



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 22 OF 2011

EDWARD MUNGAI WAWERU.....PLAINTIFF

VERSUS

SAMSON OCHIENG KAGUNDA.....1ST DEFENDANT

KIMANI MARY.....2ND DEFENDANT/APPLICANT

RULING

1. What falls for this court's determination is the 2nd defendant's Notice of Motion dated 24th October, 2017. The first three prayers in the motion are already spent and what remains for determination is prayers 4, 5 and 6. In those prayers, the 2nd defendant (hereinafter the applicant) requests this court to set aside, review or vary the orders issued on 6th October 2017 in which the applicant was required to inter alia deposit the decretal amount into a joint interest earning account in the names of both advocates on record. The applicant seeks that the aforesaid order be substituted with an order for sufficient security in tandem with *section 3 (a) and 3 (b) of the Insurance [Motor Vehicles Third Party Risks (Amendment) Act 2013*; that the court be pleased to make any other orders it deems appropriate for the ends of justice and that the costs of the application be in the cause.

2. The application is premised on grounds stated on its face which are largely replicated in the supporting affidavit sworn on 24th October, 2017 by *Ms Philomena Theuri*, the Claims and Legal Services Manager of the applicant's insurer, M/S Monarch Insurance Company Limited.

3. The applicant's case as can be ascertained from the grounds anchoring the motion and the depositions in the supporting affidavit is that the applicant's motor vehicle registration number KBA 252P was at the time of the accident that gave rise to the claim in this case insured by Monarch Insurance Company Limited; that following an amendment to *Section 10 of the Insurance (Motor Vehicles Third Party Risks) Act*, (the Act) by the *Insurance (Motor Vehicle Third Party Risks) Amendment Act of 2013*, the insurance contract between the applicant and his insurer was premised on a ceiling of KShs.3,000,000; that the applicant through his insurer is consequently unable to comply with the orders issued by this court requiring him to deposit the entire decretal amount in the sum of KShs.9,900,965 into a joint interest earning account in the names of the advocates on record as security for due performance of the decree since in view of the amendment, doing so would be tantamount to perpetuating an illegality. The applicant further contended that the court in exercising its discretion while assessing the amount to be deposited as security should have been guided by the prevailing law which is *section 5 (b) of the Act* as amended; that therefore the orders of 6th October 2017 should be reviewed and security be substituted with an amount of KShs.3,000,000 which in the applicant's view is reasonable in the circumstances of this case.

4. The application is opposed vide the replying affidavit sworn on 11th December 2017 by the respondent's counsel, *Ms Magdalene Nyokabi Waiganjo*.

In her affidavit, counsel deposed that the applicant was undeserving of the orders sought since he failed to comply with any of the orders in the conditional stay granted by *Hon Mwangi, J* on 6th October 2017 including the order requiring him to deposit the decretal sum within 14 days and consequently, the stay orders lapsed on 20th October, 2017; that the applicant has a history of delaying finalization of this case despite the fact that the respondent sustained severe injuries in the accident which is the subject matter of this suit; that the respondent has been kept away from the fruits of his judgment yet he requires urgent medical attention.

5. The application was argued before me on 11th April 2018. In their submissions, learned counsel for the applicant *Ms Karanja* and learned counsel for the respondent *Ms Waiganjo* buttressed the positions taken by their respective clients as stated in the affidavits sworn in support and in opposition to the application.

6. I have carefully considered the application, the affidavits filed on behalf of the parties as well as the rival oral submissions. I have also

studied the court record including the ruling delivered on 6th October 2017.

7. At the outset, I wish to point out that though ideally applications for review should be heard by the judge who made the order or passed the decree sought to be reviewed, where a judge is no longer attached to the court in which the application is filed, under *order 45 rule 2* of the *Civil Procedure Rules* (the *Rules*), the application can be heard by any other judge attached to the said court. At the time the instant application came up for hearing, *Hon. Mwongo J* who issued the orders sought to be reviewed had already been transferred to another duty station and I thus heard the application under *order 42 rule 2* of the *Rules*.

8. That said, I now turn to consider whether the instant application meets the threshold for review as set by *order 45* of the *Civil Procedure Rules*. *Order 45 rule 1* is in the following terms:

“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.”

9. From the above provision, it is clear that for an applicant to succeed in an application for review, he must establish to the satisfaction of the court any one of the following three main grounds:

- i. That there is discovery of new and important evidence which was not available to the applicant when the judgment or order was passed despite having exercised due diligence; or
- ii. That there was a mistake or error apparent on the face of the record; or
- iii. That sufficient reasons exist to warrant the review sought.

In addition to proving the existence of the above grounds, the applicant must also demonstrate that the application was filed without unreasonable delay.

10. In the instant application, the applicant has not expressly pigeon holed his prayer for review on any of the three grounds allowed for review under *order 45 rule 1* of the *Rules*. In my view, the application is primarily anchored on the claim that the learned judge erred in his assessment of the amount to be deposited as security for the performance of the decree in that he ordered for the depositing of the entire decretal amount in the sum of KShs.9,900,965 which was contrary to the law which vide *section 5 (b)* of the *Act* sets a ceiling of Kshs 3,000,000 as the amount recoverable from an insurance company in respect of a claim by a third party. This explains the averment in the supporting affidavit that the applicant was unable to deposit the security ordered by the court within the time specified as it was not desirous of perpetuating an illegality.

11. In view of the foregoing, it is clear to me that the applicant’s prayer for review is based on the claim that the learned judge erred in failing to take into account the prevailing law on the ceiling of the amount an insurance company can pay in satisfaction of a decree passed against its insured. The applicant was thus attacking the legality of the court’s decision on grounds that it was either based on an error of the law or lack of appreciation of the relevant law.

12. The Court of Appeal in *Pancras T. Swai V Kenya Breweries Limited, Civil Appeal No. 275 of 2010, [2014] eKLR* was emphatic in its pronouncement that errors of law should not form the basis for applications for review. The court expressed itself as follows:

“It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.” The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. ...”

13. The court proceeded to quote with approval what it had earlier stated in *Francis Origo & Another V Jacob Kimalu Mungala Civil Appeal No. 149 of 2001* that:

“... an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground of 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. ...”

14. As stated earlier, the applicant based his review application on the alleged failure by the court to correctly apply the existing law which

in effect means that he was faulting the court's decision on a point of law. The applicant did not give any other reason in support of his prayer for review.

It is therefore my finding that the ground relied upon by the applicant took the instant application out of the parameters of review as errors of the law can only be corrected on appeal. If I was to accept the applicant's invitation to review the orders in the ruling of 6th October 2017 in the manner proposed in the application, I would be sitting on appeal on a decision made by a judge of concurrent jurisdiction which is not permissible in law. The applicant ought to have filed an appeal against the decision of the Hon Judge instead of filing an application for review.

15. It may also be important to note that by the time the instant application was filed on 24th October 2017, the stay orders had already lapsed for want of compliance by the applicant of the conditions precedent to the grant of stay within the time specified by the court. Granted these circumstances, even if the applicant had established a case for review, the application would still have failed since in my opinion, no useful purpose would be served by reviewing orders which are already spent.

16. For the foregoing reasons, I am satisfied that the application dated 24th October 2017 is devoid of merit. The same is consequently dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Nairobi this 17th day of May, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Ms Rono h/b for Ms Waiganjo: Advocate for the Plaintiff/Respondent

No appearance: Advocate for the 1st Defendant

Ms Ochieng h/b for Ms Karanja: Advocate for the 2nd Defendant/Applicant

Mr Fidel Salach: Court Assistant