



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CIVIL APPEAL NO. 420 OF 2019**  
**REGIONAL INSTITUTE OF BUSINESS MANAGEMENT... APPELLANT**  
**VERSUS**  
**LUCAS ONDONG' OTIENO .....RESPONDENT**

**RULING**

1. The appellant, *Regional Institute of Business Management* (the applicant) approached this court vide a Notice of Motion dated 10<sup>th</sup> August 2020 seeking review of orders issued by this court in a ruling delivered by *Hon. Kamau, J* on 30<sup>th</sup> July 2020.

2. In the ruling, the applicant was granted stay of execution of the lower court's judgment on condition that it deposited KShs.532,000 in a joint interest earning account operated by counsel on record for both parties. The applicant now requests this court to review the above condition and to substitute it with an order directing it to deposit the original logbook for motor vehicle registration number KBH 070M owned by one of its directors, *Ms. Roselyne Akeyo Oketch*.

3. The application is supported by the grounds stated on its face and the depositions made in the supporting affidavit sworn on 13<sup>th</sup> August 2020 by its learned counsel *Ms Sheila Orwa* and the supplementary affidavit sworn by *Ms. Roselyne Akeyo* on 27<sup>th</sup> October 2020.

A perusal of the grounds premising the motion and the depositions in the aforesaid two affidavits show that the main reason advanced by the applicant for seeking a review of the aforesaid court order is that due to economic hardship occasioned by measures undertaken by the Government to curb spread of the Covid-19 pandemic particularly the abrupt closure of learning institutions, it is unable to raise the money ordered to be deposited in a joint interest earning account as security for the due performance of the decree held by the respondent but its director is willing to provide an alternative security in the form of a logbook of her motor vehicle.

4. The applicant further contends that unless the application is allowed, it will be subjected to execution proceedings which may render its pending appeal nugatory; that if the application is allowed, the respondent is not likely to suffer any prejudice.

5. The application is opposed through a replying affidavit sworn by the respondent, *Lucas Ondong' Otiemo* on 6<sup>th</sup> October 2020. The respondent contends, *inter alia*, that he has waited for so long to enjoy the fruits of his judgment and reviewing the orders in the manner sought will greatly prejudice him; that the application lacks merit as the applicant has not availed any evidence to prove its claim that it is unable to raise the security ordered; that the motor vehicle logbook offered as an alternative security is not proper or adequate to secure the decretal amount and that the applicant has not demonstrated that there is an error apparent the face of the record or sufficient reason to warrant the review sought.

6. By consent of the parties, the application was canvassed by way of written submissions.

It may be important to state at this juncture that though the orders sought to be reviewed were issued by *Hon. Kamau J* who also issued directions for disposal of the application by way of written submissions, when the application was fixed for mention for purpose of confirming compliance with those directions, the Hon. Judge was no longer in the Civil Division as she had proceeded on transfer to another station. In the premises, I took over hearing of the application under *Order 45 Rule 2 (2)* of the *Civil Procedure Rules* (the Rules).

7. The record shows that both parties filed their respective written submissions reiterating and expounding on the different positions they had taken in support and in opposition to the motion.

8. I have carefully considered the application, the affidavits on record and the rival written submissions filed by both counsel on behalf of the parties and all the authorities cited. Having done so, I find that the only issue arising for my determination is whether the applicant has

demonstrated that it is deserving of the orders of review in the manner sought in the application.

9. The jurisdiction of the court to review its own orders is donated by *Section 80* of the *Civil Procedure Act* (the *Act*) which provides that:

**“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.”**

10. Order 45 particularly *Order 45 Rule 1* of the Rules operationalizes *Section 80* of the *Act* by providing the parameters within which courts should exercise the power of review.

11. It is clear from *Order 45 Rule 1* that before an applicant can be entitled to review of any court order, he must satisfy any of the following conditions:

- i. That he has discovered new evidence which after the exercise of due diligence was not within his knowledge or was not available at the time the order was made;
- ii. That there was a mistake or error apparent on the face of the record; or
- iii. That there is sufficient reason to warrant the review sought; and
- iv. That the application was filed timeously.

12. Applying the above prerequisites for review to the present application and starting with the requirement that the application ought to be filed timeously, I find that no complaint has been made to the effect that there was delay in filing the application. This notwithstanding, I have considered the question whether or not there was undue delay in filing the application. As stated earlier, the order sought to be reviewed was issued on 30<sup>th</sup> July 2021 and considering that the application was filed on 13<sup>th</sup> August 2020, I find that it was filed within a reasonable time.

13. Regarding the facts founding the motion, a reading of the application and the depositions made in support thereof shows clearly that the applicant is not alleging that it has discovered new evidence which was not available at the time the application was heard or that there is an error on the face of the court record. The application is predicated on the applicant’s claim that there is some other sufficient cause or reason to warrant the exercise of the court’s discretion in its favour by granting the orders sought.

14. According to the applicant, it is necessary to have the condition imposed to the grant of stay reviewed because it has suffered hardship and financial constraints due to measures taken by the Government to combat spread of the Covid-19 pandemic and is consequently unable to raise the money ordered to be deposited as security.

15. It is a cardinal principle of the law of evidence that he who alleges must prove. Even though I fully appreciate that the Covid-19 pandemic brought with it numerous challenges including economic hardship to many business organizations including learning institutions like the applicant, the applicant has not availed any evidence to demonstrate that it was so adversely affected financially to an extent that it was incapable of complying with the court order issued on 30<sup>th</sup> July 2020.

16. The applicant did not, for example, produce evidence of its financial status at the time it filed the application to substantiate its claim that it was incapable of raising KShs.532,000 which the court, in its discretion, ordered to be deposited in a joint interest earning account as a condition for stay. In the absence of such evidence, I am not persuaded to find that the applicant has laid sufficient basis upon which I can exercise my discretion in reviewing the orders issued on 30<sup>th</sup> July 2020.

17. In addition, it is important to note the type of security the applicant was offering in lieu of the security ordered by the court. The purpose of requiring provision of a security as a condition for grant of stay pending appeal is to ensure that the successful litigant is guaranteed of accessing fruits of his or her judgment without undue difficulty in the event that the losing party is unsuccessful in the appeal.

18. In this case, the director who is offering to deposit a logbook for her vehicle in lieu of the security ordered by the court is not a party to the appeal. In any event, a motor vehicle is a fluid asset whose value is not static but depreciates with time.

19. Considering that even if the logbook is deposited in court the vehicle will continue to be in the use and control of the applicant’s director, I am in agreement with the respondent’s submission that many things can happen to the said vehicle before the appeal is determined and there is no guarantee that its value will not have completely diminished by the time the appeal is concluded. Having taken all relevant factors into account, it is my finding that the motor vehicle logbook being offered by the applicant’s director is not a good or proper substitute for the security ordered by the court.

20. It is always important to remember that justice is a double edged sword. It cuts both ways. In as much as the applicant is entitled to have its right of appeal safeguarded by having the substratum of its appeal safeguarded, the respondent is also entitled to enjoy the fruits of his judgment and to access them without undue hardship if the applicant’s appeal fails.

21. Having weighted the parties competing interests and for all the foregoing reasons, I am satisfied that the Notice of Motion dated 10<sup>th</sup> August 2020 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH 2021**

**C. W. GITHUA**

**JUDGE**

**In the presence of:a**

Mr. Miyare for the Appellant/ Applicant

No appearance for the Respondent

Ms. Karwitha Court Assistant