



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 40 OF 2001

RAMJI MEGJI GUDKA LIMITED PLAINTIFF

-VERSUS-

ALFRED MORFAT OMUNDI MICHIRA 1ST DEFENDANT

GETEMBE THRIFT COMPANY LTD 2ND DEFENDANT

THOMAS ORESI OMWOYO 3RD DEFENDANT

RULING

1. In a judgment that was delivered on 30th September 2011, this court dismissed the plaintiff's suit herein with costs and allowed the 1st and 2nd defendant's counter-claims. The 1st and 2nd defendants had counter-claimed for the rectification of the register in respect of all that parcel of land known as **LR No. Kisii Municipality/Block II/72 ("the suit property")** by the cancellation of the plaintiff's name therefrom and the registration of the suit property in the name of the 1st defendant. The plaintiff was dissatisfied with the said judgment and filed a notice of intention to appeal against the same to the Court of Appeal. Soon after filing the said notice of appeal, the plaintiff filed an application for stay of execution of the said judgment on 13th October 2011 pending the hearing and determination of the intended appeal to the Court of Appeal. The plaintiff's application was opposed by the defendants. The application was heard by Korir-Lagat J. who in a ruling delivered on 21st August, 2013 allowed the application conditionally. The court allowed the plaintiff's application and stayed the execution of the judgment that was entered herein on 30th September 2011 on condition that the plaintiff deposits in court the title deed for the suit property and a sum of Kshs. 500,000.00 as security.
2. The plaintiff found the second condition for stay onerous and filed an application on 24th September 2013 by way of a Notice of Motion dated 23rd September 2013 seeking the review of the same. In the plaintiff's application for review which is the subject of this ruling, the plaintiff sought the setting aside of the condition requiring the plaintiff to deposit a sum of Kshs. 500,000.00 in court and the substitution thereof with an order that the plaintiff furnishes a bank guarantee and/or an insurance bond of a similar amount as security. In his affidavit sworn on 23rd September 2013 in support of the application, the plaintiff's managing director one, Ashwin Gudka termed the condition requiring the plaintiff to deposit a sum of Kshs. 500,000.00 in court as a security *burdensome, oppressive, punitive and unjust*. He contended that the condition if complied with would occasion the plaintiff substantial loss as monies deposited in court do not accrue or attract interest. The plaintiff's managing director contended further that if the plaintiff was to deposit the said amount in court, the plaintiff would be deprived of the use and benefit of the said amount that would not earn him any benefit or profit. The plaintiff's said managing

director contended that good grounds have been shown to warrant the variation of the said condition.

3. The plaintiff's application for review was opposed by the 1st and 2nd defendants. The 1st defendant through his replying affidavit sworn on 10th October 2013 contended that the plaintiff does not deserve the granting of the orders sought. The 1st defendant contended that no cause had been shown by the plaintiff to warrant the variation of the orders of the court made on 21st August 2013. The 1st defendant contended that the plaintiff had failed to comply even with the first condition for stay that required the plaintiff to deposit the title deed for the suit property in court. In its grounds of opposition filed on 7th October 2013 in opposition to the application, the 2nd defendant contended that no cause had been shown for the review of this court's order made on 21st August 2013.
4. When the plaintiff's application came up for hearing on 27th January 2014, Mr. Oguttu advocate appeared for the plaintiff, Mr. Nyatundo advocate for the 1st defendant, Mr. Masese advocate for the 2nd defendant and Mr. Bosire advocate for the 3rd defendant. In his submission in support of the application Mr. Oguttu reiterated the contents of the affidavit of Ashwin Gudka filed in support of the application and argued that the condition requiring the plaintiff to deposit a sum of Kshs. 500,000.00 in court was onerous and burdensome. The plaintiff's advocate submitted that the plaintiff would suffer prejudice if the condition is not varied. The plaintiff's advocate contended that a banker's guarantee or an insurance bond is equivalent to cash and the same would serve the same purpose as the security that had been ordered by the court herein but without causing difficulty or hardship to the plaintiff. On the allegation that the plaintiff had not met the first condition that was imposed by the court, the plaintiff's advocate submitted that the plaintiff had duly complied by depositing the certificate of lease for the suit property in court. On behalf of the 1st defendant, Mr. Nyatundo submitted that the plaintiff had not satisfied conditions for review. The 1st defendant's advocate submitted that the condition that was imposed by the court was not punitive as claimed by the plaintiff. As a way of compromise, the 1st defendant suggested that the said sum of Kshs. 500,000.00 be deposited in an interest bearing account in joint names of the advocates for the parties. For the 2nd defendant, Mr. Masese reiterated the contents of the 2nd defendant's grounds of opposition and urged the court to dismiss the plaintiff's application. Mr. Bosire for the 3rd defendant did not address the court.
5. I have considered the plaintiff's application together with the affidavit filed in support thereof. The law on review of court decrees and orders is now settled. As was held in the case of, **Nairobi City Council –vs- Thabiti Enterprises Ltd, Court of Appeal at Nairobi, Civil Appeal No. 264 of 1996** (unreported) this court has unfettered discretion to review its decree or order for sufficient cause. It follows therefore that the question that I need to answer in this application is whether the plaintiff has shown sufficient cause to warrant a review of the condition that this court imposed on 21st August 2013. As I have stated above, the plaintiff has contended that the condition that was imposed by the court was oppressive, unjust, burdensome, punitive, and amounts to discrimination. The plaintiff has claimed that if he pays the sum of Kshs. 500,000.00 in court as a condition for stay as ordered by the court, he will lose the benefit of that money for the duration that the appeal would take as he will not be able to earn any interest or profit from the same while it remains deposited in court. The plaintiff has not suggested that it will have any difficulty in coming up with the said sum of Kshs. 500,000.00. Its problem is that while that amount is deposited in court, he will not be able to have the benefit thereof. The plaintiff prefers to provide a bank guarantee or an insurance bond that would be convenient to him. I am entirely in agreement with the defendants' submission that the plaintiff has not shown sufficient reasons to warrant a review of the condition that was imposed herein on 21st August 2013. Court orders are not made for convenience of the parties. A party cannot seek a review of an order or decree of the court merely because the same does not serve his convenience. While the court was imposing the condition for depositing of Kshs. 500,000.00 in court as a security, the court was aware that there are other forms of security such as bank guarantees and insurance bonds. The court having imposed the condition requiring the security to be deposited in court, it cannot vary that condition because it does not suit the convenience of the plaintiff. The condition can only be varied for good cause.

6. As I have mentioned above, the plaintiff has no difficulty in coming up with the sum of Kshs. 500,000.00 that is supposed to be deposited in court as a security. Its contention is that the other forms of security that it has proposed would be more convenient to it. With all due respect, convenience of a party to a suit is not a sufficient cause to warrant a variation of an order or a decree. It follows from the foregoing that the plaintiff has not shown sufficient cause to warrant the review order sought. I would add further that the fact that an order that has been issued by the court is found by a party to be unjust, oppressive and punitive can only form a ground of appeal but not a ground for the review of the said order. If a court was to review its order based on those grounds then it would be sitting on appeal against its own decision. In the case of **National Bank of Kenya Ltd –vs- Ndungu Njau, Court of Appeal at Nairobi, Civil Appeal No. 211 of 1996** (Unreported) the Court of Appeal stated 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 not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor 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 for review.”

7. The upshot of the foregoing is that the plaintiff’s application dated 23rd September, 2013 has no merit. The same is hereby dismissed with costs to the defendants.

Delivered, dated and signed at Kisii this 28th day of March 2014.

S. OKONG’O

JUDGE

In the presence of:-

Mr. Oguttu for the Plaintiff
Mr. Nyatundo for the 1st Defendant
Mr. Masese for the 2nd Defendant
N/A for the 3rd Defendant
Mr. Mobisa Court Clerk

S. OKONG’O

JUDGE