



REPUBLIC OF KENYA



Said (Suing as the administrator of the Estate of Tahir Sheikh Said Ahmed (Deceased) v Kenya Commercial Bank (Civil Case 3 of 2020) [2024] KEHC 5542 (KLR) (9 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 3 OF 2020**

SM GITHINJI, J

MAY 9, 2024

BETWEEN

FATMA TAHIR SHEIKH SAID (SUING AS THE ADMINISTRATOR OF THE ESTATE OF TAHIR SHEIKH SAID AHMED (DECEASED)) APPLICANT

AND

KENYA COMMERCIAL BANK RESPONDENT

RULING

Kamoti Omollo Advocates for the Plaintiff/Respondent

Munyao Muthama & Kashindi Advocates for the Defendant/Applicant

1. On 26th February 2021, this court delivered a ruling striking out this suit which prompted the Applicant to file Mombasa Civil Appeal No E045 of 2022. She also filed an application to this court for temporary injunction pending lodging, hearing and determination of the appeal, which was allowed by my brother the learned Hon. Justice Nyakundi in a ruling dated 29th April 2021. The temporary injunction orders were vacated on 5th June 2023 when the matter was listed for mention. The Applicant has now brought the present application dated 20th June 2023 seeking orders: -
 1. Spent.
 2. That the court be pleased to review, vary or set aside the orders made on 5th June 2023 and reinstate the ruling made by the court on 29th April, 2021.
 3. That costs of the application be in the cause.
2. The application is brought under the provisions of section 1A, 1B,3, 3A of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. It is premised on the grounds enumerated on the face of the motion and supported by the affidavit sworn by the Applicant on the same date. The Applicant deposed that the Respondent misled the court into making drastic orders while the appeal



is still pending before the court of appeal. She contended that her advocate was never served with the mention notice in the first place, and that he only happened to coincidentally see the matter in the cause list on the material date.

3. The Respondent opposed the application. It filed a replying affidavit sworn by Francis Kiranga on 19th July 2023, who deposed that the Applicant is not an administrator of the deceased's estate, thus her suit and application are a nullity. He narrated that the purpose of the mention on 5th June 2023 was the notice to show cause that had been adjourned from 6th June 2022, which the Appellant was well aware of. He added that there is no proof that the Respondent intends to dispose part of the deceased's estate to warrant an injunction; and that in any case, the properties in dispute were charged to the bank as security hence became commodities in the market place for sale in the event of default. According to Mr. Kiranga, the real loss is therefore to the bank whose debt remains unpaid.
4. The application was canvassed by way of written submissions which I have carefully considered.
5. The sole issue for determination is whether this court should review its orders issued on 5th June 2023.
6. 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.

7. 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.”

8. The above rules restrict the grounds for review as; (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.”



9. Additionally, the Supreme Court of India in the case of *Ajit Kumar Rath v State of Orisa & others*, 9 Supreme Court Cases 596 at Page 608 explained as follows: -

“the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked 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 establishing it. It may be pointed out that the expression “any other sufficient reason” means a reason sufficiently analogous to those specified in the rule”

10. In the instant case, the Applicant argued that the court was misled into issuing the impugned directions as it did. Looking at the proceedings of 5th June 2023, Mr. Kariuki counsel for the Respondent informed the court that;

“The appeal is pending. There’s an order issued pending the appeal. The appeal is filed and the order can be vacated.”

11. Following the above, the court stated;

“The appeal has been filed. There is no need of the order for stay pending filing of the appeal. such order is vacated...”

12. I have perused the application for injunction that was allowed by my brother, Nyakundi J. One of the prayers therein was that there be a temporary injunction pending the lodging, hearing and determination of the intended appeal to the Court of Appeal. That application was dated 22nd March 2021. It is evident therefore that the orders were to lapse upon the hearing and determination of the appeal. It is undisputed that the said appeal is yet to be heard and determined. In the foregoing, I am satisfied that the application passes the test of “sufficient reason”.
13. The upshot is that the notice of motion dated 20th June 2023 is merited. It is hereby allowed. Costs to abide the outcome of the appeal.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 9TH DAY OF MAY, 2024.

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S.M. GITHINJI

JUDGE

In the absence of: -

1. Mr Gikandi for the Applicant
2. Mr Kariuki for the Respondent

They be notified.

