



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL APPEAL NO 5 OF 2018**

**JOHN SIMIYU KHAEMBA.....1<sup>ST</sup> PLAINTIFF/APPELLANT**

**SUSAN KAVULUNZE.....2<sup>ND</sup> PLAINTIFF/APPELLANT**

**VERSUS**

**COOPERATIVE BANK OF KENYA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**R.M.NGURU T/A NGUTU AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

*By application under certificate of urgency filed on 8<sup>th</sup> January 2019 by Appellants brought under Sections 1A 1B 3A & 80 of CPA cap 21 Rule 3(1) & (2) High Court and Procedure Rules and all other enabling provisions of law.*

*They sought review, vary/set aside the Court orders of 19<sup>th</sup> November 2018 that the Appellants deposit in Court Ksh 3,000,000/- and instead direct that they file Ksh 1,000,000/-*

*They sought review, vary/set aside the Court orders of 19<sup>th</sup> November 2018 requiring the Appellants to deposit with the Court sum of Ksh 300,000/- within 45 days from date of the Ruling and instead extend the period of compliance to 6 months on the following grounds;*

*Although the Appellants are willing to comply with Courts Ruling of 19<sup>th</sup> November 2018 they are unable to comply as the amount of Ksh 3000,000,/= deposit within 45 days is overwhelming and impossible to find in such a short period.*

*If the stay of execution is vacated due to noncompliance of the Court Ruling of 19<sup>th</sup> November 2018, the Respondents shall exercise the statutory power of sale; the Appellants cannot sell the suit property due to the charge by the Respondent.*

*The deposit of **Ksh 100,000,000/-** be accepted and the same shall not prejudice any party as they obtain more time to comply.*

*The 1<sup>st</sup> Appellant has been suffering ill health from December 2018 and travelled to India for treatment as evidenced by copies of medical documents and air ticket annexed to Appellant's Supplementary Affidavit filed on 16<sup>th</sup> January 2019. These circumstances made him unable to comply with Court orders as the health issues were urgent and required prompt attention, he travelled on doctor's recommendation and the funds were depleted.*

*The 1<sup>st</sup> Respondent filed Replying affidavit on 18<sup>th</sup> January 2019 and objected to the Appellants application for review on the following grounds; the application for review is unmerited as there is no ground for review known to law. The Appellants are relying on the sympathy of the Court which is not ground for review. Secondly, the Appellants sat on their right which lapsed on 2<sup>nd</sup> January 2019 and hence there is nothing to vary, set aside or to extend unless the Court is appropriately moved to issue fresh orders or to revive lapsed orders.*

*The Appellants are using stay of execution to frustrate the 1<sup>st</sup> Respondent in exercise of statutory power of sale. They have not paid Ksh 1000,000/- 2 months now and have not filed record of appeal.*

*The Respondent urged the Court to take into account that as at the loan keeps accruing interest and penalties as at 15<sup>th</sup> January 2019 it accumulated to **Ksh 7,197.290.59/=**. The loan will outstrip the value of the security. If the Court is minded to allow the application Ksh 1m should be deposited with the 1<sup>st</sup> Respondent to reduce the interest and penalties escalating.*

The 1<sup>st</sup> Respondent relied on the following cases to fortify their position;

1. **STEPHEN GATHUA KIMANI vs NANCY WANJIRA WARUINGI T/A PROVIDENCE AUCTIONEERS CIVIL APPEAL NO 142 OF 2012.**
2. **ANTHONY GACHARA AYUB vs FRANCIS MAHINDA THINWA CIVIL APPEAL 92 OF 2008.**

### **DETERMINATION**

***The issue is whether the review application has merit and if the Court can grant the orders sought by the Appellants?***

**Order 45 CPR 2010 and Section 80 CPA** are instructive on grounds for review.

The Appellants have not shown/proved that in spite of a decree from this Court there has been discovery of new and important matter or evidence which after exercise of due diligence was not within his knowledge or could not be produced by him at the decree was passed. There is no mistake or error apparent on the face of the record. The Appellants are relying on any other sufficient reason that a review of the decree or order is made.

***In the case of STEPHEN GATHUA KIMANI vs NANCY WANJIRA WARUINGI T/A PROVIDENCE AUCTIONEERS CIVIL APPEAL NO 142 OF 2012 supra the Trial Court considered ‘sufficient reason’ at great length as follows;***

**Mulla** in the Code of Civil Procedure ( writing on **Order 47 Rule 1** of the **Civil Procedure Code** of India)( equivalent to our **Order 45 Rule1**) states that the expression ‘**sufficient reason**’ is **wide to include misconception of fact or law by a Court or even by an advocate**’

**Mulla** in the Code of Civil Procedure (writing on **Order 47 Rule 1** of the **Civil Procedure Code** of India) (equivalent to our **Order 45 Rule1**) states that ‘**sufficient reason**’ means ‘**a reason sufficiently analogous to those specified in the rule.**’

***The Registered Trustees of the Archdiocese of Dar es Salaam vs Chairman of Bunju Village Government & Others Civil Appeal 147 of 2006 C.A.*** observed;

***“It is difficult to attempt to define the meaning of the words sufficient cause. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the Appellant.”***

In **EVAN BWIRE VS ANDREW NGINDA CIVIL APPEAL 103 OF 2000 KISUMU HIGH COURT;** it was noted;

***“An application for review will only be allowed on very strong grounds particularly if its effect will amount to reopening the application or case afresh.”***

In **Muyodi vs Industrial & Comercial Development Corporation& Anor (2006) EA 243 the C.A.** emphasized that the application for review must be brought to Court without unreasonable delay.

This Court has considered the prerequisites of granting a review as preceded by **Order 45 CPR 2010** and **Section 80 CPA** and unfortunately none of the grounds are the basis of the instant application. Sufficient reason relates to analogous issues as the preceding grounds.

The Court agrees with the Respondents that there is no basis for review of this Court’s Ruling of 19<sup>th</sup> November 2018 but a case of challenges in enforcement and compliance of the resulting orders of the Court. Therefore the application for Court decree/order fails.

However, it was brought to the attention of the Court that due to unforeseen circumstances that cropped up after issuance of the orders and these circumstances adversely interfered and impacted on compliance with the Court orders.

The Applicant/ Appellant herein stated that he cannot be able to deposit the whole sum of Kshs.3,000,000/= ordered by the court on 19<sup>th</sup> November, 2018 giving reasons of time and medical grounds, He produced documents showing he was in hospital in India during the period in which he was supposed to deposit the said amount. He has intimated that the medical situation paralyzed his finances therefore making it impossible for him to raise the whole amount.

The medical state of the 1<sup>st</sup> Appellant and the medical documents produced were not challenged or contested. The Respondent has opposed the Applicant’s prayer for review stating that the prayer is unmerited since it does not disclose a single ground for review known to law.

The Respondent also argued that the Applicant took a lot of time before making this Application since the Orders were issued and therefore feels that the Application should not even be considered.

**Section 1A provides as the objective of CPA (1) to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

Section 3A provides for saving of inherent powers of court as follows;

*“Nothing in this act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”*

REPUBLIC vs CHIEF LAND REGISTRAR & 2 OTHERS EX PARTE MICHAEL NJENGA WAWERU [2017] eKLR held that the court has inherent powers to make such orders as are necessary to ensure that the ends of justice are met in every case or to prevent abuse of its process.

The judge relied on THE MATTER OF THE ESTATE OF GEORGE M'MBOROKI MERU HCSC NO. 357 OF 2004, OUKO, J where it was held as follows:

*“It is .....accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”*

Therefore this Court in effecting the overriding principle to expedite the matter and at the same time dispense justice; Although there is no basis for review order of the Court orders of 18 the November 2018 , the fact of medical ill health of the 1<sup>st</sup> Appellant made it difficult to comply with the Court orders. It is not out of any circumstances he could foresee or forestall and in practical terms has affected ability to comply within the stated timelines.

#### **DISPOSITION**

**In exercise of Section 3A CPA, this Court shall exercise judicial discretion and vary the terms of the Court orders of 18<sup>th</sup> November 2018 as follows;**

- 1) The Appellants deposit the Kshs. 1,000,000/= in an interest earning account jointly opened and run by the respective Advocates in record for the Applicant and Respondent in these proceedings by end of February 2019.**
- 2) The Appellants deposit the balance of Ksh. 2,000,000/= within 4 months from March 2019 and each succeeding month; in the said interest earning account (since two months have already since the application was filed) Kshs. 500,000/= per month;**
- 3) The Appellants shall file record of appeal and serve by end of June 2019;**
- 4) In default of any of the above by end of June 2019, the appeal and stay of execution shall stand dismissed/vacated;**
- 5) The Appellants to pay costs of the application to the Respondents.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT ON 25<sup>TH</sup> FEBRUARY 2019**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. KENNETH WILSON FOR PLAINTIFF/APPELLANT**

**M/S ADONGO FOR DEFENDANT/RESPONDENT**

**COURT ASSISTANT - JASMINE**