



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 472 OF 2014

BENARD NJOROGE GATHUA.....APPELLANT

VERSUS

MWANZIA MUTISO.....RESPONDENT

RULING

1. What is before me for determination is the Notice of Motion dated 19th November 2019 in which the appellant (the applicant) seeks two substantive orders as follows:

i. That this court be pleased to review and correct the omissions and/or slip in its judgment delivered on 17th October 2019 and align its conclusions with paragraphs 25-32 of its judgment by setting aside its conclusion in paragraph 33 and partially allow the appeal in as far as setting aside the lower court's proceedings on the Notice to Show Cause having found and declared them a nullity in its findings but still maintain the lower court's judgment having found that the same was regularly entered.

ii. The court does further order the release to the appellant of the security of KShs.1,219,538 deposited by the appellant in court as security, the same having been admitted in compliance with the proceedings on the Notice to Show Cause which proceedings have since been declared a nullity.

2. The application is premised on grounds stated on its face and depositions made in the supporting affidavit sworn on 19th November 2019 by the applicant's learned counsel, *Mr. Joseph Makumi*.

3. The court record shows that by 18th December 2019, the respondent through his learned counsel *Mr. Chengo* had been served with the application and despite being granted leave to file a response to the motion, none was filed by the date the motion proceeded for hearing. The motion is thus unopposed.

4. On 23rd June 2020 when the application was scheduled for hearing, there was no attendance for the respondent though the court record shows that his learned counsel was aware of the hearing date. In the circumstances, hearing of the motion proceeded *ex parte*.

5. During the hearing, learned counsel for the applicant, *Ms Karwitha* urged me to find that there was an error on the face of the judgment I delivered on 17th October 2019 in that I made a finding in paragraphs 23-32 that the execution proceedings conducted in the trial court were a nullity in law as they had been conducted in contravention of stay orders issued by the High Court but instead of setting them aside and partially allowing the appeal, I proceeded to dismiss the appeal in its entirety.

6. Counsel argued that even if the applicant had not in his memorandum of appeal expressly sought orders to set aside the execution proceedings, in prayer (c) of the motion, he had prayed for setting aside of orders made by the trial court. She implored me to find that this court has wide powers under *Section 3A* of the *Civil Procedure Act* to make orders that would conform to its findings and meet the ends of justice.

7. The orders she invited the court to make were to set aside its orders dismissing the appeal and substituting them with orders partially allowing the appeal. She in addition, requested the court to order a refund of KShs.1,219,538 to the appellant which had been deposited in court as security so that parties can be restored to the position they occupied before the orders made in the impugned execution proceedings were issued.

8. I have considered the application and the oral submissions made on behalf of the applicant. I have also perused the court record and the judgment sought to be reviewed. I find that the only issue for my determination is whether the applicant has met the threshold for review of the judgment as proposed.

9. *Order 45 Rule 1* of the *Civil Procedure Rules* (the *Rules*) sets out the prerequisites to the exercise of a court's power of review which is

donated under *Section 80 of the Civil Procedure Act*. A reading of *Order 45 Rule 1* shows that for an applicant to succeed in an application for review, he must demonstrate to the satisfaction of the court the existence of any one of the following circumstances:

- i. That he has discovered a new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced at the time the decree or order sought to be reviewed was made;
- ii. That there was a mistake or error apparent on the face of the record; and
- iii. That there is sufficient reason to warrant the review sought and;
- iv. That the application was made without unreasonable delay.

10. Starting with the last condition, I find that in this case, I delivered the judgment sought to be reviewed on 17th October 2019. The application was filed on 20th November 2019 about a month later. In my view, a delay of about one month cannot be said to be inordinate or inexcusable. I thus find that the application was filed without unreasonable delay.

11. Turning to the grounds anchoring the motion, the applicant contends that there was a mistake or error apparent on the face of the judgment in that in paragraphs 23-32, I found that the proceedings in the notice to show cause and the subsequent ruling delivered on 16th October 2014 were nullities in law as they contravened High Court orders issued on 23rd October 2009 in HCCC No. 748 of 2009 which stayed all proceedings of whatever nature or form against the *United Insurance Company Limited* and its policy holders; that despite that finding, in my final orders, instead of partially allowing the appeal, I dismissed it in its entirety.

12. A close reading of the amended memorandum of appeal shows that whereas the applicant clearly indicated that the ruling dated 16th October 2014 was the subject of his appeal, the reliefs sought in the appeal did not make any reference to the said ruling or the post judgment proceedings conducted by the trial court which gave rise to the ruling. The applicant in his amended memorandum of appeal did not request this court to set aside those proceedings and the ruling. Instead, he asked the court to set aside all the proceedings that led to the entry of judgment against him and to remit the case back to the trial court for retrial by a different magistrate. There was therefore a disconnect between what was challenged on appeal and the prayers sought.

13. In my judgment, I found that the proceedings conducted by the trial court during the hearing of the suit were lawful and that the resultant judgment issued in favour of the respondent was regularly entered given that though hearing proceeded *ex parte*, the applicant through his advocates was properly served with a hearing notice and the stay orders in HCCC No. 748 of 2009 had not been issued by the time the trial was concluded. Having found that the judgment in the suit was regularly entered, I did not find any basis for granting any of the orders sought in the appeal hence my decision to dismiss the appeal in its entirety.

14. The above notwithstanding, being the first appellate court and having found that the post judgment proceedings and the ruling dated 16th October 2014 were nullities in law, I am persuaded by the appellant's argument that I should have partially allowed the appeal even if the applicant had not specifically sought any relief targeting the said proceedings or the resultant ruling considering that in the appeal, the applicant had challenged the validity of the ruling.

15. In view of the foregoing, I find merit in prayer 1 of the motion. It is hereby allowed on terms that the order dismissing the appeal in its entirety is hereby set aside and is substituted with an order partially allowing the appeal to the extent specified above.

16. Turning to prayer 2 of the motion, the applicant sought a refund of KShs.1,219,538 deposited in court allegedly as security pursuant to orders issued by the trial court in the proceedings related to the Notice to Show Cause. My reading of the court record however establishes that contrary to the applicant's contention, the money was not deposited in compliance with orders issued by the trial court. It was deposited as security in compliance with orders issued by this court as a condition for stay of execution pending disposal of the appeal.

17. The appellant is therefore seeking a refund of money deposited as security for due performance of the decree issued in favour of the respondent by the trial court. As correctly stated by the applicant, in my judgment, I upheld the trial court's judgment after finding that it was regularly entered. Given that the money was not deposited pursuant to the proceedings related to the Notice to Show Cause or the resultant ruling which have been nullified by this court, I do not find any basis upon which I can order release of the said money to the applicant. In the premises, prayer 2 of the motion fails and it is hereby dismissed.

18. Since the application was not opposed, I will not make any order as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of July 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Karwithia holding brief for Mr. Makumi for the applicant

No appearance for the respondent

Ms Mwinzi: Court Assistant