



**Kabugi v Equity Bank Limited (Civil Case 154 of 2019)
[2024] KEHC 11686 (KLR) (Civ) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL CASE 154 OF 2019**

AN ONGERI, J

SEPTEMBER 24, 2024

BETWEEN

WILSON MACHARIA KABUGI PLAINTIFF

AND

EQUITY BANK LIMITED DEFENDANT

RULING

1. The application coming for consideration is the one dated 9/4/2024 brought under Section 1, 1A, 3, 3A, 63(e) and 80 of the *Civil Procedure Act*, Order 10 Rule 1, 5 to 11, Order 45 Rule 1 and Order 51 of the *Civil Procedure Rules* and all enabling provisions of law seeking the following prayers;
 - i. That this application be certified urgent and service thereof be dispensed with in the first instance.
 - ii. That the firm of Messrs. Igeria and Ngugi Advocates be granted leave to come on record as advocates for the defendant herein in place of Messrs. K. Macharia & Co. Advocates post judgment.
 - iii. That this honorable court be pleased to issue an order of stay of execution of the judgment delivered by on 10th November 2023 and all other consequential orders issued thereafter pending the hearing and determination of the intended appeal.
 - iv. That this honourable court be pleased to review the judgments delivered on 10th November 2023 and all orders arising therefrom.
 - v. That this honourable court be pleased to issue any other order that it deems fit.
 - vi. That costs of this application be in the cause.



2. It is based on the following grounds;
 - i. That this Honourable Court on 3rd April 2024 issued Warrants of Attachment and Sale of the Defendant/ Applicant's movable property to Dikemva Auctioneers in execution of a decree in favour of the Plaintiffs/ Respondents herein for the realization of the sum of KES,8,298,873.84.
 - ii. That on 5th April 2024, the said firm of Auctioneers proceeded to the Defendant/Applicant's premises where they proclaimed goods and notified the Defendant/Applicant that after the expiry of seven (7) days from the date of proclamation aforesaid, the said proclaimed goods will be removed from the Defendant/ Applicant's custody to the Auctioneers premises and sold by public auction or through private treaty unless the amount of Ksh.8.298.373.84 together with Ksh.275,000/- being the reduced Auctioneer's fees are paid in the meantime
 - iii. That the proclamation is pursuant to a Judgment of this Honourable Court delivered on 10th November 2023 wherein the Court proceeded to enter Judgment in favour of the Plaintiffs/ Respondents against the Defendant/Applicant under mistaken belief that the funds the subject of the suit were still held in the bank accounts with the Defendant/Applicant at the time of delivery of Judgment whereas the said funds had already been transferred to the drawer of the impugned cheques, Western Region Insurance Brokers Limited on 15th August 2012
 - iv. That the evidence of the transfer to Western Region Insurance Brokers Limited aforesaid was not presented to the Court due to mistake of Counsel who failed to annex the Statements of Accounts showing the transfer of funds back to the Western Region Insurance Brokers Limited.
 - v. That the seven (7) days' notice aforesaid expire on the 11th April 2024 and there is real and imminent danger that if the Defendant/Applicant does not pay the amount of KES.8,298,873.84 together with KES.275,000/- being the Auctioneer's fees and making a total of KES.8,573,873.84 as demanded by the said firm of Auctioneers, the Defendant/Applicant's goods will be removed from its premises and sold by public auction, an act which will greatly prejudice the Defendant/Applicant.
 - vi. That it is in the interest of justice that this Application be allowed
3. It is supported by the affidavit sworn on 9/4/2024.
4. The respondent filed two replying affidavits which I have duly considered.
5. The applicant was granted leave to file a supplementary affidavit in response to the replying affidavit.
6. The parties filed written submissions as follows;
7. The defendant/applicant submitted that it is seeking to review the judgment of this court delivered on 10/11/2023 on the ground that the court made an order for release of the sum of ksh.8,298,873.84 to the plaintiff/respondent.
8. That the advocate forgot to bring it to the attention of the court that the said funds had been released to the drawer of the impugned cheques, Western Region Insurance Brokers Ltd on 15/8/2012.
9. That the evidence of the transfer was not presented to the court due to a mistake of the counsel for the defendant/ applicant who failed to annex the statements of the accounts.



10. The plaintiff/respondent opposed the application and submitted that the defendant/applicant has not established the grounds or review of the court's judgment delivered on 10/11/2023.
11. That the defendant/applicant could not constitute itself investigator, prosecutor and judge to grant itself orders to release money to Western Union Insurance Brokers without establishing the truth.
12. That the alleged statement of the account was in the possession of the defendant/applicant at the time the case was heard and judgment delivered.
13. The plaintiff/respondent urged the court to dismiss the application dated 9/4/2024 with costs to the plaintiff/respondent.
14. The sole issue for determination is whether the court should review its judgment dated 10/11/2023.
15. The law governing review is Order 45 which states as follows;

Order 45 of the [Civil Procedure Rules](#) provides for Review and it states 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.

(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 on which he applies for the review”

17. In the case of [Francis Njoroge V Stephen Maina Kamore](#) (2018) eKLR, Njuguna J held that:

“Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-

- (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
- (b) There was a mistake or error apparent on the face of the record; or
- (c) There were other sufficient reasons; and
- (d) The application must have been made without undue delay”.

In the case of [Sanitam Services \(E.A.\) Limited V Rentokil \(K\) Limited & Another](#) (2019) eKLR, the Court of Appeal held that:

“Jurisdiction to review a judgment or order of a court is donated by Section 80 of the [Civil Procedure Act](#) and Order 45 Civil Procedure Rules. By those provisions of law any person



considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is 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 – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay”.

16. Upon considering the submissions by both parties, I find that the defendant/applicant has not established the ground for review of the judgment.
17. The evidence the defendant/applicant is seeking to table was in their possession at the time this case was heard and determined.
18. The same cannot be said to have discovered by the defendant/applicant after the fact.
19. It is not clear who gave the defendant/applicant the mandate to release funds in an account held by their client.
20. The application dated 9/4/2024 is dismissed with costs to the plaintiff/respondent.
21. This ruling to abide in HCC no. 155 of 2019.
22. I dismiss the application dated 9/4/2024 with costs to the respondent.
23. The order to abide in HCCC 155 of 2019.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

