



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 2463 OF 1996

REUBEN INDIATSI NASIBI.....PLAINTIFF

VERSUS

ALFRED MACHAYO.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. In his Notice of Motion application dated 9th August 2019 and filed on 13th August 2019, the Plaintiff sought to review the judgment that was delivered by P.J. Ransley (as he then was) on 20th February 1996 and grant orders that the accounts from the rental income received by the 1st Defendant in respect of NAIROBI/BLOCK 32/21 (hereinafter referred to as the “suit premises”) with effect from 1974 to 2018 be paid to him forthwith and that the 1st Defendant be ordered to pay for loss of use and commercial investment of the said suit premises to be proved during the hearing of the said application. He swore the Affidavit in support of his application on 9th August 2018.
2. He pointed out that whereas he complied with the order of the court in terms of transferring the suit premises and paying a sum of Kshs 152,000/= less Kshs 40,000/= stamp duty, registration fees, other outgoings and his advocates costs and also pleading for the aforesaid rent, the court omitted to grant orders from refund of the rent received on his behalf by the 1st Defendant herein. It was his contention that he had lost opportunity for economic use of the suit premises as he would have put up flats for income generation.
3. In opposition to the said application, on 1st October 2018, the Plaintiff’s swore a Replying Affidavit that was filed on even date. He referred to the Plaintiff as a dishonest client who had benefitted from his firm for the last twenty-two (22) years and had refused to pay his fees.
4. He averred that M/S S.K. Ritho & Co Advocates for the 1st Defendant filed an application seeking a stay of execution pending appeal of the Judgment, which application was allowed on condition that the rent yielded by the property be deposited in an interest bearing account in the names of the respective parties’ advocates. He stated that, however, the said firm of M/S S.K. Ritho & Co Advocates opened the account without his firm’s input making the said firm the sole signatory of the account.
5. He added that the Plaintiff applied for a discharge of the stay orders after the 1st Defendant failed to file an appeal whereupon the Plaintiff asked the bank to release the monies directly to him without involvement of his firm and further proceeded to collect rent without also involving his firm. He pointed out that the Plaintiff instructed the firm of M/S D.B. Wati & Co Advocates to negotiate the mode of payment of the taxed costs in the sum of Kshs 1,135,496/= but that he rejected the Plaintiff’s proposal to pay his fees in monthly instalments of Kshs 50,000/= and demanded that he instead pays monthly instalments of Kshs 200,000/=.
6. On his part, the 1st Defendant filed Grounds dated 21st December 2018. The same did not bear the court stamp to show the date of filing. Be that as it may, on 9th April 2019, he also filed a Replying Affidavit that he swore on 21st December 2018.
7. He contended that the Judgment had already been satisfied and there was nothing to be reviewed by the court. He stated that the Plaintiff could not claim for rent income from 1974 to the time he swore his Replying Affidavit for the reason that his (the Plaintiff’s) advocates forwarded to him the Original Title in respect of the suit premises on 19th December 2017.
8. He further averred that the Plaintiff had sought to adduce additional evidence long after delivery of the judgment over twelve (12) years ago. It was his assertion that the present application did not meet the threshold of a review as provided under Order 45 of the Civil Procedure Rules, 2010 as the Plaintiff had failed to particularise any mistake or error apparent on the face of the court or demonstrate that there was any new or important matter that was not within his knowledge at the time of trial and passing of the decree.

9. He added that the Plaintiff's efforts to dispose of the suit premises were not a reasonable and justifiable ground for the delay in filing the present application and that after delivery of the Judgment, the Plaintiff appointed several counsel to act for him.

10. He asserted that prayers sought by a party are discretionary and/or granted by the court on just and equitable grounds. He termed the said application as bad in law, brought in bad faith, unmerited, an abuse of the court process and prejudicial to him and thus urged this court to dismiss the same.

11. The Plaintiff emphasised that the Judgment excluded key and fundamental prayers thereby prejudicing his interests and causing him to incur massive losses and damages. It was his submission that the present application had been brought in good faith and without undue delay. He was claiming a sum of Kshs 10,800,000/= and placed reliance on the case of **Court of Appeal Civil Appeal No 2111 of 1996 National Bank of Kenya Ltd vs Ndungu Njau**. He did not annex a copy of this decision. He had attached copies of other cases but did not make any reference of them in his Written Submissions.

12. On his part, the 1st Defendant referred this court to the cases of **Skool Enterprises Limited vs Housing Finance Company of Kenya & 3 Others [2017] eKLR** and **Roy Mutua Kivusyu & Another vs Nairobi City County & 2 Others [2019] eKLR** to support his argument that the Plaintiff had not reached the threshold of being granted an order for review.

13. This court had due regard to the provisions of Section 80 of the Civil Procedure Act Cap 21 (Laws of Kenya) that stipulates as follows:-

“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.”

14. It is important to point out that an order for review is not granted as a matter of course because Section 80 of Civil Procedure Act has to be read together with Order 45 Rule 1 of the Civil Procedure Rules. Order 45 Rule 1 of the Civil Procedure Rules states 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.”

15. Notably, the Judgment the Plaintiff sought to review was delivered on 20th February 2006. The present application was filed on 13th August 2019. There was therefore delay in filing the same. He did not also proffer any sufficient reason to explain why he did not move the court in good time and/or adduce evidence that he was unwell as he had contended. He did not also demonstrate what mistake the court made or that there was an error apparent on the face of the court record or that the evidence he was relying upon in his present application was not within his knowledge and/or could not be produced by him at the time when the decree was passed or order was made.

16. Accordingly, applying the provisions of Order 45 Rule 1 of the Civil Procedure Rules to the facts of this case, it was evident that the Plaintiff had not met the threshold of being granted an order for review as he had sought.

DISPOSITION

17. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated 9th August 2018 and filed on 13th August 2018 was not merited and the same is hereby dismissed with costs to the 1st Defendant herein.

18. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of July 2020

J. KAMAU

JUDGE