



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

HIGH COURT CIVIL APPEAL

No. 2 OF 2015

B E T W E E N:

ROSE MAKOMBO MASANJU APPELLANT

AND

NIGHT FLORA alias NIGHTIE FLORA 1ST RESPONDENT

TOTAL PLUS BUREAU 2ND RESPONDENT

RULING

1. The Court has before it an application for the Court to a review or set aside the order, decree and judgment dated 22nd November 2016. The Application is dated 6th February 2018 and was filed on the same day.

2. The Applicant was the 1st Defendant in the Suit in the Lower Court (*SPMC Civil Case No 150 of 2013*). When the Plaintiff appealed, the Applicant was the 1st Respondent and similarly in the Taxation she was the 1st Respondent. The Application is brought under a Certificate of Urgency. The Application states that the Applicant was condemned unheard and "the appeal papers" were not served on her. There is also an urgency because the execution proceedings have commenced and the applicants goods have been proclaimed. The Application itself is brought "under Order 45 rule 1, 2 of the Civil Procedure Act and Section 3, 3A and Section 63(e) and any other enabling Provisions of Law". It seeks the following Orders:

"1. That this Application be certified urgent and be heard on priority.

2. That the court be pleased to review or set aside the order, decree and judgment dated 22nd November 2016 as there is an apparent error on the fact of the record.

3. That the court be pleased to make an order restraining the respondent/appellant, its agents, legal representatives or anybody authorised by the respondent from executing, proclaiming or selling the applicants properties on the basis of the decree, orders and the judgment dated 22nd November 2016 pending the hearing and determination of this application inter parties.

4. The Cost of the application be provided for. "

3. The Application is based on the Grounds which are set out on its face and the Affidavit of the Applicant. The grounds can be summarised thus:

(1) The Appellant has commenced execution proceedings on the judgment of 22nd November 2016;

(2) The Applicant was not aware that there was an appeal filed or that it was proceeding;

(3) The Applicant did not know that the Appeal had resulted in a Judgment against her;

(4) The Applicant only discovered there was a judgment when the Appellant commenced execution proceedings dated 16th December 2017, almost a year after the judgment;

(5) The Appellant/Respondent did not serve the Applicant with a demand notice for the Judgment sum;

(6) The firm of Lumatete Muchai & Co Advocates did not inform the Applicant of the Appeal;

(7) The Applicant was never served with any notice of appeal nor "appeal papers" nor notice of appeal nor notice of judgment.

(8) The Applicant continued to make payments based on the judgment of "the lower court dated 15th December 2017". without knowing there was another judgment in the high court.

The Applicant feels that "it is necessary for the judgment of 22nd November 2016 to be set aside for failure of service

4. In her Supporting Affidavit, the Applicant simply repeats what is set out above save that she attributes different dates to the events. She says that she was condemned to pay KShs.114,300. However, that was the computation of general damages. She does not include the medical costs allowed as special damages. She claims that immediately thereafter she began to make payments into court. She does not explain whether or not those payments were ever communicated to the Appellant as required by **CPR Order 27**. There is no notice of payment in exhibited. The receipts that are exhibited are dated in 2015 (January and February, October), 2016 (March, April, June) there is not one single payment that could be referable to the Judgment delivered in November 2016. The receipts are not stamped and therefore their origin and admissibility is questionable. The direction of Hon SPM Nderitu to produce originals was ignored.

5. Exhibit NF-4 is interesting in that it comprises an application dated 20th December 2017 also made under a certificate of urgency. That application was also made ex parte to the SPM's Court at Voi seeking a stay of the orders and execution and/or attachment and sale. In the Supporting Affidavit to that Application the Applicant states that judgment was entered against her on 15th December 2015 and that she commenced paying through instalments through the Court. She then stopped around mid 2016. She says she discovered there was judgment against her only when the auctioneers confronted her with warrants. There is absolutely no mention of the judgment being improperly entered as is now being alleged and argued. In the circumstances, she is taken to have acquiesced in its propriety.

6. Exhibit NF-5 is a copy of the Judgment of the Court that heard the Appeal. In it the learned Judge records that "The 1st Respondent never appeared in court despite having been served with Mention Notices several times to attend Court. In his oral Submissions, Counsel for the Applicant argues that either Order 42 or Order 45 rule 12 is very clear that the Notice of Appeal must be served on the Respondent personally. **Order 45** ends at **rule 6**. There is no rule 12. **Order 42 Rule 12** states:

Service of memorandum.

12. After the refusal of a judge to reject the appeal under section 79B of the Act, the registrar shall notify the appellant who shall serve the memorandum of appeal on every respondent within seven days of receipt of the notice from the registrar.

It was also submitted that the Applicant was not served at all. The Learned Judge's Judgment demonstrates that was not the case. In addition, there is the Affidavit of Service of Dominic Njoroge Gachuma showing the Applicant's Advocates were served. The Notice of Taxation together with a Bill of Costs was similarly served by a process server on the Advocates on Record. The Certificate of Costs is dated 29th June 2017.

7. The Application is brought under **Order 45 Rules 1 and 2**. The subsequent rules also require consideration. They provide:

1. (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. (emphasis added).

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as

the Chief Justice may designate.

[Order 45, rule 3.] When court may grant or reject application.

3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation. (emphasis added)

8. The Applicant states that the Advocates on record ceased to act for her. However, there is no notice on the Record that shows that either she or those Advocates came off the record and she proceeded in person. It is also noteworthy that the Applicant did not think of making an application for review until the Judge who heard the appeal had been transferred and after her application for a stay (of the High Court Order) in the lower court. The Applicant applied for a stay first. The fact that she opted for a stay rather than a review provides an indication of her priorities.

9. The application for stay was heard by the SPM on 19th February 2018. The Order that states:

"a THAT the Applicant pay a sum of KShs30,000 monthly on or before 19th March 2018. Thereafter on or before the 19th of each month till payment in full

b) that in default if any one instalment execution to issue

c) That the Applicant/Defendant to avail original receipts from the amounts so far paid to the Court for release of the same to the Plaintiff

d) The amount so released shall offset...

e) The installment payment to be paid either directly to the Plaintiff or via her Advocate.. payment to Court to cease forthwith."

There was no attendance but the Applicant requested a copy of the Ruling the next day. When the current application was argued before the Court on 27th June 2018. There was no mention of any payments - even relating to the lower figure of KShs.114,300 nor release of funds already paid. Therefore, although the Application for stay was exhibited, its outcome was not revealed contrary to the requirement of full and frank disclosure relating to ex parte applications. Further, there is no correspondence between the Applicant and her advocates withdrawing her instructions, as alleged.

10. The Applicant's Advocate has filed three authorities. Unfortunately they relate to antiquated procedure predating the **Civil Procedure Rules 2010**. They provide little, if any, guidance.

11. As to the evidence, the Applicant has provided very little evidence. The evidence that she does provide does not raise any grounds for (a) setting aside the judgment nor (b) reviewing it. There is no evidence that has come to light that the Court must consider. The Court also takes into account that such evidence must be that that could have been produced by reasonable diligence. Failure to produce evidence due to indolence is not a good enough reason. She has not demonstrated that she did not have a fair hearing or that any injustice was visited upon her.

12. Having considered the history of this case, the evidence presented to the Court and the record of the Senior Principal Magistrate's Court as well as the High Court, it is clear that there are no real grounds for either reviewing or setting aside the Judgment of Hon J. Kamau J. In addition, it is clear that the Applicant had no faith her own Application. At the same time (or earlier) as filing an Application in the High Court she had an Application in the Lower Court. She seeks Court Orders but then does not comply with them if she does not like what they say. This Application is clearly an attempt to delay payment to the successful Appellant. There is no reason before the Court why a successful litigant should be deprived of the orders made in her favour. This Application has all the hallmarks of a delaying exercise.

13. If it is indeed the case that the Advocates on the record did simply ignore pleadings and notices served upon them, the Applicant may a remedy against them in negligence.

14. For those reasons, the Application is dismissed with costs.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED ON THIS the 31st day of July 2018.

In The Presence of :

Court Assistant: Josephat Mavu

Applicant: Flora Nightie in Person

Respondent: No Appearance