



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. E035 OF 2020

1. ANWAR ALLI.....1ST APPELLANT

2. FARID AHMED SWALEH.....2ND APPELLANT

-VERSUS-

1. MONICA MUTHONI.....1ST RESPONDENT

2. MARGARET MUTHONI.....2ND RESPONDENT

RULING

1. Before the court is a **Notice of Motion** application dated **23rd July, 2021** brought under **Order 22 Rule 52**, and **Order 45 Rule 1**, both of the **Civil Procedure Rules** and **Section 80** of the **Civil Procedure Act**, in which the Applicant is seeking for a review of the court's Ruling delivered on **24th June, 2021**, more specifically, for the court to substitute the security of Kshs.2,000,000/= which was ordered to be deposited in the joint names of counsel on record for the parties with an alternative security like a logbook of a car.

2. In support of the application is an **affidavit** sworn by **Farid Ahmed Swaleh** together with the annexures attached thereto. The main grounds are that the 1st Appellant cannot afford to raise a deposit in the sum of Kshs.2,000,000/= as a condition of stay of execution pending appeal because he is currently out of the country for treatment having been in and out of hospital whereby most of his funds have been used to pay hospital bills. He has offered to substitute the security with a title deed. Also, the deponent has deposed that he has stumbled upon new evidence that he did not have at the time of making the application for stay being that the 2nd Appellant is the legally registered owner of the **Motor Vehicle Registration No.KAQ 640P** at the time of the accident and had insured the same.

3. The application is opposed by the Respondent vide a **Replying Affidavit** sworn by **Monica Muthoni** on **6th August, 2021**. According to the Respondents, the application is baseless and merely meant to further delay them from accessing the fruits of their Judgment. That one of the annexed documents dated **23rd January, 2021** and written by **M/S Beyond Scope Hospital** has indicated that the Applicant "*unfortunately has travelled to Dubai for investment and to relieve stress*". She has also deposed that the logbook and endorsement by **M/S Invesco Assurance Company Limited** annexed as new evidence cannot be classified as such since they are documents which ought to have been used during the hearing. She had taken issue with the timing of this application, which is just one day to the lapse of the 30 days period that was set by the court for depositing of the security, as being a show of bad faith.

4. On **2nd February, 2021** the application came up for interparties hearing and directions were taken by consent of both counsel for the parties that the same be canvassed by written submissions. The 1st Appellant filed his submissions on **19th August, 2021** while the Respondents filed theirs on **26th August, 2021**. Both sets of submissions reiterated the grounds in the parties' respective affidavits.

DETERMINATION

5. I have considered the application, the affidavits on record, the written submissions by counsel for both parties and all the cited authorities. I find only two issues arise for determination, being:-

a) Whether an order for substituting security can issue;

b) Whether the court can review its orders issued on 24th June, 2021;

6. In the instant suit, this court made a determination allowing the application dated **18th December, 2020** in which it made an order granting the Applicant a stay of 30 days on condition that he deposits the entire decretal sum in an interest earning joint account. Being unable to pay the same, the Applicant has invoked the court's inherent powers and now seeks to have the order reviewed and security substituted. In essence, the Applicant herein is seeking for a review of the orders of this court.

7. It is common ground that the High Court has a power of review, but such power must be exercised within the framework of **Section 80** of the **Civil Procedure Act**

80. 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 Judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

8. Further, **Order 45(1)** of the **Civil Procedure Rules, 2010** provide the conditions under which a court can allow an application for review. The Court of Appeal in the case of **Pancras T. Swai –vs- Kenya**

Breweries Limited (2014)eKLR reiterated the conditions set by **Order 45** and held that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds: -

i. That there is discovery of new and important evidence which was not available to the Applicant when the Judgment or order was passed despite having exercised due diligence; or

ii. That there was a mistake or error apparent on the face of the record; or

iii. That sufficient reasons exist to warrant the review sought.

iv. In addition to proving the existence of the above grounds, the Applicant must also demonstrate that the application was filed without unreasonable delay.

9. From the above conditions, it is clear that the prayer for review in the instant application is premised on the first condition.

In the case of **Turbo Highway Eldoret Limited –vs- Synergy Industrial Credit Limited [2016]eKLR** Sewe J. cited the case of **Rose Kaiza –vs- Angelo Mpanjuiza [2009]eKLR**, where the Court of Appeal considered an application for review on the ground of new evidence and held that:-

“Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made.”

10. It is therefore clear that the discovery ought to be of new and important evidence which after due diligence was not within the knowledge of the party or could not have been produced when the decree was being made.

In the case of **D. J. Lowe & Company Ltd –vs- Bonquo Indosuez, Nairobi Civil Application No.217 of 1998**, the Court of Appeal sounded a caution in such applications and stated that:-

“Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

11. Thus, in an application for review based on discovery of new and important evidence, the court must exercise caution to prevent a party against whom a decision has been entered from procuring new evidence so as to strengthen or change the complexion of the case.

12. From the above authorities, to qualify to be new evidence so as to fall within the ambit of **Order 45 Rule 1** of the **Civil Procedure Rules**, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence.

13. In my view, the Applicant's contention that he did not know about the ownership of the suit motor vehicle is not plausible. In his submissions for stay pending appeal dated **10th February 2021**, the applicant submitted that the 2nd Appellant had started paying the decretal amount through **Invesco Insurance Co. Ltd.** It is common knowledge that the insurer was settling the claim in the insured's name, that is, the 2nd Appellant, hence it cannot be said that there is discovery of new evidence.

14. **Order 45** also provides that an application for review must be brought without unreasonable delay. The orders for deposit of security in this application were made on **24th June, 2021** and the Applicant given 30 days within which to deposit the decretal sum of Kshs.2,000,000/=. The Applicant filed the instant application on **23rd July, 2021** which was within 30 days from the date of the court's Ruling albeit a day before the lapse of the stay. In my view, the application was filed within time but the timing is "questionable".

15. I say so because the Applicant was fully aware of the orders of this court issued on **24th June, 2021**. It was also aware of its financial status in the same period and ought to have made the application as soon as the order was made. It is my opinion that the circumstances and timing of the application clearly show it was not made in good faith but rather was made to delay and avert justice.

16. First, for a court to review its orders there must be very good reasons which may include an error on the face of the records, a mistake which was unintended, or that there is now available information or evidence which if the court had been seized of, a different finding could have resulted. A review cannot be founded merely on the basis that the Applicant is not happy with one of the remedies given in the order, and can easily provide an alternative remedy.

17. The Applicant is also seeking to have the order that he deposits the decretal sum of Kshs.2,000,000/= in a joint interest earning account substituted with an alternative security like a logbook or title deed. The Applicant has annexed to his application copies of medical records and title deed to mitigate the application.

18. The legal basis for security in stay of execution application is provided for under **Order 42 Rule 6(1)** of the **Civil Procedure Rules, 2010** and which is one of the requirements for stay of execution pending appeal. However, the amount to be ordered to be deposited as security is at the discretion of the court.

19. To offer land as security, though quite in order, may prove difficult to realize the decretal sum which continues to accrue interest in view of the long and complicated procedures involved in the sale of a property.

20. Regarding the motor vehicle, the Applicant has not attached the official search of the vehicle that he intends to substitute as security or the log book. Further the Applicant has not attached any valuation report showing the value of the said vehicle to establish whether the same is equal to the security he was ordered to deposit.

21. The court in the case of **Mwaura Karuga T/A Limit Enterprises –vs- Kenya Bus Services Ltd & 4 Others [2015]eKLR** was of the view that -

“... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the Applicant. The rule does not, therefore, envisage just any security. The words ‘ultimately be binding’ are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick.”

22. The same was reiterated in the case of **Arun C Sharma –vs- Ashana Raikundalia T/A Rairundalia & Co. Advocates**, where the court

stated that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor...Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or

order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

23. The issue of a logbook being used as security for stay of execution of a decretal sum has been widely discussed by courts in other cases. A motor vehicle is an asset that may change ownership any time and within a short period. In the case of ***Lochab Brothers Ltd –vs- Lilian Munabi Nganga & 2 Others [2007]eKLR***, for example, the court dismissed a similar application to substitute security with a logbook, and expressed the view that –

“There is no guarantee that by the time the appeal will be heard and determined the vehicle will be worth the same money or it be there at all. The vehicle is still under the control and use of the applicant. Many things can happen to it before the appeal is heard. It can be wasted and its value diminished or it can even be involved in an accident and be completely damaged. I am not saying that this is going to happen but it can happen. If that happens then there will be no security for the respondent to fall back on if the appeal is not successful. Deposit of motor vehicle log book is therefore not a satisfactory security”.

24. In the recent case of ***Esri Star Ltd & Another –vs- Sila Oweshiwani [2018]eKLR*** the court held that;-

“A motor vehicle or a trailer, as in this matter, is the worst form of security that an applicant can offer with the aim of obtaining orders for stay of execution in a case involving a money decree.”

25. From the above authorities, it is clear that a logbook is not and cannot be the ideal security owing to the circumstances and the uncertainties that it possesses in terms of how the respondent will recover the decretal sum.

26. Additionally, it is clear that the Applicant has assets he can sell to raise the security in cash and satisfy the court order. He cannot then argue that he cannot deposit the Kshs.2,000,000.

27. In my view, the Applicant has failed to satisfy the conditions upon which an order for review can issue. He has also failed to provide sufficient reason to justify substitution of the security ordered by this court. In the circumstanced, the application dated 23rd July, 2021 is hereby found to be without merit and dismiss it with costs.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19th DAY OF NOVEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for Applicants

Mr. Mkombe counsel for Respondents

Court Assistant – Gitonga