



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**MISCELLANEOUS CIVIL APPLICATION NO. 34 OF 2016**

**JEFF BONDIST LUSIKI.....APPLICANT**

**VERSUS**

**MORRIS SHAURI KAZUNGU.....RESPONDENT**

**RULING**

**[NOTICE OF MOTION DATED 9<sup>TH</sup> JANUARY, 2017]**

1. In the application dated 9<sup>th</sup> January, 2017 brought under Order 45 rules 1 and 2 of the Civil Procedure Rules, 2010, the Applicant, Jeff Bondist Lusiki prays for orders as follows:

**“1. THAT for reasons to be recorded in writing herein, the Application herein be certified as urgent and service be dispensed with in the 1<sup>st</sup> instance.**

**2. THAT pending the hearing and determination of this Application, this Honourable Court does stay the operation of its Order dated 30<sup>th</sup> November, 2016.**

**3. THAT this Honourable Court be pleased to vary/review its Order dated 30th November 2016 with an Order allowing the plaintiff an unconditional right of appeal.**

**4. THAT costs be provided for.**

2. The application is supported by grounds on its face as follows:

**“1. There is an error of law on the face of the record.**

**2. The Plaintiff has a Constitutional Right of Appeal to pursue an Appeal without conditionalities fettering the said right.**

**3. The Appellant has not been shown to be a frivolous Defendant in the matter before the Lower Court; the Appellant’s Defence was meritorious and raised important legal issues for determination thereat. Likewise, the Appellant is pursuing a meritorious appeal based on merit and with likelihood of success.”**

3. The application is also supported by an affidavit sworn by the Applicant on the date of the application wherein he avers that he intends to appeal against the decision of the lower court as he is heavily

aggrieved by the same. He avers that he is aware of this court's order of 30<sup>th</sup> November, 2016 requiring that he deposits **“the sum of Kshs. 655,451 into court as a condition for appealing.”** It is his case that he is in the hotel business and is unable to raise the funds ordered as a result of the decline of business in the hotel industry. He concludes by stating that he has a strong and valid appeal and feels largely fettered by the condition placed on him as he cannot meet the same. He therefore prays to be allowed to be heard on his appeal.

4. In written submissions dated 12<sup>th</sup> September, 2017 counsel for the Applicant bases his application on Article 48 of the Constitution which provides that the **“State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”** According to the Applicant, the amount he is directed to deposit is excessive and unreasonable as he cannot raise it thus impeding his right to access justice as provided by Article 48.

5. The Applicant also points out that Article 159(2)(a) of the Constitution requires the courts and tribunals to do justice irrespective of status. It is thus the Applicant's case that the Constitution requires courts to open its doors to both the poor and the rich in society.

6. Counsel for the Applicant concluded submissions by citing decision in **Harit Sheth Advocate v Shamas Charavia, Civil Appeal No. 68 of 2008** where it was held that:

**“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties to equal footing.”**

7. The Applicant therefore urges this court to review its order of 30<sup>th</sup> November, 2016 with an order allowing him an unconditional right of appeal.

8. The Respondent, Morris Shauri Kazungu opposed the application through grounds of opposition dated 27<sup>th</sup> January, 2017 as follows:

**“1. The applicant has failed to satisfy the basic requirements for the orders sought in the application.**

**2. The application is frivolous and otherwise a total abuse of the process of the Honourable Court and the same should be rejected with costs.”**

9. In submissions dated 16<sup>th</sup> October, 2017 counsel for the Respondent pointed out that an application under Order 45 Rule 1 of the Civil Procedure Rules, 2010 allows a decree or order from which no appeal has been preferred to be reviewed, where there is discovery of new and important evidence or where there is a mistake or error apparent on the face of the record or for any other sufficient reason.

10. According to counsel for the Respondent, the Applicant's case does not disclose new evidence or any error apparent on the face of the record or any other sufficient reason hence failing to meet the conditions for review of a judgement. The decision in the case of **Stephen Gathua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR** is cited in support of the submission that the grounds for review of a decree or order are as found in Order 42 Rules 1(1) of the Civil Procedure Rules, 2010

11. It is the Respondent's case that the Applicant's argument that the court reached an erroneous conclusion of law in ordering a deposit of security for the due performance of the decree as a condition for grant of stay of execution cannot be a ground for review but a ground for appeal.

12. It is the Respondent's position that since the Applicant has not established sufficient grounds for

review, the court should dismiss this application as required by Rule 3(1) of Order 45 of the Civil Procedure Rules, 2010.

13. The Respondent asserts that the provision of security is a fundamental requirement for the grant of stay of execution of a judgment pending appeal as provided by Order 42 Rule 6(2)(b) of the Civil Procedure Rules, 2010. It is thus the Respondent's submission that in line with the said provision the court has discretion to order the deposit of security that it considers reasonable and just in the circumstances. The decision in **Northwood Service Ltd v Mac & More Solution Ltd [2015] eKLR** is cited in support of this proposition.

14. It is further the Respondent's submission that as was stated in the cases of **Kenya Tanzania Uganda Leasing Co. Ltd v Mukenya Ndunda & another [2013] eKLR** and **Antione Ndiaye v African Virtual University [2015] eKLR**, an applicant's right of appeal against the judgement of the trial court has to be balanced against the respondent's right to enjoy the fruits of his judgement which should not be taken away, and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the applicant. It is the Respondent's conclusion therefore that the order for deposit of security is in line with the Civil Procedure Rules, 2010.

15. Through the instant application, the Applicant seeks a review of orders issued by this court (S.J. Chitembwe, J) on 30<sup>th</sup> November, 2016. The orders provided as follows:

**“i. The applicant to deposit the entire sum of Kshs. 655,441 in court within forty-five (45) days hereof.**

**ii. The applicant to ensure that his appeal is properly filed and served within ninety (90) days hereof.**

**iii. The applicant is condemned to pay costs of this application in view of his indolence.”**

16. A reading of the ruling leading to the issuance of the said orders shows that the Applicant herein had sought stay of execution pending appeal of a judgement issued in favour of the Respondent and against the Applicant by the Chief Magistrate's Court at Malindi in Civil Case No. 38 of 2011. The application was allowed on condition that the Applicant deposits the decretal amount within 45 days from the date of the ruling.

17. The Applicant subsequently brought the instant application seeking to set aside the condition that the order of stay of execution pending appeal was premised on his depositing the decretal amount.

18. It is the Applicant's case that there is an error on the face of the record. He also says he cannot afford to raise the decretal amount.

19. As submitted by counsel for the Respondent, a review of a decree or order premised on Order 45 Rule 1 of the Civil Procedure Rules, 2010 can only occur where the applicant shows there is new and important evidence that was not available at the time the decree was passed or that there is a mistake or error apparent on the face of the record or for any other sufficient reason. The Applicant does not base his application on the ground that there is new and compelling evidence that was unknown to him at the time of hearing of the application that gave rise to the orders he now seeks to review. His application cannot therefore succeed on that ground.

20. The second ground upon which an order can be reviewed is where there is an error or mistake apparent on the face of the record. Such a mistake should be so clear that it does not need any detailed explanation. Whether a judge exercised his discretion properly is not a mistake apparent on the face of the record. The Applicant bases his application on the ground that he cannot raise the decretal amount. That is not a ground for review.

21. There is no other reason given by the Applicant as to why the orders of this court should be reviewed.

22. It must be noted that the Applicant has couched his application so as to appear that the court had stated that his right of appeal can only be exercised upon the deposit of the decretal amount. This is not correct. The Applicant's right of appeal was not interfered with. What has happened is that he has failed to meet the condition for stay of execution pending appeal thereby giving the Respondent the liberty to execute even as the Applicant pursues his appeal.

23. The conclusion is that this application has no merit. The same is dismissed with costs to the Respondent.

**Dated, signed and delivered at Malindi this 30<sup>th</sup> day of November, 2017.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**