



Kungu v Kaarumbi (Civil Appeal 335 of 2023) [2024] KEHC 8991 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8991 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 335 OF 2023
FN MUCHEMI, J
JULY 25, 2024**

BETWEEN

JAMES KINYANJUI KUNGU APPLICANT

AND

LUKAS CURINGI KAARUMBI RESPONDENT

RULING

Brief Facts

1. The application dated 20th March 2024 seeks for orders of review and setting aside of the orders dated 7th March 2024. The impugned orders were as a result of the ruling of the court delivered on 7th March 2024 that dismissed the applicant's application dated 4th October 2023.
2. The application is unopposed.

Applicant's Case

3. The applicant states that he filed an application dated 4th October 2023 whereas he sought orders for stay of execution of the judgment and decree in Thika SCCC NO. E339 of 2023 and the court on 7th March 2024 disallowed the said application. The applicant states that he is ready and willing to deposit such security as the court orders for the due performance of such decree. The applicant is further apprehensive that unless stay of execution is granted, he stands to suffer substantial loss and damage.
4. The applicant further states that the court issued orders that the record of appeal be filed within 30 days in the event he is interested in pursuing the appeal. The applicant argues that the appeal is meritorious, has a good chance of success and will be rendered nugatory in the event the orders sought are not granted.
5. The applicant states that the instant application has been made without inordinate delay. No prejudice shall be suffered by the respondent.



The Applicant's Submissions

6. The applicant relies on Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and the cases of Sylvester Nthenge vs Johnstone Kiamba Kiswili [2021] eKLR and Shanzu Investments Ltd vs Commissioner for Lands (Civil Appeal No. 100 of 1993) and submits that his appeal is meritorious, has a good chance of success and will be rendered nugatory and urges the court to be considerate and review the orders issued on 7th March 2024. The applicant further submits that he is ready and willing to deposit such security as the court orders for the due performance of such decree.

The Law

Whether the applicant has met the threshold for the orders of review.

7. Order 45 of the Civil Procedure Code sets out the parameters for an application for review 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 order made or made the order without unreasonable delay.
 2. A party who is not appealing from a 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 respondent, he can present to the appellate court the case which he applies for the review.
8. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate to the court 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. Secondly, the applicant must demonstrate to the court that there was some mistake or error apparent on the face of the record. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.
9. The applicant herein urges this court to set aside the orders made on 7th March 2024. However, he has not stated on what grounds his application is premised. On perusal of the record, the applicant has not demonstrated any mistake or error on the face of the record. Neither has the applicant demonstrated any 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 the decree was passed and neither has the applicant provided any sufficient reason to be granted the orders of review. The applicant has only stated that his appeal is meritorious and has a good chance of success.
10. In my view, the applicant has brought an application for stay a second time before the same court which dismissed the first application dated 4th October, 2023. It is noted that the action of the applicant is not supported by any law. If he was serious that he wanted this court to review its orders of 7th March 2023, then the requirements of order 45 which have been stated herein ought to have complied with. The



applicant's intention must be to buy time to delay satisfying the decree in the original suit. As far as I am concerned, this application is vexatious, incompetent and an abuse of the due process of the court.

11. Consequently, this application is hereby struck out with costs to the respondent.

12. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 25TH DAY OF JULY 2024.

F. MUCHEMI

JUDGE

