



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPL. NO. 97 OF 2015

**CEASER WAREMA GITHINJI.....PLAINTIFF/
RESPONDENT**

V E R S U S –

**ESTHER IKAMBA.....1ST
DEFENDANT/APPLICANT**

**JOSEPH D. B. KIMANI T/A PYRAMID AUCTIONEES.....2ND
DEFENDANT/APPLICANT**

AJAA OLUBAYI

**PARNWELL M MURANGO T/A AJAA OLUBAYI & CO. ADVOCATES...3RD DEFENDANT/
APPLICANT**

RULING

1. The 1st defendant/applicant took out a motion dated 30th March 2016 where she sought orders to wit:

- a) This application be certified as urgent and the same be heard ex-parte in the first instance.***
- b) This honourable court be pleased to order a stay of sentencing of the 1st and 2nd respondents pursuant to the court orders made on the 15th day of March 2016 pending the hearing and determination of this application.***
- c) This honourable court be pleased to review the orders made on the 15th day of March 2016.***

The application is premised on the grounds that on 15th March 2016, this court ruled that the 1st and 2nd defendants sold the plaintiffs goods while the orders issued on 24th October 2014 by the chairman of the Rent Restriction Tribunal in Rent Tribunal case no. 253 of 2010 were in force. That the court found the 1st and 2nd respondents in contempt of court for breach of the orders of court issued on the 24th October 2014 by the chairman of the Rent Restriction Tribunal in Rent Restriction Tribunal case no. 253 of 2010 and they were ordered to appear in court on 31st March 2016 for sentencing. That the 2nd defendant was informed through a letter dated 21st January 2015 by the 1st respondent's advocate that the Rent Restriction tribunal case no. 253 of 2010 had been settled and to release the entire plaintiff attached goods. That at the time of filing the replying affidavit sworn by the 1st respondent on 16th April 2015, there was an inadvertent omission to annex the said letter which letter is an important evidence which was

not within the 1st respondent's knowledge and which could not be produced at the time the ruling was delivered on 15th March 2016. She stated that the new evidence will enable the court to review the orders made.

2. In response, the plaintiff/respondent raised grounds of opposition to the effect that:

1. "THAT the application is bad in law, incompetent and abuse of court process.

2. THAT the application is unwarranted in the circumstances.

3. THAT the application is brought in bad faith and intended to delay due process of the law."

3. When the motion came up for interpartes hearing, learned counsels appearing in the matter orally submitted on the application. I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for the application and those set out in the grounds of opposition. The applicant avers that in the Rent Tribunal case the applicant was restrained from selling the property of the respondent. That on 20th January 2015, the parties entered a consent where the reference was settled and subsequently on 21st January 2015 Ajaa Olubayi & Company Advocates wrote to the auctioneer to release the goods to the respondent but the letter was delivered on 22nd January 2015 and was duly received. She proceeded to sell the respondents goods on 2nd February 2015 contrary to the Rent Tribunal orders. She averred that the letter of instructions had not been annexed to the affidavit and stated further that had this been done, then this court would have come to different conclusion on the matter. She concluded that contempt proceedings are quasi-criminal and as such the proof should be higher than a balance of probabilities.

4. The plaintiff/respondent on his part opposed the motion and argued that an application for review is governed by Order 45 of the Civil Procedure Rules. He stated that the applicant has not demonstrated that this motion meets the principles for review since the letter was within the applicant's knowledge. He averred that due diligence has not been demonstrated as provided for under Order 45 rule 3 of the Civil Procedure Rules. He further stated that there must be strict proof that the letter was not available for the application for review to suffice. He urged the court to dismiss the motion.

5. The applicant in this case seeks for the review of the ruling dated 15th March 2016, where I found the 1st and 2nd respondents in contempt of the court order. I stated that before sentencing them, I would give them a chance to mitigate. The applicant therefore in addition to praying for review orders has sought for an order for stay of sentencing.

6. The Court of Appeal in the case of **Pancras T. Swai vs Kenya**

Breweries Limited (2014) eKLR referred to the case of **National Bank of Kenya Limited vs Ndungu Njau Civil Appeal 211 of 1996 (unreported)** where it was held that:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter, more can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law, misconstruing a statute or other provision of law cannot be a ground of review.

.... the learned judge he made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been contested as in this case cannot be reviewed by the same court

which had adjudicated upon it.”

7. According to the Court of Appeal case above and Order 45 Rule 1 of the Civil Procedure Rules, review of a case can only be done where a person aggrieved by an order discovers new and important matter or evidence which was not previously within his knowledge at the time the decree was passed or order made or secondly on an account of some mistake or error apparent on the face of record or for any other sufficient reason desires to obtain a review of the decree or order.

In the present case the 1st defendant applicant has produced a letter dated 21st January 2015 addressed to the Pyramid Auctioneers by the plaintiff’s advocate. According to this letter, the plaintiff informs the auctioneers that the matter was marked settled and they proceed to ask the auctioneers to release all goods attached subject to the payment of their fees and storage charges by the plaintiff. I have looked at the application dated 5th March 2015 that gave rise to my ruling dated 15th March 2015 that has necessitated this prayer for review. In that application, the plaintiff did not attach this particular letter which had been drafted by his advocates. The letter would have shed more light since the applicant herein would have become aware of it and she would have presented her case differently in the circumstances. None of the parties attached the letter in question and as such there is a possibility that indeed the applicant discovered new evidence which was not within her knowledge as a result of which she disposed of the property.

8. I am therefore convinced that the applicant did not have the knowledge of the letter. I hereby allow the application and review my orders made on 15th March 2016. The plaintiff to have the costs of the application.

Dated, Signed and Delivered in open court this 25th day of November, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent