



REPUBLIC OF KENYA



KENYA LAW
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Orina v Palmieri (Civil Appeal 138 of 2022) [2024] KEHC 5496 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5496 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 138 OF 2022
SM GITHINJI, J
MAY 15, 2024

BETWEEN

GEOFFREY ORINA APPELLANT

AND

GIORGIO PALMIERI RESPONDENT

(Being an Appeal of the whole decision and Ruling and Order made on the 14th day of December, 2022 by Hon James Ongondo – SPM in Malindi CMCC Case No. E260 of 2022)

RULING

Representation:

Mouko & Co. Advocates for the Appellant.

Njuki & Co. Advocates for the Respondent.

Mr Mutugi Advocate for the Appellant

Mr Mugambi Advocate for the Respondent

- 1 For determination is the application dated 5th June, 2023 brought under Orders 22 (1), 23, 24-50, 45 (1) of the Civil Procedure Rules, Article 40 and 42 of the Constitution seeking the following orders;
 1. Spent.
 2. That this Honourable Court be pleased to review the ruling entered against the Applicant on 16th May, 2023 and all consequential orders.
 3. That upon granting prayer 2 above, the Honourable Court be pleased to order the immediate release of the Motor vehicle to the applicant upon deposit of the decretal sum in court being Kshs. 37, 220/-.
 4. The costs of this application be provided for.



- 2 The application is supported by the grounds on the face of it and the supporting affidavit sworn by Giorgio Palmieri on the same day. He deposed that the Respondent was granted unconditional stay pending determination of the appeal which means that his motor vehicle will continue lying at the Respondent's garage for an indefinite time exposing it to extreme damage due to wear and tear.
- 3 According to him, the Respondent is in his Defence claiming a sum of KShs. 37,220/- which amount he is ready and willing to deposit in court as security for the Motor vehicle to be released to him. Further, that the motor vehicle which has been illegally withheld by the Respondent is deteriorating in value and at the end of the trial the ends of justice will not be met. He also asserted that the court has discretion to review its ruling to allow him offer security in court so that the subject matter is preserved.
- 4 In response, the Respondent filed a Replying affidavit sworn by Goeffrey Orina on the 12th day of July, 2023. He asserted that the import of the application is to offer security of the defendant's claim forgetting that Kshs. 37,200/- is the amount claimed for repair charges, and the storage charges continue to accrue daily as claimed in the Counter claim. He contended that the respondent ought to have filed an appeal which should have been filed at the Court of Appeal. According to him, the applicant ought to have offered adequate security at the time of the application for injunction.
- 5 The application was canvassed by way of written submissions but at the time of writing this ruling, only the Respondent had filed submissions.

Disposition

- 6 I have considered the application dated 5th June, 2023, the response by the Respondent and the submissions by the Respondent's counsel.
- 7 In my view what is for determination is whether this court ought to review its ruling delivered on 16th May, 2023.
- 8 Section 80 of the [Civil Procedure Act](#) Cap 21 provides 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.”

Order 45 Rule 1 of the [Civil Procedure Rules](#), 2010 provides as follows: -

“ 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.”

- 9 An applicant seeking orders for review must satisfy the court with the following;
- a. There is a 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 or order was made.
 - b. There is some mistake or error apparent on the face of the record.
 - c. Or for any other sufficient reason.
- 10 In the case *Republic v Public Procurement Administrative Review Board & 2 others* (2018) e KLR it was held: -
- “Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
- 11 The applicant herein contends that this court while granting the orders of 16th May, 2023 overlooked the nature of the claim and that the court erroneously failed to consider that the essence of granting stay is for preservation of the subject matter pending determination of the dispute amongst the parties. He further contends that the ruling ought to be reviewed and the Applicant’s motor vehicle vested in the applicant who is the rightful owner pending hearing of the appeal.
- 12 On the other hand, the respondent asserts that the stated Kshs. 37,200/- is the amount claimed as repair charges and the storage charges continue to accrue daily as claimed in the Counter claim. He contended that the respondent ought to have filed an appeal which should have been filed at the Court of Appeal. According to him, the applicant ought to have offered adequate security at the time of the application for injunction.
- 13 I am guided by the holding in the case of *Evan Bwire v Andrew Aginda* Civil Appeal No. 147 of 2006 cited in the case of *Stephen Githua Kimani v Nancy Wanjira Waruingi T/A Providence Auctioneers* (2016) eKLR the Court of Appeal held as follows:
- “An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material



before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

14 Having perused the reasons advanced by the applicant for review, I note that there is no new and important matter or evidence that after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order was made, and equally there is no mistake or error apparent on the face of the record. The fact that the applicant is now willing to offer security is not reason enough to allow the application as there are other issues that need be addressed in the Counter claim raised by the respondent.

15 In the end, the application dated 5th June, 2023 is devoid of merit and the same is dismissed.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15TH DAY OF MAY, 2024.

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S.M. GITHINJI

JUDGE

In the Presence of; -

1. Miss Metto for the Applicant
2. Mr Mouko is for the Respondent –(absent)

Ms. Metto; - We can have a date for directions on the appeal.

Court; - Mention on 18/7/2024 for directions.

Respondent be notified.

