



Odindo (Suing as the administrator and legal representative of the Estate of George Ismael Odindo (Deceased) v National Bank of Kenya Limited & 2 others (Civil Suit 445 of 2007) [2024] KEHC 7344 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 445 OF 2007
FG MUGAMBI, J
JUNE 14, 2024**

BETWEEN

ERIC O ODINDO (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE ISMAEL ODINDO (DECEASED) APPLICANT

AND

NATIONAL BANK OF KENYA LIMITED 1ST RESPONDENT

ALICE MBINYA OMBAYO 2ND RESPONDENT

DICKSON TUMBO T/A SADIQUE 3RD RESPONDENT

RULING

1. This ruling determines the Notice of Motion application dated 12th August 2010, brought under Order 50 Rule 1 and 45 Rule 1(1) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of law.
2. The application seeks, review of the orders issued on 7th July 2010 dismissing the plaintiff's suit; reinstatement of the said suit for trial on its merits; and costs.
3. The application is premised on the grounds on the face of the application and supporting affidavit sworn by Eric O. Odindoo on 12th August 2010, primarily to the effect that the applicant's failure to attend court was genuine and was occasioned by illness. It is averred that there is sufficient evidence to support this averment.
4. The applicant relies on the copy of the doctor's report dated 5th July 2010 and forwarding letter dated 7th July 2010 annexed to his supporting affidavit and marked as "EOO1a" and "EOO1b" respectively.



- He urges his failure was due to an excusable and unforeseen cause. Consequently, he pleads with the court for a chance to ventilate its matter
5. The application is opposed by the 1st and 3rd respondents' replying affidavit sworn by Z.K Mogaka on 30th August 2010, the 2nd respondent's Grounds of Objection dated 23rd August 2010 and replying affidavit sworn by Alice Mbinya Ombayo on 31st August 2010. The respondents dispute that the applicant was ill and argue that the alleged sickness was a lame excuse and afterthought intended to delay the expeditious determination of the matter. Further it is urged that upon grant of injunction in favour of the applicant, he lost interest in prosecuting the matter.
 6. Additionally, it is the respondent's argument that the application is incompetent, frivolous, vexatious, misconceived, unmeritorious and is for dismissal for reasons that:
 - a. It offends the provisions of the Civil Procedure Rules and it is not brought under any of the grounds for review;
 - b. It seeks to re-argue the application for adjournment which has been dispensed with making the court functus officio and the issues raised therein are res judicata;
 - c. It is challenging this court's exercise of discretion;
 - d. The proper forum for determination of the issues raised is the Court of Appeal; and
 - e. This court cannot sit in appeal of its own judgment.
 7. The applicant in his further affidavit sworn on 1st September 2010 restates its grounds in support and emphasis that he has demonstrated there was sufficient incapacity on his end to attend court on the day the suit was dismissed. He also urges that he has endeavored to make full and frank disclosure to the court.
 8. It is the applicant's further contention that there was no inordinate delay on his part. He also urges that no prejudice will be suffered by the respondents should the instant application be allowed.
 9. All the parties have filed their submissions, lists and bundles of authorities. The applicant's submissions and further submission in reply are dated 20th September 2010 and 12th October 2010 respectively; the 1st and 3rd respondents' submissions are dated 5th October 2010; and the 2nd respondent's submissions are dated 12th October 2010.

Analysis and Determination

10. I have carefully considered the pleadings, submissions and evidence presented by the parties with respect to this application. At this Juncture, it is important to recall that as per Justice Mugo's directions issued on 3rd November 2011, the instant Notice of Motion, the Replying Affidavits by the 1st and 3rd respondents as well as the 2nd respondent were missing from the file.
11. Despite the court's directions on 14th December 2010, the said pleadings save for the Notice of Motion were not availed in court. Therefore, without the benefit of the said missing pleadings, and in the interest of justice, the court was unable to render a ruling.
12. The proceedings were only revived in 2022 and thereafter the court scheduled numerous mentions to ascertain the status of the missing pleadings. The court was in receipt of all the relevant pleadings on 31st July 2023. The application was set down for submission on priority basis in view of the time taken to determine it.



13. Turning to the issues raised, the respondents have challenged the application on grounds it fails to meet the threshold for review. It is urged that as the Motion is brought pursuant to Order 45 Rule 1(1), the applicant must satisfactorily meet the threshold for review settled therein. To this end, the respondents have argued that the application is not brought under any of the grounds for review set out in the said provision.
14. The applicant having preferred to move this Court under Order L Rule 1, Order 45 Rule 1 (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, it must demonstrate it meets the threshold therein.
15. In my view the provisions of Order 45 Rule 1 are very clear, they read as follows:
 - “(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. [Emphasis Added]
16. In the case of Tausi Assurance Company Limited v NIC Bank Limited, [2014] eKLR, the Court held as follows:

“It is therefore imperative, that for the Court to consider an application for review, the aforementioned provisions under Order 45 Rule 1 have to be satisfied.”
17. Moreover, in National Bank of Kenya Limited v Ndungu Njau, [1997] eKLR, the Court of Appeal affirmed this position:

“We are of the view that the appellant's notice of motion did not comply with the mandatory requirements of Order L r 3 of the Civil Procedure Rules according to which every notice of motion must state in general terms the grounds of the application. It is not enough to say that the notice of motion is grounded on the grounds or evidence contained in the aforesaid affidavits. It is also not enough to say that the notice of motion is grounded on the grounds of opposition which had been filed in opposition of the said earlier application of the respondent.”
18. Guided by these principles, has the applicant satisfied the mandatory grounds for review? I concur with the respondents that in an application for review, it is particularly necessary that the application should disclose in the body of the motion the ground or grounds on which the review is being sought in line with Order 45 Rule 1 (1).
19. In his Motion, the applicant failed to disclose whether it is seeking review on grounds of discovery of new and important matter or evidence, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.



20. The applicant tries to make a flimsy attempt to urge discovery of new evidence as the ground upon which the application is premised on, in his submissions. This is not sufficient as the grounds upon which an application is brought must be set out on the face of application itself and in the supporting affidavits, but not in submissions. The applicant therefore fails to meet the threshold for review under 45 Rule 1 (1).
21. In any event, even if I were to consider the reasons given by the applicant, I note that the court exercised its discretion in rejecting the application for adjournment and went on to dismiss the suit. I have taken note of the case cited by the parties, *National Bank of Kenya Ltd v Ndungu Njau*, (*supra*) wherein the Court of Appeal found that:
- “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.”
22. The court has also considered *Tausi Assurance Company Limited v NIC Bank* (*supra*) where in the Court of Appeal applied the above jurisprudence with approval.
23. As a result of the above analysis, I find that the application herein is tantamount to inviting this court to make a finding on the discretion exercised by another Judge in the matter. That is not a ground for review. An aggrieved party in this case can only pursue an appeal.

Disposition

24. For these reasons, I find no merit in the application before me. The plaintiff's application dated 12th August 2010 is hereby dismissed with no orders to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 14TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE

