



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NUMBER 795 OF 2005

GRACE WANGUI NGENYE.PLAINTIFF/RESPONDENT

VERSUS

TOM MSHINDI.1ST DEFENDANT/APPLICANT

THE STANDARD GROUP LIMITED..... 2ND DEFENDANT/APPLICANT

R U L I N G

The application before the court for determination is the Notice of Motion dated 30th May, 2016 brought under Sections 1A, 1B and 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

The Defendants/Applicants have sought order for stay of execution and proceedings pending: -

1. Hearing and determination of this application
2. Review of the Judgment dated 24th February, 2016.

The application is premised on the grounds that, the defendants filed submission on the 15th January, 2016 in the High Court at Milimani and the same was served upon the Plaintiff on the 20th January, 2016. That the court did not consider the submissions before making the judgment.

It is supported by the affidavit of Wambugu Gitonga Advocate sworn on the 30th May, 2016 wherein it is deponed that on the 30th July, 2015, the court ordered that parties exchange written submissions within 60 days. He was served with the Plaintiff's submission on the 9th September, 2015 after requesting for them.

It is further deponed that due to pressure of work, he was unable to complete writing the submissions until the 15th January, 2016 when the same were filed and served upon the Plaintiffs Advocate on 20th January, 2016.

He avers that it was not within his knowledge that he should have sent the submissions to the Judge who had by then been transferred to Chuka High Court and to whom the file had been sent to for writing of the judgment. He has contended that the contents of the submissions have the chance of convincing the court to a different judgment other than the one entered.

The application is opposed vide a replying affidavit sworn by the Plaintiff, Grace Wangui Ngenye on the 12th August, 2016 wherein she has set out the chronology of events from the taking of the evidence upto the conclusion of the matter on the 30th July, 2015. On the said date, the court ordered the parties to file

their submissions within 60 days from the date thereof and the matter was stood over to 7th October, 2015 to confirm compliance.

She avers that her advocate on record filed her submissions on the 26th August, 2015 and the same were served upon the Defendant's Advocate on the 9th September, 2015. When the matter came up for mention on the 7th October, 2015, counsel for the defendant had not filed his submissions and he requested for more time within which to do so. He was given up to 9th November, 2015 and on the said date the Defendant again sought for more time and he was given up to the 1st December, 2015 to comply which he failed to. The court directed that the file be forwarded to the Hon Justice Mabeya for purposes of writing the judgment.

The Plaintiff avers that the Applicants sole aim in bringing this application is to frustrate the execution of the decree like they had frustrated the conclusion of the hearing. That the Defendants had on many occasions stalled the hearing by claiming that they could not trace their witnesses.

The Plaintiff further depones that the application for review was only brought on 30th May, 2016 a period of 96 days after delivery of the judgment and the Defendants are, therefore, guilty of laches. The Plaintiff further avers that the indolence or failure by a party and/or their advocate to comply with the directions of the court does not constitute any of the grounds upon which an application for review may be brought. She avers that there is no material or evidence envisaged under Order 45 of the Civil Procedure rules to warrant a review of the judgment of the court.

When the matter came up for the hearing of the application on the 29th August, 2016, the learned counsels made oral submissions in support of their respective cases which largely mirrors the contents in the affidavits and which this court has carefully considered

The main prayer sought for in the application is for review of the judgment dated 24th February, 2016. Review is provided for under Order 45 Rule 1 of the Civil Procedure Rules: -

“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 an 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.”

The foregoing provisions are based on Section 80 of the Civil Procedure Act which provides that:

“any person who considers himself aggrieved: -

a. By a decree or order from which no appeal is allowed by this Act, but from which no appeal has been preferred, or

b. By a decree or order from which no appeal is allowed by this Act.

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

An applicant seeking an order for review needs to satisfy the court the following: -

- a. There is a 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 or order was made.
- b. There is some mistake or error apparent on the face of the record.
- c. Or for any other sufficient reason.

While dealing with an application for review the court in the case of **Antony Gachara Ayub Vs Francis Mahinda Thinwa (2014) eKLR** quoted with approval in its earlier decision of **Muyodi Vs Industrial and Commercial Development Corporation & Another (2006) IEA 243** where the court stated: -

“For an application for review under Order XLV, Rule 1 (Now Order 45), the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at the time.....”

Reliance was also made on the case of **Rose Kaiza Vs Angelo Mpanju Kaiza (ZW 9) eKLR** where the Court of Appeal citing its earlier decision in **D J Lowe & Co. Ltd Vs Bangué Indosuez (Civil Appeal Nai. 217/09) (UR)** stated: -

“where such a review application is based on the fact of the discovery of fresh evidence the court must exercise greatest of the care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lie and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was remissness on his part in adducing all possible evidence at the hearing.”

The Applicant herein seeks to review the orders of Justice Mabeya on the ground that his submissions were not considered when the Hon. Judge wrote the judgment. A perusal of the record will show that the matter was concluded on the 30th July, 2015 when parties were given 60 days within which to file written submissions. The Applicants did not file their submissions as ordered and the matter was mentioned on three occasions to accommodate the Applicants and it was not until the 15th January, 2016 when they finally filed the same. It is noted that by this time, the file had been forwarded to Justice Mabeya for purposes of writing the judgment a fact the Applicants were aware of but they did not take reasonable steps to ensure that the submissions reached the Hon. Judge before he could write the judgment. The Applicants were given more than ample time to comply with the court’s directions to file and serve the submissions which they failed to do and no good reason has been given to this Honourable court why the Applicants could not file the submissions on time despite being given numerous opportunities to do so.

The Applicant in his application does not state that there was an error apparent on the record or that there has been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at the time. The only reason that they have given for seeking to review the judgment is that their submissions were not considered. I have taken the liberty to read the said submissions and the judgment by Hon. Justice Mabeya. In his judgment, the Judge not only relied on the Plaintiff’s case law but also other independent legal authorities in arriving at the decision that he did. I wish also to add that the Defendant having failed to call any evidence in defence, were only entitled to submit on quantum of damages which in my view, was taken care of by the court by relying on independent decisions in addition to what was supplied by the Plaintiff.

As provided for under Order 45 Rule 1(6), an application for review should be made without unreasonable delay. The Judgment herein was delivered on the 24th February, 2016 and it was not until 30th May, 2016 when the application herein was filed. This was a period of more than three months and the Applicants have chosen not to explain why it was not filed earlier. In fact, they have said nothing about the delay even after the counsel for the Plaintiff submitted on the issue of unreasonable delay in filing the application. On the other hand, no reason was given by the counsel for the Applicants why he took too long to file his submissions. From the record and in the circumstances of this case, the counsel for the Applicant handled this matter in a rather casual manner.

His failure to file written submissions in the circumstances, of this case, in my view, cannot constitute a sufficient reason for a review especially considering that no reason was given for failure to file the same on time.

The Respondent has raised the issue of the notice of appeal that was filed by the Applicants, and this being an application for review, it is imperative that this court do address the issue. It is noted that though the applicants filed the notice of appeal, the substantive appeal was not filed. The remedy for review is only available to a party who is not appealing against the order or the decree. There are two contradictory decisions from the Court of Appeal on this issue. In the case of **Kisya Vs Attorney General**, the court held that a party who had filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However in **Yani Haryant Vs E. D. & F. Man, (Sugar) Limited**, Civil Appeal No. 122 of 1992 the Court of Appeal was of the following view: -

“the facility of review under Order 45 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including Rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...”

An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in Rule 58 and the inclusion of a Memorandum of Appeal.”

In the light of the two decisions both from the Court of Appeal the High Court is entitled to adopt any of them. In my view, the **Haryant** case reflects the true legal position. A notice of appeal is not an appeal but just a formal notification of an intended appeal. Accordingly, the mere fact that a party has given a notice of intention to appeal does not amount to an appeal for purposes of review.

In view of the foregoing, filing of a notice of appeal is not a bar from applying for review of the same decision which is the subject of the said notice and in the premises the Applicant is properly before the court.

In the premises, the order that commands itself to this court and which I hereby grant is that the Notice of Motion dated 30th May, 2016 is hereby dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 31st day of October, 2016.

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L NJUGUNA

JUDGE

In the presence of

..... **For the Plaintiff/Respondent.**

..... **For the Defendants/Applicants.**