



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCA NO. 005 OF 2020

MOFFAT NYAGA KAGAU (Suing as the Administrator of the estate of

EUSTACE KAGAU KANGWERE)1ST OBJECTOR/ APPELANT

MARGARET MBOGO (Suing as the Administrator of the estate of

GERSHON JOHN MBOGO.....2ND OBJECTOR/APPELANT

WALTER NYAMU KARIUKI.....3RD OBJECTOR/APPELANT

(Suing as the administrator of the estate of Joseph Kariuki Nyamu)

TERESIA GATURI NJOKA.....4TH OBJECTOR/APPELANT

(suing as the administrator of Josephat Njoka Mbiriai

VERSUS

PATRICK ODUNDO OWITI T/A COUSINS MOTORS.....DECREE HOLDER/RESPONDENT

NEW EMBU UHURU GARAGE LIMITED.....JUDGMENT DEBTOR/RESPONDENT

ANFIELD AUCTIONEERS.....INTERESTED PARTY/RESPONDENT

RULING

1. This ruling is in respect to the application dated 23rd October 2020 in which the applicants sought the following orders;

1) SPENT

2) SPENT

3) THAT there is discovery of new and important facts that were not disclosed and/or brought to the Honourable courts attention before arriving at the decision arrived at

4) THAT the court be pleased to issue an order of stay of execution of the orders issued by this honourable court on the 1st day of October 2020 pending the hearing and determination of this application.

5) THAT this honourable court be pleased to review, vary, set aside and/or vacate the orders issued on the 1st Day of October 2020 in terms of the condition for the objectors to deposit the sum of Kshs. 4,000,000/=

6) THAT it is apparent that the decree holder PARTICK ODUNDO OWITI who is alleged to trade as COUSINS MOTOR WORKS is not the proprietor of the business name but one MORRIS OSEWE

7) THAT this honourable court do issue any further and appropriate orders in the circumstances of this matter as it deems fit

8) *THAT the costs of this application be provided for.*

2. The application is based on the grounds that;

1) *THAT it is apparent on the face of the record that the said orders as they are cannot be enforced and/or executed as the judgment debtor did not participate in the proceedings herein.*

2) *THAT the deposit of Kshs 4,000,000 for the due performance of the decree is punitive and excessive under the circumstances.*

3) *THAT the respondents misled the honourable court in respect of the purported sale of the property as it was in respect of a different case being Nairobi CMCC No 4028 of 2018 and the suit that gave rise to the purported sale was Nairobi CMCC no 8372 of 2018.*

4) *THAT it is possible that the purported and/or alleged sale may have not taken place at all and the certificates of sale produced were meant to mislead the court or to deny the orders sought*

5) *THAT no returns of auction were ever produced in court to justify the certificates of sale*

6) *THAT no payment receipt for the purchase price was ever produced before court to confirm the sale proceeded as alleged and the highest bidder made payment for the purchase of the Auctioned properties*

7) *THAT there is reliable information from a very reliable source that no sale ever took place on the 20th January 2020 at 11.00 am at the auctioneers' offices at Suraj Plaza 1st Floor, Room F1 along Limuru road opposite Jamhuri High School, Nairobi or at any time of the day on that particular day.*

8) *THAT it is apparent that the alleged Decree holder is fictitious and is not in existence.*

9) *THAT there has been no unreasonable delay in making this application*

10) *THAT it is in the interest of justice that the objectors/ Applicants are given a chance to defend themselves before adverse orders and/or execution as ordered against them.*

3. The application is supported by the affidavit of **Ms Margaret Mbogo**, who avers that the properties known as LR No 269 Embu Township, LR no 270 Embu Township, LR no 347 Embu Township and LR348 Embu Township which were subject to attachment belonged to the objectors as the administrators of the deceased properties. She states that the court allowed the application for stay of proceedings pending appeal on condition that the objectors deposits the sum of Kshs 4,000,000 for due performance of the decree. She however laments that the amount of 4 million is excessive, punitive and oppressive. She therefore requests the court to vary or set aside the order for security to a reasonable amount. She further states that there has been discovery of new and important facts to the effect that the decree holder **Patrick Odundo Owiti** is not the proprietor under the business name **Cousins Motor Works** whose real proprietor is **Morris Osewe**.

4. The respondent opposed the application through the replying affidavit of **Patrick Odundo Owiti** who states that there is no order capable of being reviewed as the impugned order stood vacated when the 30-day period provided for depositing the decretal amount of Kshs 4 million lapsed. He avers that the application does not meet the threshold for orders for review as the alleged new facts were considered in the impugned ruling dated 1st October 2020.

5. Parties canvassed the application by way of by written submissions. Counsel for the applicant submitted that there is an error on the face of record as the orders issued by this court cannot be executed because the judgment debtor did not participate in the court proceedings. It was submitted that the respondents did not adduce any evidence to link the Objectors with the judgment debtors.

6. The 1st respondent submitted that the applicant seeks to reopen the same issues that were considered in the ruling of 1st October 2020. It was submitted that there is no order to be reviewed as the order of 1st October 2020 stood vacated when the 30-day period lapsed.

7. I have carefully considered the pleadings filed herein, the rival arguments made by the parties and the authorities that they cited. The question before the court is whether the application meets the threshold for the grant of orders for review.

8. The background of the application is that through an earlier application dated 20th January 2020, the applicants moved this court for orders of stay of execution of the decree dated 22nd January 2019. After considering the parties' arguments, the court issued orders to restrain the decree holder from transferring the ownership of the suit properties on condition that the objectors deposit the sum of Kshs 4 million in a joint interest earning account. As a consequence of these orders, the applicant filed the present application urging the court to review, vary, set aside the said orders.

9. The courts power to review its judgment or ruling is exercised within the framework of Section 80 of the Civil Procedure Act and Order 45 rule 1 of the Civil Procedure Rules. Section 80 of the Act gives the substantive right of review in certain circumstances, while Order 45 provides the procedure thereof.

10. **Section 80 of the Civil Procedure Act provides;**

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. Order 45(1) of the Civil Procedure Rules sets out the requirements for an application for review 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

12. In respect to the claim on the discovery of new and important matter or evidence, the applicants submitted that based on the information received from one **Christopher Chengwali**, no auction took place on the day the auction was scheduled to take place and that the decree holder was not the proprietor of Cousin Motors. In a rejoinder, the 1st respondent submitted that the applicants’ assertions were not new as the same were addressed in the court’s ruling dated 1st October 2020.

13. In **Baneland Enterprises v NIC Bank Limited & Another Nairobi (Milimani) HCCS No. 251 of 2007, Kimaru, J** stated that;

“For the court to favourably consider an application to review a decision of the court on the grounds that the applicant has made discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the applicant at the time the original application was argued under Order 44 rule 1 of the Civil Procedure Rules, it must be satisfied that such new and important matter or evidence is of such nature that it would lead any court of law applying its mind to the facts and the law applicable to the case reach a determination that if the court which heard the original application had the advantage of the new evidence, it would have reached a different decision other than the one that was rendered. The applicant must also establish that the new and important matter or evidence was not within its knowledge after the exercise of the normal diligence required of any conscientious litigant.”

14. One of the grounds that the applicants relied on in support of their application was that the records obtained from the registrar of companies show that the owner of business name Cousins Motor Works was Moris Osewe and not Patrick Odundo. My humble view is that this does not amount to discovery of new and important evidence as the same was within the knowledge of the applicants and was pleaded in the earlier application.

15. In **Nyamogo & Nyamogo v Kogo (2001) EA 170** the court held as follows regarding error on the face of the record: -

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal”

16. The applicants contend that the amount of Kshs 4 million is excessive, punitive and oppressive. I find that it is trite that an error apparent on record ought to be self-evident and require no explanation. I associate myself with the decision in **Francis Njoroge v Stephen Maina Kamore** [2018] eKLR where the court observed that the security given is one of the key elements that the court is bound to consider in granting an order of stay. The court stated;

“One of the key elements a court is bound to consider when granting an order for stay is the security given by the Applicant for the due performance of the decree. And it is upon such consideration that a court of law will make a determination on the same. This court well considered the Appellant’s arguments on the same and made an order for the Appellant to deposit one half of the decretal sum in a joint interest earning account. This order was made after considering the arguments by the Respondent that he has a decree which he would like to execute versus the Appellant’s plea that he was in financial difficulties. Indeed, if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review.”

17. In sum I find that the applicants have not established any ground for granting orders for review. The security of the sum of Kshs 4 million was to be given in satisfaction of the conditions for stay for the due performance of the decree. The applicants have not demonstrated that they are unable to raise the said amount and neither have they given any sufficient cause for the variation of the security. Furthermore,

the applicants have not made any effort to deposit any amount in the joint interest earning account as ordered by the court. I find no merit in the application dated 23rd October 2020 and I therefore dismiss it with costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 27th day of May 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Nyangoro for the Applicant.

Mr. Mwangombe for the Decree Holder/Respondent.

Court Assistant: Sylvia.