Sehmi v Hassan (Environment & Land Case 640 of 2017)
[2023] KEELC 16196 (KLR) (9 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16196 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 640 OF 2017

AA OMOLLO, J

MARCH 9, 2023

BETWEEN

TEJ SEHMI ..... PLAINTIFF

AND

MOHAMED WELI HASSAN ..... DEFENDANT

RULING

1. The applicant filed a notice of motion dated May 25, 2022 brought under the provisions order 45 of the *Civil Procedure Rules* and section 1A and 3A of the *Civil Procedure Act*. It seeks for the following orders;

    1. Spent

    2. That this honourable court be pleased to review, set aside/vary the terms of the ruling delivered on April 28, 2022 on the issue of payment of Kshs 2,749,308/ being accrued rent and the issue of the payment of Kshs 71,500/ to the respondent.

    3. That this honourable court be pleased to vary payments from Kshs 2,749,308/ to Kshs 749,308.00/ being the difference of the amount due and owing to the respondent and that of the household goods sold by the respondent acting in a principal-agent relationship which were valued at over 2,000,000/ pending the hearing of the main suit to allow the applicant seek for a legal action against the respondent for recovery of household goods valued at over Kshs 2,000,000/.

2. The application is supported by the affidavit sworn by Mohammed Weli Hassan on May 25, 2022 which deposed to similar grounds listed on the face of the application inter alia;

a. That there is an error apparent on the face of the record as the court in page 7 of its ruling held that pending the hearing and determination of this suit, the defendant shall deposit in an interest earning bank account in Nairobi in the joint names of the advocates on record herein for the parties a sum of Kshs 2,749,308.00/ within thirty (30) days from the date hereof.

b. That the court in making the award on the judge failed to appreciate the fact that the ruling pre-empts the outcome of the main suit which case is yet to determined.

c. That there is sufficient cause to review as the applicant goods valued at over Kshs 2 million which were attached and sold against a court order.

d. That the tabulated amount of Kshs 2,749308 be reviewed downwards to Kshs 749,308 to afford the applicant to seek legal redress for the recovery of the sold items.

3. The respondent opposed the application *vide* supporting affidavit (sic) sworn by Tej Sehmi on June 16, 2022 stating that the same is devoid of any merit and justification in law as per order 45 rule 1 of the *Civil Procedure Rules 2010* as the applicant has not availed any new important matter of evidence to support its application or show that the ruling has a mistake or error apparent on the face of the record.

4. The respondent contended that the issue as to the selling of the applicants goods in distress for rent was raised in paragraphs 16 to 24 of the applicant's replying affidavit dated July 12, 2021 filed in response to the application that resulted in the impugned ruling of April 28, 2022. That the court considered all the issues in pages 5-6 and made a finding including that the applicant is at liberty to pursue the issue with the Auctioneers Licensing Board.

5. The respondent averred the application is a delaying tactic to distract the progress of the suit to the hearing as the matters on goods sold for distress deponed to in par 4 to 6 of the supporting affidavit have already considered and do not constitute any new evidence or show any error apparent on the record.

Submissions

6. Both parties filed their submissions dated May 25, 2022 and November 16, 2022 respectively. The applicant submitted that he has satisfied the grounds for review as provided for in order 45 rule 1(b) of the *Civil Procedure Rules* since the court in the impugned ruling failed to capture the applicant's true position that he was a good tenant prior to defaulting in rent arrears. He stated that even after clearing the rent arrears the respondent proceeded with the distress, which prompted him to lodge a complaint against Moran Actioneers at the Auctioneers Board. That the auctioneers absolved themselves from blame on grounds of having acted on his instructions. The applicant avers that the household goods valued at Kshs 2,000,000 ought to be availed to him as they were illegally sold and since they have been sold, the same ought to have been accounted for as goods held in lien of the unpaid rent hence reduced the amount due from Kshs 2,749,308/ to Kshs 749,308/-

7. In support of his averrments, the applicant cited Mativo J in the case of *Stephen Gathua Kimani v Nancy Wanjira t/a Providence Auctioneers* [2016]Eklr which cited with approval the case of *National Bank of Kenya Ltd v Ndungu Njau*, in which Kwach R.O,Akiwumi A.M & Pall G.S,JJA stated:

> "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."

8. The respondent submitted that there is no ground of mistake or error apparent on the face of the record and that there is no new evidence to warrant a review of the ruling delivered. To buttress his argument, the respondent relied on the decision in *Stephen Gathua Kimani* (supra) where the Indian Court decision in *Ajit Kumar Rath v State of Orisa & others* is cited as follows;

> "...A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it, it may be pointed out that the expression "any other sufficient reason" used in order 47 rule 1 means a reason sufficiently analogous to those specified in the rule"

9. The respondent also submitted that the applicant has not tendered any sufficient reason for this court to warrant review of the impugned ruling as the substratum of the ruling and orders were anchored in law. That the failure by the applicant to pay accrued rent of Kshs 2,749,308.00, was not denied in the application and the fact that the applicant vacated the suit premises on October 31, 2021, the order on payment of rent by the 5th day of the month automatically lapsed as he is nolonger a tenant. The respondent stated that he is not claiming rent for the period after the vacation of the premises.

Analysis

10. The applicant sought for a review of the ruling dated April 28, 2022 on the grounds that there is a mistake apparent on the record and that there was sufficient cause to warrant the review. He argued that his household goods valued at over Kshs 2,000,000 sold for distress of rent were never factored in the tabulation of the rent and so, the amount should be credited thus reducing the debt owed downwards to Kshs 749,308/.

11. Order 45 rule 1 of the *Civil Procedure Rules, 2010* sets the grounds upon which a court can allow review. It states as follows: -

> " 45 rule 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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

12. For a review of the ruling to be granted, the mistake or error on the ruling should be self -evident and should not require an elaborate argument to establish it. In this case, the applicant has pleaded and submitted that the court failed to factor the amount realized from the sale of his household goods when tabulating the rent owed to the respondent. In his determination, Justice Okongó recorded *inter alia*,

that there was no dispute the respondent (now applicant) had not paid rent from April 2018 to the date of filing of the impugned application. The judge was alive to the issue of distress of the applicant's goods as he observed that it was the only excuse the applicant had failed to settle the rent and that no accounts were rendered by the auctioneer for the proceeds of the sale.

13. From the reading of the orders prayed for in the impugned ruling, there was no prayer for taking of accounts in regards to the proceeds of auction and sale of the applicant's goods. Secondly, it is my considered opinion that there was no evidence placed before the judge then and before me now that indeed that auction sale realized the sum of Kshs 2,000,000. I have perused the applicant's affidavit sworn on July 12, 2021 made in response to the application whose orders he wants reviewed. Nowhere does the applicant depose on value of goods sold were Kshs 2,000,000.

14. For instance, the applicant deposed in the stated replying affidavit at paragraph 17 thus; on January 11, 2018, through my advocates, I wrote to the said auctioneers requesting for an account of the proceeds realized as a result of sale of my household goods the letter did not elicit any response until August 2018.Appearing on pages 8-9 are our letter and the response thereto. Under paragraph 20, the applicant stated that there were several meetings between the applicant and myself to try reconcile the value of my goods with the rent allegedly owed and in whid1 meetings the applicant had suggested that I move out of the premises but refused to acknowledge that indeed he stills subjected me to untold suffering by illegally selling my goods.

15. I have highlighted part of the contents of the said replying affidavit to show that indeed there was no mistake made by the judge in failing to give credit in tabulation of the rent due to the respondent. The evidence presented before him by the applicant did not have any specific figures realized from the auction of his goods. The replying affidavit made mention of rents owed and paid during the period of 2017. In the impugned ruling, the judge was specific when he commented that the applicant had not paid any rents from April 2018 to the date of filing of the application in June 2021 which period fell after the "illegal" distress.

16. In the *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

> "...In *Nyamogo & 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 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 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 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."

17. The applicant equally moved the court to review the orders under the sufficient cause head. In attempting to demonstrate that there was sufficient cause under paragraph c of the grounds listed on the face of the application and paragraph 5 of the affidavit in support of the application, the applicant reiterated that the value of his goods sold were not factored in the tabulation of rents due. The applicant's annex MWH 2(b) is a copy from Moran Auctioneers dated January 15, 2018 addressed Cheboi Kiprono Advocates stating they would be sending an itemized account for the sales. Beside

this document, there is no evidence presented to this court on the amount realized from the sale. The applicant has not demonstrated that there is Kshs 2000000 already received by the respondents. Nothing has changed between when the ruling was delivered in April 2022 and now in terms of account taking of the proceeds of sale pursuant to the distress levied. This court cannot reduce the amount ordered to be deposited in court without evidence that the alleged Kshs 2,000,000 was realized from the public auction.

18. It is my opinion that the options open to the applicant for taking of accounts and credit for goods sold do not fall under the purview of review. The case is still pending and he has discretion to exercise those options. In essence, I am saying that the present application lacks the requisites that would make me review the orders that were granted on April 28, 2022. Consequently, the application dated May 25, 2022 is dismissed with cost to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH MARCH 2023

A. OMOLLO

JUDGE