



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 103 OF 2014

EQUITY BANK LIMITED (KISUMU BRANCH).....APPELLANT

VERSUS

CHEMELIL SUGAR COMPANY LIMITED.....1ST RESPONDENT

THYMA ENTERPRISES COMPANY.....2ND RESPONDENT

RULING

- 1). By its notice of motion dated 2-3-2015 the applicant prays for the following reliefs:
 1. **There be stay of proceedings anchored on the ruling of this honourable court delivered on the 18th February 2015 pending the hearing and determination of this review application.**
 2. **That corollary to Order 1 above the the condition provided for in the ruling of this court of 18-2-2015 be set aside.**
 3. **This court do grant the applicant's prayers as prayed in the application dated 23-9-2014.**
- 2). The said application is grounded on the affidavit of Tom Kuya together with the attendant annextures sworn on 2-3-2015. The substantive argument therein is that contrary to the court's finding that there was a credit balance in the account of the respondent, it already had a debit balance of Kshs. 264,034 and the applicant has attached a bank statement to that effect. In the premises, it will be fair for the court to review its order which had granted a conditional stay to the applicant on 18-2-2015. In that ruling which was premised on the application dated 23-9-2015 the court had ordered that the applicant do pay the respondent the sum of Kshs. 264,034/= within 30 days pending the determination of the appeal.
- 3). The respondent has opposed the application vide the grounds of opposition dated 9-3-2015 arguing that the issues raised herein by the applicant are best raised in the appeal and not review and that the application offends the provisions of order 42 Rule 6 (6) of the Civil Procedure Rules.
- 4). Having perused the application together with the parties written submissions, the issue whether to review an order is anchored under the provisions of Order 45 (1) (2) of the Civil Procedure Rules which states:

“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 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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

5). From the perspective of the applicant, had the court been made aware that there was a “debit balance” and not “credit balance”, it would not have made the order its seeking to review.

6). On the other hand the respondent thinks otherwise. It argued that the application offends the provisions of Order 42 (6) of the Criminal Procedure Rules. This portion deals with stay pending appeal and it states grounds which the court ought to consider when granting such stays.

7). From the wholesome reading of the application I find that the same is meritorious. The attached bank statements showed that there is a debt balance and that indeed it is the 2nd respondent who owes money to the applicant's bank. This bank statement it appears was not made known by the applicant at the time of arguing the application dated 23-9-2014.

8). I do not think therefore that the application offends the provisions of Order 42 (6) of the Civil Procedure Orders as it does not seek to appeal but review the same. The purposes of any review application is to correct an error which was not apparent at the time of making the order and the same has therefore been made known. The question of whether the respondent having to suffer any loss or damage may not necessarily apply at this juncture.

9). In National Bank of Kenya Ltd -VS- Ndungu Njau Civil Appeal No. 211 of 1996 (unreported) the court stated as follows:

“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 not require an elaborate argument to be established”.

10). In this regard I do not think that the debit balance as indicated in the bank statement needs much elaboration. Neither do I find the application unmeritorious and abuse of the court process. In the premises I shall allow the application dated 3-3-2015 and further review the order of 18-2-2015 by setting them aside. I shall further substitute the same with the orders that:

There be stay of execution of the garnishee order absolute dated 9-8-2012 pending the hearing and determination of the intended appeal.

The attachment made on 13-8-2013 by May Wood Auctioneers, is hereby lifted and discharged altogether.

Costs shall await the appeal.

Orders accordingly.

Dated, signed and delivered at Kisumu this 30th day of April, 2015.

H.K. CHMEITEI

JUDGE