REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 50 of 200

ROSE NJERI MUIRURI ……. APPELLANT

VERSUS

1. **JAMES KIIRU CHEGE)**
2. **FAMILY FINANCE BUILDING SOCIETY)…..... RESPONDENT**

(Being an appeal from the Ruling of the learned Senior Resident Magistrate, Kigumo (L. Nyambura) as delivered on 4th May, 2004 in L.D.T. case No. 5 of 2002)

JUDGMENT

The resident magistrate at Kigumo court in LDT No. 5 of 2002 issued an order on 3rd July 2003 of garnishee absolute against the 2nd respondent Family finance building society. The garnishee was ordered by the court to pay to the appellant Kshs.382,000/-. The garnishee paid to the appellant Kshs.312,024.80/-. That amount was short by Kshs.79,975.20/- of the garnishee amount. The short fall prompted the appellant to file the notice of motion dated 19th September 2003 seeking the court's order as appropriate against the garnishee due to that short fall. The court granted prayers as sought in that application. The garnishee by a chamber summons dated 17th March 2004 sought a review of the orders of the notice of motion dated 19th September 2003. The garnishee further prayed that on the review being made the application be dismissed. The lower court granted garnishee the prayers sought in its application. The order of the court allowing the application of the garnishee is the subject of the present appeal. The appellant has brought before court the following grounds of appeal:-

"1. The learned Senior Resident Magistrate grossly erred in law in entertaining and allowing an application for review when there were not sufficient or any grounds whatsoever to justify or warrant a review.

2. The learned Senior Resident Magistrate grossly erred in law and in fact in finding that the 2nd respondent/garnishee had provided sufficient new and important evidence to court to justify a review.

3. The learned Senior Resident Magistrate grossly erred in law in failing to appreciate that the application for review as brought by way of Chamber summons was incompetent, misconceived and bad in law as the same ought to have been brought by way of Notice of Motion as provided in law.

4. The learned Senior Resident Magistrate grossly erred in law and in fact in admitting in evidence fresh documents as filed by the garnishee which documents ought to have been presented in the first place.

5. The learned Senior Resident Magistrate erred in finding and holding that the garnishee had fully satisfied the garnishee absolute order when in fact the garnishee had only paid a portion of the order.

6. The learned Senior Resident Magistrate erred in failing to see that the garnishee should have gone for appeal and not review as there were no grounds in law to justify or warrant a review."

In the first ground the appellant argued that there was no sufficient ground in the garnishee application to justify review of the appellant's application. The background to the action in the lower court was that the garnishee had obtained credit in favour of the judgment debtor from a property which was sold by auction by the garnishee. The garnishee stated before the lower court that although the credit into the judgment debtor's account was Kshs.382,384.90/- there were other fees, interests and other charges that were deductable from that account. Those charges the judgment debtor was obliged under the charge instrument to honour. After deducting those charges the garnishee stated that it held in credit in the judgment debtor's account Kshs.312,024.80/-. This was the amount that was paid to the appellant following the garnishee proceedings. In the application for review before the lower court Paul Maina Muturi Manager of the garnishee stated that the previous manager who had sworn previous affidavits at the garnishee herein forgot to inform the court of those other charges. In his affidavit Muturi attached documents proving the deductions of those charges. The appellant in her argument are that the grounds for seeking review as stated in the garnishee application were not capsulated in section 80 of the Civil Procedure Act or Order XLIV rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provide as follows:-

"***80. Any person who considers himself aggrieved-***

(a) by a decree or order from which an 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."

Review therefore is permitted under this section from a decree or order. Order XLIV rule 1 is in the following terms:-

"***1 (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 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."

That rule provides that the courts can review orders or decree where new or important evidence is available that was not produced when the order was issued, on account of mistake, error apparent on the face of the record or for any other sufficient reason. The court of appeal in the case of ***Civil Appeal No. 235 of 1997 Official Receiver and Liquidator and Freight Forwarders Kenya Limited*** considered both the above section and rule. In that case the official receiver had been ordered to make payment. He was unable to make the said payment because the money that could have been used to make that payment had been deposited in a financial institution that became insolvent. The court of appeal asked itself whether

that situation could be brought under "*for any other sufficient reason"*. The court of appeal proceeded to consider a previous authority of that court as could be seen in the following portion:-

"In Wangechi Kimita & Another v. Mutahi Wakibiru (1982-88) 1 KAR 977 with regards to the words "for any other sufficient reason" Nyarangi JA said:-

"… ***I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly S. 80 of the Civil Procedure Act confers unfettered right to apply for a review and so the words "for any other sufficient reason" need not be analogous with the other grounds specified in the Order: See Sadar Mohamed v. Charan Singh (1959) E.A. 793."***

And in agreeing with Nyarangi J.A. Hancox J.A (as he then was said at page 981)

"***I would add that I also agree with the reasoning of Nyarangi J.A. that the third head under Order 44 rule 1(1), enabling a party to apply for a review namely "or for any other sufficient reason" is not necessarily confined to the kind of reason stated in the two proceeding heads in that sub-rule, which do not themselves form a "genus or class of things with which the third general head could be said to be analogous."***

From the foregoing, it would appear that this court has already given its interpretation to what "or for any other sufficient reason" means.

The position in this appeal is that the order of the superior court made on 28th April, 1994 could not be complied with since the Official Receiver had put the money in Jimba Credit Finance which had become insolvent. The Official Receiver was, therefore, at the risk of being in contempt of a court order. Hence, that is why an application for review was made. In my view the situation that the appellant found itself constituted "any other sufficient reason" to warrant a review of the previous order."

The facts in that case in the court of appeal are similar to this present case. The official receiver just like the garnishee in this case did not have the money he was being asked to pay. Blacks Law Dictionary defines garnishee as, "*A creditor who initiates a garnishee action to reach the debtors property that is thought to be held or owed by a third party." (Underlining mine)* From that definition it is clear what the appellant was in law entitled to the funds that were the property of the judgment debtor. Such funds could only be ascertained once the garnishee had deducted the money due under the obligation of the charge instrument. For that reason grounds No. 1, 5, and 6 of this appeal are rejected. The finding made above also applies to ground No. 2. Further on ground No. 2 Order XLIV rule 1 provides that a decree or order could be reviewed on account of mistake or error apparent on the face of it. When the court was hearing the appellant's application dated 19th September 2003 the garnishee filed a replying affidavit where the issues of the deductions to be made on the Judgment debtor's account were disclosed. The court however failed to take into account that information in its ruling. I therefore find that mistake was apparent on the face of the record. Had the learned magistrate correctly interrogated that affidavit of the garnishee she would not have issued orders against the garnishee. On that score the issue raised in ground No. 4 that is the issue relating to the deductions made in the judgment debtor's account were raised by the garnishee previously before the hearing of the review application. At the hearing of the review application all the garnishee did was to attach evidence of those deductions. There was no error in entertaining those documents. On ground No. 3 the appellant faulted the application for review on the basis that it was brought by way of chamber summons rather than by notice of motion. The appellant is correct in so far as she argues that such an application as provided under Order L rule 1 ought to have been by way of Notice of motion. But the issue that the court needs to consider is whether failure to come under notice of motion was fatal to the garnishee's application. I respond with an emphatic, No. The court of appeal has had to consider this issue more than once. In the case of ***Boyes v Gathure [1969]*** the court held as follows:-

"***Use of the wrong procedure did not invalidate the proceedings, because:***

(a) it did not go to jurisdiction, and

(b) no prejudice was caused to the appellant."

The court of appeal also considered the same issue in the case of ***Civil Appeal No. 284 of 1997 Johnson Joshua Kinyanjui & another and Rachel Wahito Thanke & another.*** The appropriate portion of that case is as follows:

"***If an application is brought under different rules, one calling for a Notice of Motion application and another calling for a chamber summons application then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of a Notice of Motion, the application does not become incompetent."***

Order 50 rule 11 provides:

"***Where any application which is authorized to be made in court is made in chambers the judge may either adjourn the application into court or hear it in chambers."***

Order 50 rule 10 provides**:**

"***Any judge or magistrate may adjourn into court an application made to him at chambers which he deems more convenient to be considered in court."***

It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in court or in chambers".

It is clear from the above cases that the failure to file a notice of motion application was not fatal to the garnishee application. The appellant's argument in that regard is rejected. The appellant further argued that the garnishee failed to extract the order which was the subject of review application. The appellant argued that failure to attach order was fatal to the garnishee application. On my perusal of the lower court's file I found that the ruling dated 23rd February 2004 had the order thereof extracted that order was in the file by the time the garnishee filed its application for review. The lower therefore was in a position to see the order which was the subject of review. The mischief which is met in requiring an order be extracted is that the court would have the benefit of seeing the order which is being reviewed. Failure to attach the order to an application is not itself fatal what makes an application fatal however is failure to extract the order. Since the lower court's order had been extracted even before the garnishee filed its application for review there is no basis in the appellant's argument. The same is rejected. In the end the judgment of this court is that this appeal is hereby dismissed with costs being awarded to the garnishee.

MARY KASANGO

JUDGE

Dated and delivered at Nyeri this 14th day of May 2009.

BY: M.S.A. MAKHANDIA

JUDGE