



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 75 OF 2016

REBECCA MUTHONI MUNGAI.....APPELLANT

VERSUS

JANE MAKENA YOGO.....RESPONDENT

RULING

1. The dispute between the parties herein arose from their agreement in 2010, in respect of the sale of a kiosk identified as Municipal Council of Thika Kiosk no. 205 (hereafter the kiosk) by the Appellant, **Rebecca Muthoni Mungai**, to the Respondent, **Jane Makena Yogo**. The Respondent sued the Appellant before the lower court seeking *inter alia* an order to compel the Appellant to transfer the ownership of the kiosk to the Respondent. Following a full trial, the lower court found that the Respondent had paid the full purchase price of Kshs. 300,000/= for the kiosk but that the Appellant had refused to transfer ownership to the Respondent. The court therefore entered judgment for the Respondent.

2. The Appellant was dissatisfied with the outcome and filed an appeal to this Court. Judgment therein was delivered on 4th October 2018. In the said judgment the court (**Ong'udi J**) found that the Appellant had received a total sum of KShs. 230,000/= and that a balance of KShs.70,000/= was owed by the Respondent to the Appellant. The court therefore upheld the judgment of the lower court but ordered the Respondent to pay the balance of the purchase price in the sum of KShs.70,000/= with interest at court rates from 7th August 2010, to the Appellant. The court stated that the said sums were to be paid within 60 days of the judgment, to pave way for the official transfer of the kiosk. This order was not complied with in the timeline given.

3. On 9th May 2019 the Appellant filed a motion expressed to be brought under Order 45 Rule 1 of the Civil Procedure Rules seeking that the judgment of this Court be set aside, reviewed or varied, and that the court declares the Appellant as the absolute owner and proprietor of the kiosk. On grounds *inter alia* that the Respondent did not comply with the orders of this Court to pay the balance sum of KShs.70,000/= in 60 days since judgment. These grounds are further amplified in the supporting affidavit of the Appellant.

4. The Respondent filed a replying affidavit on 23rd October 2019 in opposition to the motion. She deposed that the judgment of the court had been delivered in the absence of the parties and that having become aware of it on 9th March 2019, she had made arrangements to comply, by issuing a cheque to the Appellant (annexure **JMY1**) which was rejected by the Appellants' counsel citing lack of instructions; that the Appellant also refused to acknowledge the said cheque; and that there is no cause shown to justify the orders sought and which orders are prejudicial to the Respondent. The Respondent also contended that the Appellant was guilty of unreasonable delay and that the court lacked jurisdiction to entertain the motion.

5. The application was argued on 18th February 2020 with parties principally canvassing the material in their respective affidavits and none of them framing their arguments around the provisions of Order 45 Rule 1 of the Civil Procedure Rules. The court has now considered the matters canvassed by the respective parties and the applicable law. The provisions of order 45 rule 1 of the Civil Procedure Rules are in the following terms:

“(1) 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”.

6. There is no dispute that the Respondent did not comply with the order to pay the adjudged sum of KShs.70,000/= within 60 days of the judgment. And when she allegedly learned of the judgment in March 2019, she did not apply to extend time for compliance or tender the full adjudged sum together with interest since 7th August 2010, as per the court’s judgment. The cheque dated 9/3/2019 (annexure **JMY3**) is for the sum of KShs.70,000/= only. At the hearing of the application, the Respondent did not offer any proposals for the payment of the interest earned on this sum as was ordered by the court. Unfortunately, the judgment of this Court did not include a default clause in the event of the Respondent’s non-compliance with the order. That said, the Appellant’s prayer that a declaration issues to the effect that she is the absolute proprietor of the kiosk is neither tenable and nor appropriate at this stage of the proceedings. In any event, it appears that the transfer of the kiosk to the Respondent is yet to be effected.

7. Under Order 45 Rule of the Civil Procedure Rules the grounds for review of a judgment or order are limited to discovery of new and important matters or evidence which, after due diligence, was not within the knowledge of the Applicant or could not be produced by him at the time the decree was passed, or order made; or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. The application must be made without unreasonable delay.

8. It was held in **Sadar Mohamed v Charan Singh & Another [1963] EA 557** that for purposes of review, *any other sufficient reason* refers to grounds that are analogous to the preceding grounds in rule 1 of Order 45, or as stated by **Mulla in The Code of Civil Procedure 18th Edn.** the term “*any other sufficient reason*” means a reason sufficiently analogous to those specified in the rule.

9. Looking at the material before the court, it is plain that there was a self-evident omission that qualifies as sufficient reason, analogous to other grounds in rule 1 of Order 45 of the Civil Procedure Rules, in that the judgment of this court failed to include a default clause, in the event the Respondent failed to comply with the order to pay the adjudged balance of the purchase price, with interest, by 4th December 2018. To date, the said sums remain unpaid, and there does not appear to be any clear-cut route for enforcing the court’s order. No explanation was offered as to why the Respondent did not deposit the adjudged sums into court if, as she alleges, the Appellant had refused to receive the cheque for the sum of KShs 70,000/=. Which sum at any rate was not only being tendered outside the period allowed by the court but also did not include interest ordered at court rates since 7th August 2010.

10. In order to unlock the impasse in this matter, and to facilitate the proper execution of the court’s judgment, this Court will vary the relevant portion of the said judgment delivered on 4th October 2018 by directing that:

(a) Within 21 (Twenty-one) days of this ruling, the Respondent is to pay the adjudged sum of KShs. 70,000/= plus interest at court rates, accruing thereon from the 7th August 2010, until the date of full payment. The said sums are to be deposited into the court on the Appellant’s account.

(b) In default of (a) above, the outstanding sums shall be recoverable as an adjudged sum , and the Appellant shall be at liberty to extract an appropriate decree in respect of such outstanding sums and to take out execution proceedings against the Respondent in the usual manner towards the satisfaction of the decree.

(c) For the avoidance of doubt, if the Respondent fully complies with (a) above and within the period stated, or if the decree is fully satisfied through execution, the Appellant will be obligated, upon the release of the deposited sums to her, or upon receiving payment, to effect the official transfer of the kiosk to the Respondent in terms of the judgment of this court, and in any event within 30 days of such receipt of funds by the Appellant , in default of which the Respondent may take appropriate steps to enforce compliance.

11. The Appellant’s motion has succeeded to that extent. Costs hereof are awarded to the Appellant.

SIGNED AND DELIVERED ELECTRONICALLY ON THIS 23RD DAY OF OCTOBER 2020.

C. MEOLI

JUDGE