



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 104 OF 2019**

**JOHN MBAYA MUCHEKE.....APPELLANT/APPLICANT**

**VERSUS**

**KABERIA E. LIMUKII.....1<sup>ST</sup> RESPONDENT**

**FELIX MUTUA MAILU.....2<sup>ND</sup> RESPONDENT**

**EQUITY BANK LIMITED.....3<sup>RD</sup> RESPONDENT**

**E W MWANGI (T/A EXCELLENCE A & INTEGRITY AUCTIONERS).....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Motion on Notice dated 23/09/2019, brought under **Order 45 Rule 1 & 2 and Section 80 of the Civil Procedure Act**, the applicant sought the review of the orders of 28/08/2019 to the effect that he be allowed to furnish an alternative security in the form of title deed No. **Nkuene/Taita/3154**.
2. The grounds upon which the application was grounded upon were set out in the body of the Motion and the supporting and further supporting affidavit of **John Mbaya** sworn on 23/09/2019 and 25/11/2019, respectively.
3. He contended that he had been unable to raise the Kshs. 2 million ordered as security. That he did not have the means to raise the said sum although he was willing to comply with the order of the court. He therefore offered an alternative security by way of title No. **Nkuene/Taita/3154** which belongs to him which was valued at Kshs. 3 Million.
4. The application was opposed vide the replying affidavit of **Kaberia E. Limukii** sworn on 3/10/2019. He deponed that there was nothing to be reviewed given that the security the applicant was offering could not fetch more than Kshs. 300,000/- in the open market. That the applicant's intention was to play games, use delaying tactics and refuse to pay the debt.
5. The applicant submitted that he was relying on the ground of sufficient reason under **Order 45 Rule 1 and 2**. He relied on **John Simiyu Khaemba & another v Co-operative Bank of Kenya & another [2019] eKLR** to support his submissions.
6. It was submitted for the 1<sup>st</sup> respondent that the applicant had not met the conditions requisite for a review application particularly on discovery of new and important matter or evidence. That the applicant could borrow the security sum on the strength of the title being offered. The cases of **In Re Estate of Peter Muriungu Kaunga (Deceased) [2019] eKLR** and **Arun C. Sharma v Ashana Raikundalia & Co. Advocates & 2 others [2014] Eklr**, were relied on to support those submissions.
7. **Order 45 Rule 1 of the Civil Procedure Rules, 2010** is clear that a court can only review its orders if the following grounds exist: -
  - a) there has been discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
  - b) there is a mistake or error apparent on the face of the record; or
  - c) for other sufficient reason; and

d) the application must be made without undue delay.

8. On 28/08/2019 the court ordered the applicant to deposit Kshs. 2 Million in court within fifteen days. On 16/09/2019, the applicant sought for more time to apply for review. The court granted him 7 days to do so. On 23/09/2019, the applicant filed the present application. Thus, the application was brought without undue delay.

9. The applicant relied on the ground of sufficient reason. He stated that he was unable to raise the Kshs. 2 Million ordered. He sought to give an alternative security by way of depositing his title to land **Parcel No. Nkuene/Taita/3154**. He produced a valuation report dated 21/11/2019 showing that the property was valued at Kshs.3,226,000/-.

10. The 1<sup>st</sup> respondent refuted the value and stated that the property was worth not more than Kshs. 300,000/-. However, he did not offer any proof for his said allegation.

11. **Section 107 of the Evidence Act** provides to the effect that he who alleges must prove. The applicant has offered some proof of the value of the property. The respondent has offered none. Since the court acts on the basis of evidence, the best evidence available is that the subject property is valued at over Kshs. 3.2 Million. The cases relied on by the respondent are not applicable. The titles being offered in those cases did not belong to the applicant.

12. In the present case, the property is registered in the applicant's name. He positively deponed that he had cash flow challenges. Security under **Order 42 Rule 6** is meant to ensure that an unsuccessful applicant is able to pay the decreed amount if and when the appeal fails. The Court had made an order for Kshs.2 million only. The security being offered is valued nearly one and a half times more.

13. For the foregoing reasons, I am satisfied that the applicant has demonstrated sufficient reason to warrant the review of the subject order. Accordingly, the application is hereby allowed as following: -

a) The order of 28/08/2019 directing the applicant to deposit Kshs. 2 million as security is hereby reviewed and set aside and substituted with the order for the deposit of the title deed for **Parcel No. Nkuene/Taita/3154** together with a certificate of search in respect thereof in Court within 14 days of the date hereof.

b) An inhibition be and is hereby placed on **Parcel No. Nkuene/Taita/3154** until further orders of this Court.

c) Costs in the appeal.

**DATED and DELIVERED at Meru this 24<sup>th</sup> day of September, 2020**

**A. MABEYA**

**JUDGE**