Amelia Karen Hotel v Kibuba & another (Sued as the Personal Representatives of the Estate of Kibuba Nge'the) (Environment & Land Case E099 of 2021) [2022] KEELC 12818 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12818 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E099 OF 2021

OA ANGOTE, J

SEPTEMBER 30, 2022

BETWEEN

AMELIA KAREN HOTEL ..... APPELLANT

AND

LOISE WANGUI KIBUBA ..... 1ST RESPONDENT

RAHAB WANJIKU KIBUBA ..... 2ND RESPONDENT

SUED AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF KIBUBA NGE'THE

RULING

Background

1. Before this Court for determination is the Appellant's Notice of Motion application dated May 25, 2022seeking for the following orders:

    a) That this Honourable Court be pleased to enlarge time and extend the Order for stay of execution given by this Court herein on May 19, 2022pending the hearing and determination of the Appeal herein.

    b) That this Honourable Court be pleased to review, vary and/or set aside the conditional order given by this Court herein on May 19, 2022requiring the Appellant to deposit the sum of Kshs. 10,000,000 in a joint interest earning account to be opened in the names of the Appellant's and Respondent's Advocates within ten (10) days from the date of the Ruling by making an order for the provision of alternative security in the form of a pledge of shares in the Appellant or a pledge of assets of the Appellant to the Respondent for the due performance of the Order issued in Nairobi BPRT Case No. 217 of 2021 on December 22, 2021.

c) That in the alternative, his Honourable Court be pleased to review, vary and/or set aside the conditional order given by this Court herein on May 19, 2022requiring the Appellant to deposit the sum of Kshs. 10,000,000/= in a joint interest earning account to be opened in the names of the Appellant's and Respondent's Advocates within ten (10) days from the date of the Ruling by making an order increasing the timelines within which the Appellant is required to deposit the said sum of KES. 10,000,000.00 to ninety (90) days.

d) That this Honourable Court be pleased to make any other order which it deems just and fit to grant in the circumstances of the case.

e) That the costs and incidentals of this Application be provided for.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Leonard Kang'ethe Wanjiku, the Executive Director of the Appellant who deponed that the Applicant filed an application seeking to stay the execution of the Business Premises Rent Tribunal's order dismissing its Reference and permitting the Respondent to levy distress for rent against it while the Respondent filed an application seeking the deposit of security pending the determination of the Appeal pursuant to Order 46 Rule (2) of the Civil Procedure Rules 2020.

3. It was deponed by the Appellant's Director that by a Ruling delivered on 19th May, 2022 in respect of the two applications, this Court granted an order of temporary prohibition restraining the Respondent from evicting or distressing the Applicant for rent, and a stay of execution of the Ruling and orders of the Tribunal pending the hearing and determination of the Appeal on condition that the Applicant deposits the sum of Kshs 10,000,000/= in a joint interest earning account to be opened in the joint names of the parties' respective counsel within ten (10) days from the date of the Ruling.

4. According to the Appellant, this Court should review its order of May 19, 2022on account of some mistake or error apparent on the face of the record and/or for any sufficient reason; that the Tribunal dismissed the Reference and application for reinstatement thereof hence condemning the Applicant unheard and as such no amount of rent was found to be due and owing to the Respondent and that no decree for Ksh16,186,500 or at all was issued against the Applicant.

5. According to the deponent, the Respondent misled this court in fashioning an application for security pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, when there did not exist any money decree or order for which the Applicant would be expected to provide security and that there is in the circumstances an error apparent on the face of the record because the matter before the Tribunal had not been determined to give rise to a decree upon which security would be required to be deposited for performance.

6. The Appellant's Director deponed that whereas the Applicant would wish to comply with the court's orders on security, it is at present impecunious and does not have the sum of Kshs 10,000,000 in its bank account or any of its reserves due to the company's dire financial position occasioned by the current harsh economic realities aggravated by the Covid-19 crisis from which the Appellant is yet to recover.

7. It was deponed that the Applicant is ready and willing to abide by an order of this court to pledge its' shares to the Respondent; that the Applicant is equally ready and willing to abide by an order of the Court to conduct a joint valuation of its entire assets and pledge the same assets to the Respondent and that the Applicant is also willing to source for the sum of Kshs10,000,000 within 90 days and to vacate the suit premises so as not to incur any further liability.

8. The Appellant's Director finally deponed that the application has been brought timeously and in good faith and that the interests of justice dictate that the orders sought be allowed to safeguard the Applicant's rights and avoid rendering the Appeal an academic exercise.

9. In response to the application, Susan Njeri Kibuba, a Co-Administrator of the Respondent's Estate deponed that the application lacks merit and is meant to deny the Respondent the opportunity to receive rental income due and owing from the suit premise and that the application is a re-litigation of the application for stay of execution disguised as one for review.

10. It was further deponed that vide its decision of 19th May, 2022, the court gave directions of what ought to transpire in default of the orders and in this case, the Respondent had already executed the orders hence the Applicant's prayer that the orders be extended and or varied has been overtaken by events and that the Applicant's assets in the suit premises have already been proclaimed and attached by the Respondent and are as such unavailable to be pledged in the circumstances.

11. It was deponed that the Applicant has vacated the premises; that it is mischievous for the Applicant to seek an extension of 90 days within which to comply with the Court orders when they have already defaulted and execution commenced; that extension of time to comply with Court orders is an equitable remedy only available to a deserving party at the discretion of the Court upon fulfilling the elements for review of the orders of the court as set in law and that the Application is unmerited.

12. The parties filed submissions which I have considered. I have also considered the authorities relied upon by the parties.

Analysis and Determination

13. Having considered the Motion, the Affidavits and the submissions in support and in opposition thereto, the issues for determination are;

    a) Whether the Applicant has satisfied the grounds to warrant an order of review?

    b) Whether the Court should enlarge time and extend the Order for stay of execution given by this Court on May 19, 2022.

14. The application herein seeks a review of the decision of this court made on May 19, 2022, specifically with respect to the orders for security requiring the Applicant to deposit the sum of Kshs 10,000,000 in a joint interest earning account in the names of the parties' counsel within ten (10) days from the date of the Ruling. The Applicant is also seeking for an order to enlarge the timelines within which the Applicant is required to deposit the aforesaid sum to ninety (90) days.

15. The law governing the framework of review is set out in Section 80 of the *Civil Procedure Act* and Order 45, Rule 1(1) of the *Civil Procedure Rules*. Section 80 of the Act provides as follows:

> " 80. Any person who considers himself aggrieved-
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (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."

16. Order 45 Rule 1 of the Civil Procedure Rules, provides as follows:-

> " Rule 1 (1) Any person considering himself aggrieved-
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> (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (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 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."

17. A reading of the above provisions shows that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by limiting it to discovery of new and important matters or evidence, mistake or error on the face of the record or any other sufficient reason.

18. This position was restated by the Court of Appeal in *Benjoh Amalgamated Limited & another vs Kenya Commercial Bank Limited* [2014] eKLR where the court observed that;

> " In the High court, both the *Civil Procedure Act* in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review."

19. The expression of the Supreme Court in *Parliamentary Service Commission vs Martin Nyaga Wambora & others* [2018] eKLR cited by the Respondent, whilst dealing with review of a decision of a single or limited bench by a bench of five or more under the Supreme Court Rules is instructive and sets out the parameters for the discretionary orders of review thus;

> " A review of exercise of discretion is not as a matter of course to be undertaken in all decisions ...., review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the Applicant to the satisfaction of the Court; an Application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application, in an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically, During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review, the Applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and as a result a wrong decision was arrived at; or it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice."

20. By way of a brief background, the Applicant herein instituted a Reference against the Respondent at the Bussiness Premises Rent Tribunal challenging the eviction notice issued against it. The Reference

was dismissed and an application to reinstate it was equally dismissed. The Applicant instituted the present matter seeking to Appeal against the decision of the Tribunal.

21. On December 22, 2021, the Appellant filed an application seeking to stay the execution of the Orders of the Tribunal and an order of order of injunction restraining the Respondent from evicting it pending the determination of the Appeal. The Respondent on its part filed an application seeking to have the Applicant deposit the sum of Kshs Sixteen Million (Kshs 16,186,500/=) into a joint interest earning account to be held by the joint firm of the Advocates on record within 14 days pending the hearing and determination of the Appeal.

22. The Court considered the two applications and vide its Ruling of May 19, 2022granted the Applicant a conditional order for stay of execution and prohibited the Respondent from evicting or levying distress on the Applicant. The Court stated thus;

> " The above two orders are granted on condition that the Appellant/Tenant deposits Kshs. 10,000,000 in a joint interest earning account to be opened in the names of the Appellant's and the Respondents' advocates within 10 days from the date of this Ruling, failure of which execution to issue as directed by the Tribunal."

23. The aforestated portion of the Ruling by the Court is the subject of the present application.

24. The Motion as brought by the Applicant is predicated on the grounds that there is an error apparent on the face of the record and that there are sufficient reasons to warrant an order for review. In discussing this concept, the Court of Appeal in *Kenya Trypanosomiasis Research Institute vs Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs)* [2019] eKLR referred to its various decisions as follows;

> " This Court in *Muyodi vs. Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 described an error on the face of the record as follows:
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> "In *Nyamogo and Nyamogo v Kogo* [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

25. This position was also stated by the Ugandan Court of Appeal in the case of *Apollo Waswa Basude & 2 others (As administrators to the Estate of the late Sepiriya Rosiko) vs Nsabwa Ham*, Civil Appeal No 288 of 2016, where the court at para 310 stated thus;

> " ...an error apparent on the face of the record is one that is evident and its incorrectness does not require any extraneous matter by way of proof. It is so manifest and clear that no court

of law exercising its judicial power would allow it to remain on the court record. This error may be either of fact or of law..."

26. From the foregoing, it is apparent that an error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record.

27. So what is the error herein? According to the Applicant, the Respondent misled this Court by fashioning an application for security pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules, when there did not exist any money decree or order for which the Appellant would be expected to provide security and further, that there is an error apparent on the face of the record because the matter before the Tribunal had not been determined to give rise to a decree upon which security would be required to be deposited for performance.

28. In response, the Respondent asserts that no error apparent on the face of the record has been demonstrated by the Applicant and that the law provides for security as one of the conditions in granting stay of execution pending appeal which the court addressed and which guided the court in determining security.

29. One of the pre-requisites in an application for stay of execution pending Appeal is the provision of security. This is found in Order 42 Rule 6 (2) of the Civil Procedure Rules, which provides as follows:

> " 2- No order for stay of execution shall be made under sub rule (1) unless–
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> (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
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> (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."

30. The Court of Appeal in *Butt vs Rent Restriction Tribunal* [1982] KLR 417 gave guidance on how a court should exercise its discretion in granting stay of execution pending appeal as follows:

> " ...The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

31. It is apparent from the foregoing that the issue of security is discretionary. The Applicant's argument is that there was no basis for consideration of security as there was no decree and that the Respondent's application was erroneous in that regard.

32. Having already laid out the foundation of security in applications for stay of execution pending Appeal, it is clear that notwithstanding the Respondent's application, the Court was obligated to consider the question of security while considering the Applicant's application for stay of execution which it did.

33. In the circumstances, it is apparent that there is no error apparent on the face of the record. Any question as to the court's discretion in imposing the conditions that it did with respect to security is a question better suited for Appeal.

34. The second limb of the Applicant's prayer for review is premised on the ground of "any other sufficient reasons." The phrase "sufficient cause" was defined by the Supreme Court of India in the case of Civil Appeal 1467 of 2011 *Parimal vs Veena Bharti* (2011) as follows:

> "Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man."

35. The scope of the ground "for any other sufficient reason" has been subject to different interpretations by the courts. There are two schools of thought, the first being that the "sufficient reason" alluded to must be analogous to the grounds pertaining to discovery of new evidence or error on the face of the record and second that the "sufficient reason" need not be analogous to the previous grounds.

36. The Court of Appeal in *Assets Recovery Agency vs Charity Wangui Gethi & 3 others* [2020] eKLR stated that;-

> "The ground "other sufficient reason" has been held to be consonant with the first two grounds: See *Kuria v Shah* [1990] KLR 316."

37. The Court of Appeal in *Pancras T. Swai vs Kenya Breweries Limited* [2014] eKLR was of a contrary view and adopted the position that "sufficient reasons" need not be analogous by stating;

> "As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the *Civil Procedure Act*, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In *Sarder Mohamed v. Charan Singh Nand Singh and Another* (1959) EA 793, the High Court correctly held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in *Wangechi Kimata & Another vs Charan Singh* (C.A. No. 80 of 1985) (unreported) wherein this Court held that
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> "any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the *Civil Procedure Act*; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

38. The Court agrees with the position that any sufficient reason need not be analogous to the other two conditions. Having regard to the application, whereas not expressly stated, it would appear that the sufficient reason the Applicant seeks to rely on is the fact that it is presently impecunious and does not have the sum of Ksh. 10,000,000 in its bank account or any of its reserves due to the company's dire financial position which has been aggravated by the Covid-19 crisis from which the Appellant is yet to recover. The Applicant has in this regard adduced its bank statement indicating that it does not have the sum of Kshs 10,000,000.

39. As to whether this constitutes sufficient reason, the Court thinks not. It is crucial to note that the Applicant in its initial application of December 22, 2021, despite being aware of its financial situation, did not give the court any guidance as to the security it was willing to deposit, only indicating its willingness to abide by any orders of the court in that respect.

40. That being the case, it is the finding of the court that the fact that the Applicant is unable to afford the security ordered is not in itself sufficient cause warranting a review of its orders because an order for security is not necessarily dependent on a party's ability to pay, as expressed by the Court in of *Absalom Dova vs Tarbo Transporters* [2013] eKLR;

> " The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation..."

41. The above notwithstanding, even if the court was convinced to grant the prayer for alternative security sought, the Applicant has not aided the court in this regard. The value of the shares and/or assets it seeks to pledge have not been specifically identified nor valued. There is therefore no basis upon which the Court can grant the alternative prayer.

42. The third alternative prayer that the Applicant seeks is that the timelines for the deposit of the security be enlarged to 90 days. The Respondent asserts that this prayer has been overtaken by events as execution has already taken place and the court will be issuing orders in vacuum.

43. Section 95 of the *Civil Procedure Act* grants the Court discretion to enlarge time as follows;

> " Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

44. Order 50 Rule 6 of the Civil Procedure Rules also provides;

> " Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.
>
> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

45. In *Nicholas Kiptoo Arap Korir Salat vs The Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR, the Supreme Court stated thus with respect to extension of time:-

> " ..... It is clear that the discretion to extend time is indeed unfettered.
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> It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant. "We derive the following as the

> underlying principles that a court should consider in exercising such discretion:-Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis; Where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; Whether there would be any prejudice suffered by the respondent, if extension is granted; Whether the application has been brought without undue delay; and Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

46. It is apparent from the foregoing that extension of time is an equitable remedy granted to a deserving party at the discretion of the court, which discretion should be considered on a case to case basis. Before delving into whether the same is merited, the Court must first interrogate the assertions that any orders for extension will be issued in vain.

47. In its Ruling of May 19, 2022, this court granted the Applicant a stay of execution on condition that the Applicant deposits the sum of Kshs 10,000,000 into a joint interest earning account within 10 days of the date of the Ruling. This was not done precipitating the present application.

48. The Respondent asserts that execution has already taken place and therefore there is nothing to extend. This position has not been rebutted by the Applicant. Indeed, the Applicant has not controverted the Respondent's deposition that it has since moved out of the suit premises.

49. That being the case, and considering that it is now more than 90 days since the court granted conditional stay, which condition has not been met by the Applicant to date, the issue of enlarging time to allow the Applicant deposit the Kshs. 10,000,000 in a joint account does not arise.

50. In the circumstances, and for the reasons I have given, I dismiss the Appellant's application dated 25th May, 2022 with no order to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Akhaabi for the Appellant

Mr. Atwal for the Respondent

Court Assistant - June