



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL APPEAL NO. E016 OF 2019**

**BETWEEN**

**BANK OF AFRICA KENYA LIMITED.....APPELLANT**

**AND**

**DAVID KABUTE.....RESPONDENT**

***(Being an appeal from the Ruling and Order of Hon. A. N. Makau, PM dated 28<sup>th</sup>***

***June 2019 at the Magistrates Court at Nairobi, Milimani in Misc. Application No. 958 of 2018)***

**JUDGMENT**

1. This is an appeal from the ruling and order of the subordinate court dated 28<sup>th</sup> June 2019 dismissing the Appellant's application for review made, inter alia, under **Order 45 rule 1** of the **Civil Procedure Rules**. I will set out the background of the matter before dealing with the grounds of appeal.
2. The Appellant filed an Originating Summons dated 25<sup>th</sup> September 2018 seeking a declaration that it was holding an informal charge over LR Number Nairobi/ Block 110/587 ("the suit property") and further seeking leave to sell the said parcel of land in exercise of its statutory power of sale. The Appellant's case was that it had advanced the Respondent various facilities which were secured by a charge over the suit property. Subsequently Wang Point Technologies Limited ("the Company"), in which the Respondent was a director, approached the Appellant for a facility of Kshs. 1,200,000/- to be secured by the suit property. Although the Appellant disbursed the funds to the Company, the security over the suit property was not perfected despite the parties' intention.
3. The Company defaulted in the repayments of the facility and since the Charge had not been registered, the Appellant filed the Originating Summons seeking leave to sell the suit property. By a ruling dated 22<sup>nd</sup> February 2019, the trial court dismissed the suit on the ground that it is not possible for a banking institution to grant such a huge amount of money without security.
4. Being dissatisfied with the decision, the Appellant elected to apply for review of the decision dismissing the Originating Motion through its Notice of Motion dated 19<sup>th</sup> March 2019. The application was supported by the deposition of the Appellant's Senior Recoveries Manager, Charles Waiyaki, sworn on 19<sup>th</sup> March 2020. The thrust of the deposition was that the Company applied for and was granted an overdraft facility which it continued to utilize but failed to pay. The Appellant contended that contrary to the trial court's finding, the amount due from the Company was not as a result of a loan but was an overdraft facility.
5. The Respondent opposed the application on the basis that the Appellant did not establish that there was an error of law or mistake apparent on the fact of the ruling or discovery of new or important matter which was not available despite due diligence. He argued that the court was being called upon to sit on appeal against the ruling.
6. The learned magistrate considered the arguments and in the ruling dated 28<sup>th</sup> June 2020 dismissed the application on the grounds that the Appellant had not met the threshold for grant of an order of review and determining the issue would require her to sit on appeal against her own decision.
7. Although the Memorandum of Appeal dated 9<sup>th</sup> July 2019 sets out 12 grounds of appeal, the sum thereof is that the trial magistrate failed to exercise her discretion properly in dismissing the application for review. The appeal was canvassed by written submissions which I have

considered.

8. Counsel for the Appellant submitted on three main issues. First, whether an informal charge had been created by the Appellant. Second, whether the Appellant disbursed the facility, and third, whether leave to sell the property is necessary. Counsel for the Appellant submitted that the Appellant filed the review application on the basis that the trial court found that it is impossible for a banking institution to grant a loan facility without a security. As such, she submitted that there was evidence to show that the Company, as borrower, executed a Letter of Offer which was clear that the parties had intended to register a second further charge over the suit property in the name of the Respondent as chargor and whose title was held by the Appellant. The Appellant pointed out that the facility issued was an overdraft and from the statements attached the Company was able to utilize the overdraft to a limit of Kshs. 1.2m.

9. Based on the provisions of **section 79** of the **Land Act**, the Appellant urged that an informal charge had been created and it was entitled to apply for an order to exercise its statutory power of sale once the Company has defaulted. Consequently, the Counsel for the Appellant submitted that the trial magistrate made an error of law and fact by failing to appreciate that an informal charge had been created and that the same can only be sold with the leave of the court.

10. In response, Counsel for the Respondent submitted that the Appellant misunderstood the issues in the appeal by essentially submitting on the merits of the suit before the subordinate court. Counsel pointed out that the appeal is against the ruling of the trial court dismissing the application for review hence the Appellant has failed to demonstrate that the trial magistrate erred in rejecting the application for review and in particular that the Appellant failed to show that there was an error apparent on the face of the record, that there was discovery of new and important evidence which was not available despite due diligence and that there were insufficient grounds for review.

11. This appeal concerns the exercise of discretion by the trial magistrate dismissing an application for review. In order to intervene in that decision, the appellate court is guided by principal set out in **Mbogo and Another v Shah [1968] EA 15** where it was held that:

*An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.*

12. The application for determination by the subordinate court was for review made under Order **45 Rule 1** of the **Civil Procedure Rules** which provides as follows:

*45(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 review of judgement to the court which passed the decree or made the order without unreasonable delay.*

13. Under these provisions, an applicant is required to show either that there was an error apparent on the face of record or that there has been discovery of a new and important matter or for any other sufficient reason for the court to review. The Court of Appeal in **National Bank of Kenya Limited v Ndungu Njau [1996] KLR 469** explained what constitutes an error of law apparent on the face of the record and the scope of review:

*A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.*

14. The same point was emphasized in **Nyamogo & Nyamogo Advocates v Kogo [2001] EA 170**, the Court of Appeal further explained that:

*Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view as adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal. [Emphasis mine]*

15. I agree with counsel for the Respondent that the Appellant failed to show or demonstrate how the trial court erred in dismissing the application for review. The Appellant did not point to an error or mistake of law on the face of the ruling or that it discovered a new fact or evidence which was not available. As I understand, the Appellant contends that the trial magistrate misapprehended the evidence regarding the nature of facilities advanced to the Company and the nature of an informal charge. These are all matters of appreciation of evidence and any conclusions reached by the trial magistrate whether right or wrong are the subject of an appeal. By asking the court to review and evaluate the entire evidence and come to a conclusion that upholds its case, the Appellant is in reality arguing an appeal from the ruling dismissing the suit.

16. In conclusion I adopt what the Court of Appeal stated in *Francis Origo and Another v Jacob Kumali Mungala* ELD CA Civil Appeal No. 149 of 2001 [2005] eKLR

*Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end.*

17. I find and hold that the Appellant has failed to show that the trial magistrate committed an error in rejecting the application for review.

18. The appeal fails. It is dismissed with costs to the Respondent.

**DATED and DELIVERED at NAIROBI this 30<sup>TH</sup> day of NOVEMBER 2020.**

**D. S. MAJANJA**

**JUDGE**

Ms Karanu instructed by Karanu Kanai and Company Advocates for the Appellant.

Ms Sagini instructed by Otieno Okeyo and Company Associates Advocates for the Respondent.