or for any other sufficient reason. In addition, the application must be made without unreasonable delay.

13. The applicant’s main reason for seeking a review is that its submissions were filed mistakenly under the wrong file number therefore the Court did not consider its contents before rendering its ruling of 27/1/2021. That as a result, a conditional stay of execution was issued which the applicant would like to be reviewed so that the applicant deposits the decretal sum in a joint interest earning account as opposed to paying the respondent Kshs. 1,500,000/- and giving a bank guarantee for the balance as security for the stay. pending appeal.

14. The Court has carefully considered the submissions that were wrongly filed in a different court file. The same do not add anything more than to buttress what was in the applicants supporting affidavit. The said submissions cannot be said to be new evidence which could not have been obtained at the time the ruling was made. In any event, its probative value does not overturn the basis on which the impugned ruling was made.

15. Further, there is no error on the face of the record in the subject ruling. The fact that the ruling was delivered without the benefit of the applicant’s submission *per se* cannot amount to an error apparent on the face of the record. Neither can I see any sufficient reason for review.

16. I need to point out here that, the basis for the orders made was that, the respondent had demonstrated that he was not a man of straw. At least, he had an income and an asset that could be realized to recover the decretal sum in the event the appeal succeeded. The respondent went to the extent of producing a title and a valuation therefor to show, as he was obliged to, that he wasn’t a man of straw.

17. It should be recalled that there was no further affidavit on the part of the applicant to challenge either the said title or the valuation report. In my view, the respondent had discharged his obligation under **sections 107 and 108 of the Evidence Act**. The valuation report showed the subject property to be valued at Kshs. 3,200,000/-, a fact that was neither doubted not challenged by the applicant who had the opportunity to do so.

18. It is for the foregoing reason, that the property was valued at Kshs. 3,200,000/-, that I ordered half the decretal sum to be released to the respondent as the victorious litigant and for him to enjoy part of the fruits of his judgment while the balance was to be in the form of a guarantee.

19. In this regard, I will reiterate what was stated in the case of **Francis Njoroge v Stephen Maina Kamore [2018] Eklr**, that: -

“It should be noted that the grounds for review are very specific as discussed herein above. The Appellant herein has not demonstrated that he discovered new evidence which was not within his knowledge, neither that there was an error apparent on the record. He just feels that depositing the ordered sum is too much for him and he wants the orders reviewed so that he can deposit the amount of money which he can conveniently raise. This is a court of justice but not court of convenience such that it has to consider the conflicting interest of the parties. And in so considering, courts have to be guided by the laid down principles of law”.

20. The only valid issue raised by the applicant is the likelihood of the respondent encumbering the said property subsequent to the ruling. The respondent did not deny that fact nor did he challenge the same. In this regard, this Court must ensure that the said property will be available for realization of the amount secured in the event the appeal succeeds. Justice looks at both sides. It must protect both the applicant and the respondent.

21. In this regard, a prohibitory order hereby issues prohibiting any dealings with the property known as **Kakamega/Lugovo/319** pending the hearing and determination of the appeal.

22. Accordingly, I find the application dated 12/2/2021 to be unmeritorious and dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF MARCH, 2021

A. MABEYA, FCI Arb

JUDGE