



REPUBLIC OF KENYA



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Muriithi & another v Ollin Savings & Credit Co-operative Society Ltd (Miscellaneous Civil Appeal E5 of 2020) [2023] KEELC 21276 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
MISCELLANEOUS CIVIL APPEAL E5 OF 2020**

**JM MUTUNGI, J
NOVEMBER 2, 2023**

BETWEEN

PURITY NJAMBI MURIITHI 1ST APPLICANT

MERCY WAIRIMU MURIITHI 2ND APPLICANT

AND

OLLIN SAVINGS & CREDIT CO-OPERATIVE SOCIETY LTD ... RESPONDENT

RULING

1. Before me is a notice of motion dated 30th March 2023 seeking the Court to review and set aside its Ruling dated 9th March 2023 and examine the evidence, PNM11, which was inadvertently left out at the time of filing the Chamber Summons dated 22nd October 2020. The motion is predicated upon Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 and 2 and Order 31 of Civil Procedure Rules. The Applicants pray for the following orders: -
 1. That this Honourable Court on its motion be pleased to recall, review and set aside its ruling delivered on 9.03.2023.
 2. That this Honourable Court be pleased and re-open and re-examine the evidence on record.
 3. That cost of this application be provided for.
2. The Application is supported on the grounds set out on the face of the application and on the affidavit sworn in support by Purity Njambi Muriithi. The Applicants aver that there is an error on the face of the record and that the Honourable Judge did not give a proper finding of the whole objection owing to the fact that he was unable to examine all the records pertaining to the said objection.
3. The applicants state that their advocate inadvertently failed to attach a copy of the reason/decision of the Taxing Officer while putting their annexures. They argue that this omission was not deliberate and



urges the Honourable Court to re-admit the documentary evidence as the omission was as a result of an honest mistake on their part.

4. The application is opposed through a Replying Affidavit dated 15.05.2023 and an undated Supplementary Affidavit both sworn by John Mwangi Gathige. The Respondent's ground of opposition to the motion are that; this Court lacks jurisdiction as it was rendered functus officio when it heard and determined the Applicants' reference. It contends that the only recourse that would have been available to the Applicants is the one prescribed under Rule 11 (3) of the Advocates Remuneration Order (ARO), it also claims that allowing the Applicants motion will be equivalent to filing a fresh objection, which is improper and against the mandatory time period of fourteen days prescribed by the ARO. For these reasons, the Respondent urges the Court to strike out/dismiss the application with costs.
5. Having considered the application and the response by the Respondent, the Court identifies a singular issue for determination; Whether the application as filed seeking for review, is competent. In the present application the applicants filed a reference by way of a chamber summons dated 22nd October, 2020 and the same was determined vide the Court's ruling dated 9th March 2023, in which the chamber summons was held to be fatally defective and struck out for reason that the chamber summons filed by the applicants did not annex the reasons/decision of the Taxing officer.
6. Rule 11 (3) of the Remuneration Order provides for the Dispute Resolution Mechanism for an aggrieved party and it requires a party who is aggrieved by the decision of a Judge in reference to any objection, to seek leave of the Judge and appeal to the Court of Appeal. Rule 11 (3) of the Remuneration Order provide as follows: -
 - 3) any person aggrieved by the decision of the Judge upon any objection referred to such Judge under Subsection (2) may, with the leave of the Judge but not otherwise, appeal to the Court of Appeal.
7. Section 80 of the Civil Procedure Act on the other hand provides for Review, it states: -

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 thereon as it thinks fit.
8. Order 45 of the Civil Procedure Rules provides for review of Court decrees or orders where no appeals have been preferred. Order 45 Rule 1 and 2 provides-
 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 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.

2. A party who is not appealing from the decree or order may apply for a review of Judgment notwithstanding the pendency 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 the Respondent, he can present to the Appellate Court the case on which he applies for review.
9. In accordance with Order 45 Rule 1, the conditions for the grant of orders of review may be summarized as follows:
 - a. Discovery of new and important matter or evidence,
 - b. Some mistake or error apparent of the face of the record or,
 - c. Any other sufficient reason.
 - d. The application must be made without unreasonable delay.
10. These conditions have been enunciated in a number of decisions. In the Supreme Court decision of *Wachira Karani vs Bildad Wachira* (2016) eKLR, the Court explained that sufficient cause (or reason) is a question of facts and the Court of Appeal decision of *Francis Njoroge –vs- Stephen Maina Kamore* (2018) eKLR the Court emphasized the need to prove the four conditions before an order of review issues. Consequently therefore, Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. The power to grant an order of review is discretionary and it should not be used to help a party who has shown lack of due diligence. In the instant case, the Applicants admit that they had acquired a copy of the ruling by the Deputy Registrar and that their Advocate on record failed to attach it to their summons. In their Supporting Affidavit, the 1st Applicant posits that she realized the mistake and wished to put it as one of her annexures in the instant application for review. It is quite clear from the foregoing that the applicants having found out why this Court decided against them went back to the drawing board and brought out this forgotten evidence to bolster their case.
11. Having considered the arguments advanced by the applicants and the facts that they have relied on the application herein, I am of the view that the failure by the Applicants to annex the reason/decision of the Taxing Officer was due to lack of due diligence on their part as it was within their possession at the time of filing their chamber summon. Accordingly, the Applicants have failed to prove any of the conditions set out in Order 45 rule 1 to warrant issuance of an order of review.
12. Besides, this Court agrees with the Respondent that the Advocate Remuneration Order is specifically tailored to address issues that arise from and during taxation of bills of costs and the recourse that would have been available to the Applicants' is the one specified under Rule 11 (3) of the Advocate Remuneration Order. Consequently, the Applicants Application for an order of review lacks merit and is therefore dismissed with costs to the Respondent.

RULING DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 2ND DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC -JUDGE

