REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

Civil Suit 88 of 2005

JULIA WAGACII NJUNGE)

FRANCIS NJUNGE MACHARIA)…….……PLAINTIFFS/APPLICANTS

VERSUS

HOUSING FINANCE COMPANY

LIMITED ……..…….. 1ST DEFENDANT/RESPONDENT

P. NGURU T/A NGURU ENTERPRISES..…2ND DEFENDANT/RESPONDENT

R U L I N G

On the 15th November 2005, this court delivered a ruling dismissing an application for an order of temporary injunction brought by Julia Wagachi Njunge and Francis Njunge Macharia (hereinafter referred to as the applicants) against Housing Finance Company Limited and P.T. Nguru t/a Nguru Enterprises (*hereinafter referred to as Respondents*). In the application the applicants sought to have the respondents restrained from selling by public auction or otherwise disposing or any way dealing with the interest of David Kibara Njunge (*hereinafter referred to as the chargor*) in land parcel No. LR Nyeri Municipality Block 1/50 (hereinafter referred to as the suit property) pending the hearing and determination of a suit filed by the applicants against the Respondents.

The court found that no prima facie case had been established as the chargor was properly served with the required statutory notices, and the chargee was entitled to exercise its statutory power of sale and that the application for a temporary injunction was therefore devoid of merit.

On the 18th November 2005, three days after the ruling of this court, the applicant came back to this court under certificate of urgency seeking orders of review of the ruling made on 15th November 2005. This application was brought under Order **XLIV** Rule 1, Order L rule 1 and Order **XXXIX** rules 1, 2, 2A & 3 of the Civil Procedure Rules and Sections80 & 63 of the Civil Procedure Act. The grounds upon which the application is brought as set out in the Notice of motion is as follows:-

> ***(a) The Plaintiff/Applicant's has discovered new and important matter or evidence which they could not have produced by the time the applicant's application dated 9th November, 2005 was argued and or orders made.***
>
> ***(b) THAT despite all due diligence they could not have produced the said evidence at that moment.***
>
> ***(c) THAT the applicant's had no knowledge of the Statutory Notices having been issued out.***

(d) THAT the applicant's were not aware and or could not speculate the mode of service or manner (sic) as the Respondent would use to effect service.

(e) THAT there was no service of the Statutory Notice upon the registered owner of the land Under Section 74 of RLA Cap. 300 and notification of sale under the Auctioneer rules 1996.

(f) THAT in all due diligence, newly discovered evidence could not be produced on the short notice.

(g) THAT discovered evidence was not in possession of the applicant at the time the orders were made.

As per the supporting affidavit sworn by Francis Njunge Macharia, new and important evidence is alleged to have come to light showing that the statutory notices purported to have been served on the chargor through registered post were in fact all returned unclaimed. This information is contained in an annexture to the affidavit which is a letter signed by D.C. Mureithi, Head Postmaster Nyeri. Mr. Mahinda argued that this was new and important matter or evidence which after exercise of due diligence was not within the knowledge of the applicant at the time the ruling was made. He relied on the following authorities:-

· ***Orero v Soko [1984] K L R 238***

· ***Kithoi v Kioko [1982] K L R 177***

Mr. Mahinda further submitted that notwithstanding the notice of appeal filed by the applicants, the application for review was properly before the court, as the appeal was not a bar to the application for review. In this regard Mr. Mahinda relied on ***African Airlines International Limited v Eastern and Southern African Trade and Development Bank [2003] I E A I (C A K).***

The application is opposed by the Respondents who have filed grounds of opposition contending inter-alia that the application for review is totally devoid of merit, and that it does not disclose any material whatsoever to warrant the giving of the orders sought. It is also contended that the application is wanting in form and is frivolous, vexatious, an abuse of the process of the court, and finally, that the applicants have preferred an appeal concurrently with, or subsequent to making an application for review.

Mr. Okeyo who appeared for the Respondents submitted that an application for review under order XLIV of the Civil Procedure Code could not be made without a formal extraction of the court order or decree from the ruling as rule 1 (a) only speaks of review of an order or decree, and that this rule is worded in the same way as Section 80 of the Civil Procedure Act. He submitted that no decree or order having been extracted in this case the application was premature. He relied on ***High Court (Milimani Commercial Courts) Civil Case No. 423 of 2002 Kenya Airways Limited v Mwaniki Gichohi and Njeru Njathika Nyagah.***

Mr. Okeyo further submitted that the applicant had to elect whether to bring an application for review or whether to file an appeal but that He could not pursue both as that could lead to inconsistency.

On the alleged discovery of new matter or evidence Mr. Okeyo submitted that the evidence alleged to have been discovered is not new, but was readily available if the applicants had exercised due diligence which they failed to do. Mr. Okeyo also contended that the alleged information was being irregularly availed to the court through a simple letter which makes reference to another letter which has not been availed to the court. He urged the court to reject the information as the same ought to have been brought by way of an affidavit, and that in any case the letter was written in contemplation of litigation and was therefore of no evidential value. In this regard Mr. Okeyo relied on ***Gachigi v Kamau [2003] K L R 169.***

Mr. Okeyo maintained that the conditions for granting an injunction as laid down in the celebrated case of Giella v Cassman Brown Limited have not been fulfilled and therefore the court ought not to grant the orders sought.

In response Mr. Mahinda reiterated that the new information could not be found without the exercise of due diligence and that the letter relied on being on a letter head of the Post Office and being duly signed its authority could be tested at the hearing.

It is necessary at this stage to reproduce order XLIV rule 1 and 2 of the Civil Procedure Rules which relate to applications for review.

> ***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 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 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 made, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
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> ***2. A party who is not appealing from a decree or order may apply for a review of judgment not withstanding the pendancy of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent he can present to the appellate court the case on which He applies for review."***
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> *(emphasis added)*

It is evident from the above rules that a party may apply for a review of judgment. There is no prerequisite that an order or decree must be extracted from such a judgment before an application for review can be made.

In the case of Kenya Airways Limited v Mwaniki Gichohi & Another H.C. (Milimani Commercial Courts) Civil Case No. 423 of 2002 the issue as to whether a party could seek review of an order which was not extracted and annexed to the motion for review was not arbitrated upon by the court as the prayer was abandoned. The issue was therefore not conclusively determined and the case has therefore no binding precedence. I am not persuaded therefore that the order or decree must be extracted from the judgment before an application for review can be made.

In this case, it is evident that the applicants are aggrieved by this courts order dismissing their application as per the ruling delivered on the 15th November 2005. The order which the applicant is aggrieved of, being one made under order XXXIX rules 1, 2 and 2A of the Civil Procedure Rules, an appeal lies as of right under order XLII Rule 1 (i) (x) of the Civil Procedure Rules. The applicants can therefore bring an application for review of the order provided that they have not preferred any appeal against the order at the time of making the application for review.

The question then arises as to whether there was any appeal preferred at the time the motion for review was brought. There is a notice of appeal which according to the court stamp was filed on the 18th November 2005 which is the same date the motion for review was filed. The receipt for payment shows that the two i.e. the Notice of appeal and the application for review were filed concurrently. This is because the receipt for payment of Kshs.1,820/- in respect of the application for review is Receipt No. O485448 dated 18th November 2005, and the one for Notice of appeal is Receipt No. O485449 dated 18th November 2005. The applicant cannot claim that they had not preferred any appeal at the time of making the application for review as both were filed simultaneously. This is clearly a situation where the applicant wants to have it both ways by filing an application for review and an appeal at the same time. That is not provided for under order XLIV rule 1 and 2 of the Civil Procedure Rules. To this extent therefore I would concur with the Respondents' advocate that the application is incompetent.

Be that as it may, the applicants contend that there is discovery of new and important matter or evidence which they could not have produced by the time their application dated 9th November 2005 was argued. This information relates to the alleged service of statutory notices upon the chargor which was the core issue at the time the applicants' application was argued. Indeed in paragraph 6 of the plaint, and paragraph 5 and 6 of the affidavit of Julia Wagachi Njunge sworn on 9th November 2005. It was evident that the applicants had information as at 26th October 2005 that the chargor was alleged to have been served with the statutory notices. It was therefore incumbent upon the applicants to pursue and obtain all necessary evidence relating to the alleged service. Indeed that evidence was readily available if only the applicants had looked for it in the right place before coming to court. I further concur with the Respondents advocate that the alleged information has not been properly presented to this court. The person alleged to be the source of the information has not sworn any affidavit to vouch for the truthfulness of the information. This taken together with the fact that the information was obtained with an eye towards the litigation makes it rather suspect and of little evidential value.

I find that the applicants have not satisfied this court that there is discovery of new and important matter which was not available to them with the exercise of due diligence.

The upshot of the above is that I find that this application is incompetent and also lacks merit. It is accordingly dismissed with costs.

Dated, signed and delivered this 9th day of November 2005.

H. M. OKWENGU
JUDGE