



**KCB Bank Kenya Limited v Morris Mugendi Karigi t/a Mugendi Karigi & Co. Advocates
& another (Civil Appeal E038 of 2023) [2024] KEHC 3415 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E038 OF 2023
LM NJUGUNA, J
APRIL 11, 2024**

BETWEEN

KCB BANK KENYA LIMITED APPELLANT

AND

**MORRIS MUGENDI KARIGI T/A MUGENDI KARIGI & CO.
ADVOCATES 1ST RESPONDENT**

AFRICAN MERCHANT ASSURANCE CO.LTD 2ND RESPONDENT

RULING

1. The applicant filed notice of motion dated 08th November 2023 premised on the grounds on its face and in the supporting affidavit, seeking orders that:
 1. Spent;
 2. Spent through the application dated 10th November 2023;
 3. The honourable court be pleased to review, set aside and or vary the order given on 17th October 2023 in this matter, and all consequential orders arising therefrom, in the interest of justice, in the following aspects as there are sufficient reasons to partly vacate;
 - a. The order to deposit the sum of Kshs 1,654,563.77/= in court is oppressive to the Appellant/Garnishee as it was not holding the funds equivalent to the amount ordered in the account of the Judgment Debtor/2nd respondent to meet the decree;
 - b. The court having found the application dated 26th July 2023 was merited and granted an order for stay of execution, it was wrong in providing for the dismissal of the appeal in the event that the money was not deposited in court by the appellant; and



- c. The court having directed that the record of appeal be filed within 14 days, it was erroneous to provide for dismissal of the appellant's appeal within 7 days of the order.
 4. The appellant's appeal be reinstated;
 5. That upon granting orders 3 and 4 above, the time for filing the record of appeal be extended to a reasonable period; and
 6. Costs of this application be provided for.
2. It is the applicant's argument that there is an error apparent on the face of the record of the court in its ruling when it ordered dismissal of the appeal if the applicant did not comply with the condition set by the court. That the applicant is not holding funds for the 2nd respondent in the sum of Kshs 1,654,563.77/= and so it is not possible for it to meet the condition set, thus, there is a miscarriage of justice. That the order of the court dismisses the appellant's appeal summarily and in a manner that occasions an injustice.
 3. That the applicant is only holding Kshs 1,090.16/= in the 2nd respondent's account. That as of the time of filing this application, the appeal stood dismissed according to the orders of the court and yet it is not possible for the applicant to make the deposit ordered. That the applicant attempted to make partial payment but the invoice generated had a problem and so the available money was not deposited. That garnishee proceedings are not meant to be punitive but are meant to help facilitate payment of debts. That if the orders are not reviewed, the 1st respondent will move fast to execute through attachment of the applicant's assets thus causing prejudice and hardship.
 4. The 1st respondent opposed the application through a replying affidavit dated 17th November 2023 wherein he deposed that the application is a gross misconception of the law since the appeal has since been dismissed. That he is being denied an opportunity to enjoy the fruits of his judgment and that the applicant participated in the garnishee proceedings which resulted in the impugned orders, determination which it now seeks review against.
 5. That the applicant's request for extension of time to appeal is an afterthought as they have not expressed any difficulty in complying with the court orders. That the applicant requested for trial court proceedings for purposes of the appeal 5 days after the lapse of the timeline set by this court for appeal. That the application was prompted by the 1st respondent's move to obtain warrants of attachment/sale dated 08th November 2023. That he believes that the applicant is working in cahoots with the 2nd respondent to circumvent the process of execution and he produced evidence showing that after this court's order, the applicant and 2nd respondent have paid out decretal amounts in other cases where the same were demanded by the court.
 6. He deposed that the condition set by this court for security for performance is not sufficient ground for review. That the applicant's account in the name of the 2nd respondent is still active and able to provide the security for costs. That if this court should review its orders and extend the time for appeal, and in the event that the appeal succeeds, he is a practicing advocate of good standing and bears the means to refund the amount. He urged the court not to support the applicant's indolence in this matter.
 7. The applicant filed a further affidavit stating that whatever monies held in the name of the 2nd respondent are held locked or held in lien and that it is unnecessary to produce bank statements as the same were produced at the trial. That the applicant had already applied for certified copies of the trial court proceedings much earlier but they were delivered after the time for appeal set by this court had lapsed. That the applicant could not pay the security for performance from its own business as the



same would cause an injustice. That it does not matter that the 1st respondent has means to refund the money since the same is expected to be paid from the garnishee's own pocket, which is not right.

8. The court directed the parties to file their written submissions but none of them complied.
9. From the foregoing, I am faced with the question of whether or not to review the orders of this court issued through the ruling dated 17th October 2023. The final orders in the ruling were as follows:
 1. Stay of execution of the order issued on 24th July 2023 is hereby granted pending hearing and determination of the appeal;
 2. The record of appeal be filed and served within 14 days of this ruling;
 3. The Applicant to deposit Kshs 1,654,563.77 in the court account within 7 days of this ruling failing which the appeal shall stand dismissed;
 4. The appeal to be prosecuted within 90 days from the date of filing the record of appeal; and
 5. The costs of this application shall abide the outcome of the appeal.
10. Review is provided for under Section 80 of the *Civil Procedure Act* as follows:

“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.”

Similarly, Order 45 Rule 1 of the *Civil Procedure Rules* 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 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.

11. From the foregoing, there are only 3 factors for the court to consider before reviewing its findings, these are:
 1. That there has been 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
 2. That there has been some mistake or error apparent on the face of the record; or
 3. Any other sufficient reason.



12. The applicant's grounds for review are that it is not able to settle the security ordered from its own pocket yet the court set a timeline for appeal pegged on provision of such security. That since the time has since lapsed and the appeal stands dismissed, it seeks reinstatement of the appeal and setting aside of orders that provided for security for performance. In light of the provisions governing review, clearly there is no new evidence to be considered. Even though the application was filed timeously, the other consideration is whether there is a mistake apparent on the face of the record. It was the applicant's case that the court granted it 14 days to file the record of appeal and 7 days to pay the security for performance, failing which the appeal would stand dismissed. According to the applicant, by the time the appeal was being dismissed, it would not have made the payment for security and so it claims injustice.

13. When the court gave these orders, it was the position that the security for performance of the decree ought to be paid within 7 days of the ruling. The window of 14 days to file the record of appeal had nothing to do with the period for payment of security for performance. From the depositions herein, it seems that whatever the amount of time given to the applicant for provision of the security, it was not their intention to pay since the applicant claims that it only holds the sum of Kshs 1,090.16/= in the 2nd respondent's account.

14. However, in light of the foregoing, it is my view that the purpose of provision of security for performance is to safeguard the process so that none of the parties trivializes judicial time. The applicants have deposed that they hold Kshs 1,090.16/= in the 2nd respondent's account which can be provided as security pending determination of the appeal. It is on this basis that this court reviews its orders. Therefore, in the interest of justice, the following orders shall issue:

1. The orders given on 17th October 2023 by this court in this matter are hereby set aside and reviewed as follows:
 - a. Stay of execution of the order issued on 24th July 2023 is hereby granted pending hearing and determination of the appeal;
 - b. The record of appeal be filed and served within 21 days of this ruling;
 - c. The Applicant to deposit Kshs 1,090.16/= to the court account within 10 days of this ruling;
 - d. The appeal to be prosecuted within 90 days from the date of filing the record of appeal; and
2. The costs of this application shall abide the outcome of the appeal.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF APRIL, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant/Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

