



**Mwangi v Rax Company Limited (Civil Appeal E110 of 2024)
[2024] KEHC 13116 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E110 OF 2024
FN MUCHEMI, J
OCTOBER 24, 2024**

BETWEEN

BILHA WAMBAIRE MWANGI APPELLANT

AND

RAX COMPANY LIMITED RESPONDENT

RULING

Brief Facts

1. The application for determination dated 17th July 2024 seeks for orders of review of the ruling delivered on 30th May 2024 herein to allow the applicant furnish security by way of a bank guarantee from a reputable financial institution. The application further seeks for orders of reinstatement of the stay of execution of the judgment and decree issued on 12th April 2024 in Ruiru PMCC No. E195 of 2023.
2. In opposition to the application, the respondent filed a Replying Affidavits and a Notice of Preliminary Objection both dated 23rd July 2024.

The Applicant's Case.

3. The applicant states that on 30th May 2024, this court gave a conditional order for stay of execution which she only came to learn of on 28th June 2024 that was dated 8th when her previous counsels called her to tell her about the said orders.
4. Given the short notice and the prevailing economic conditions, the applicant argues that she was not in a position to raise the said amount but she applied to her bank to issue her with a bank guarantee. The applicant states that the bank issued her with a bank guarantee on 16th July 2024 that was dated 8th July 2024 which was the date she applied for the same.



5. The applicant states that the appeal will be rendered nugatory if the respondent proceeds to execute judgment against her. The applicant further states that the respondent is not in a financial position to refund the decretal sum should the appeal succeed.
6. The applicant argues that she stands to suffer irreparable loss should execution proceed as the issue in contention is the construction of her house on LR No. Ruiru/Ruiru East Block 7/1401 which the respondent constructed poorly. The applicant states that there are reports by a quantity surveyor showing poor quality of work done by the respondent and in the event that execution takes place, she will be condemned to pay the respondent, carry out extensive demolitions of the existing construction and rebuild the same at an unknown cost.
7. The applicant states that the application has been brought timeously and without inordinate delay save for the delay occasioned by informing her of the orders on security.
8. The applicant argues that the bank guarantee is in line with the court's discretion on the manner of security for stay of execution.

The Respondent's Case

9. The respondent states that the application is incurably defective, bad in law, frivolous, vexatious, an abuse of the court process and is intent on frustrating it from enjoying the fruits of its judgment.
10. The respondent states that on 1/7/2024, the applicant's previous counsel appeared before court and sought review of the orders that she be allowed to deposit the decretal sum within 14 days. Counsel for the applicant further submitted that the applicant had been advanced a facility and what was remaining was the depositing of the monies. The respondent further states that the court upon hearing the oral submissions of both parties, proceeded to review the orders it issued on 30/5/2024 and directed the applicant to deposit the decretal sum within 7 days thereof.
11. The respondent thus argues that the instant court is functus officio having conclusively pronounced itself on the issue on 1/7/2024 when it determined the oral application by counsel for the applicant, which application sought review and extension of orders of 30/5/2024. Thus the respondent argues that the orders prayed for are res judicata and the court lacks jurisdiction to entertain the application as it cannot sit on appeal on its own orders. The respondent further argues that the application offends Order 45 Rule 6 of the Civil Procedure Rules which bars a second application for review.
12. The respondent states that the application has not demonstrated any reasonable grounds why the instant court ought to disturb or review its orders dated 30/5/2024 which was reviewed on 1/7/2024 upon the court hearing both parties, as the applicant has neither met the requisite conditions for review as no new ground or fact has been explained to the court. Neither has the applicant demonstrated an apparent error on the face of the record or sufficient reasons to warrant review.
13. The respondent argues that the applicant deliberately failed to comply with the conditions set by the court and the instant application is an afterthought. Further on 5/7/2024, counsel for the applicant requested the court to invoice them for the deposit of half the decretal sum which the court obliged and invoiced them the same day but the applicant refused to deposit the said amount. Thus, the respondent argues that it beats logic why the applicant's counsels on record timely moved the court to be invoiced when they were aware that their client had no monies to comply.
14. The respondent states that the applicant is adopting sharp practice of changing advocates with a view of making similar applications blaming the previous counsel on record. Further, the applicant changed her advocates in the trial court immediately after the court issued an order for a joint inspection of



the premises and after parties had reached an amicable settlement aimed at frustrating the recording the amicable settlement and enforcement of the court order. Furthermore, the respondent argues that advocates further their clients' case with their instructions and the applicant has not insinuated that her previous advocates acted without her express instructions.

15. The respondent states that cases belong to the respective parties and not to advocates. Thus the applicant having treated this matter casually from the beginning and even after the court reviewed its orders demonstrates the fact that the applicant did not bother to timely comply with the court order.
16. The respondent states that the instant application is highly prejudicial to it as it diligently and professionally discharged its mandate and contractual obligation by completing the house which the applicant used to secure a loan facility of Kshs. 14,500,000/-. Furthermore, by the applicant bank accepting the house to be used as security, the respondent argues that the said house has no constructions technical shortfall and is upto the required standard.
17. Directions were issued that the application be canvassed by way of written submissions and from the record only the respondent complied by filing its submissions on 26th August 2024. The applicant on the other hand had not filed her submissions by the time of writing this ruling.

The Respondent's Submissions

18. The respondent relies on Order 45 Rule 6 of the Civil Procedure Rules and the cases of A.N. vs B.K. [2015] eKLR; Jeremiah M'Njogu vs District Land Registrar, Meru Central & 3 Others Young & Co. (E.A) Ltd & 2 Others (Interested Parties) [2021] eKLR and Yurub Investments Limited & 2 Others vs Diamond Trust Bank (K) Limited & Another [2021] eKLR and submits that on 1/7/2024, the applicant's counsel sought review orders that she be allowed to deposit the decretal sum within 14 days which the court allowed and directed that the applicant do deposit the decretal sum within 7 days thereof. Thus, the court having reviewed the orders, became functus officio and the orders sought are res judicata.
19. The respondent further cites Order 45 Rule 1 of the Civil Procedure Rules and the cases of Nathan Ondego Mdeizi vs National Housing Corporation Kisumu HCCC No. 34 of 2000 (unreported) and Julius Mukami Kanyoko & 2 Others vs Samuel Mukua Kamere & Another [2014] eKLR and submits that the court having reviewed its orders on 1/7/2024 the application by the applicant for the second review does not lie. Furthermore, the applicant has not demonstrated any discovery of new and important facts or evidence, an error apparent on the face of the record and sufficient cause to warrant review of the said orders dated 30/5/2024.
20. The respondent submits that the court lacks jurisdiction to entertain the present application by virtue of Order 45 Rule 6 of the Civil Procedure Rules and without jurisdiction, the court cannot grant the orders prayed.
21. The respondent submits that the present application having been filed after it has commenced execution following the lapse of the stay orders initially granted herein, the application has been filed with inordinate and unexplained delay. The respondent relies on Article 159 of *the Constitution* and the cases of Dickson Miriti Kamonde vs Kenya Commercial Bank Limited [2006] eKLR and Ibrahim Mungara Mwangi vs Francis Ndegwa Mwangi [2014] eKLR and submits that delay cannot be excused and an indolent party must reckon with the consequences of its inaction.
22. The respondent argues that the applicant shall not suffer any substantial loss and neither has she shown any such substantial loss as she is enjoying the comfort of her house as well as a loan facility of Kshs. 14,500,000/- guaranteed by the said house which she claims is of poor quality and workmanship. The



respondent further argues that the appeal will not be rendered nugatory since it is a money decree and the decree has specifically stated that the applicant to retain 10% of the contract sums to cater for any defects that may arise during the defect liability period.

23. The respondent submits that the record shows that the applicant has shown willful defiance and disrespect towards court orders and continues to refuse to comply with the directions of the court in spite having been indulged by the respondent and the court. Thus the applicant is undeserving of any further indulgence from the court.

Issue for determination

24. The main issue for determination is whether the application has merit.

The Law

Whether the application has merit.

25. Order 45 of the Civil Procedure Code sets out the parameters for an application for review as follows:-

Rule 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 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.

26. It then follows that Order 45 provides for three circumstances under which an order for review can be made. The applicant must demonstrate 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 is some mistake or error apparent on the face of the record that has occurred. The third ground for review is worded broadly; an application for review can be made for any other sufficient reason.
27. In the instant application, the applicant prays for orders of review on the grounds that she learnt of the orders made on 30th May 2024 late since her previous counsel on record, the firm of Ann & Steve Mbugua Law informed her on 28th June 2024. In my view, the said counsel was duly instructed by the applicant. He therefore acted on her behalf and the applicant is bound by the conduct or actions of her advocate. It is my considered view that the applicant has not met the threshold of the orders of review as she has failed to demonstrate discovery of new material or facts, an error apparent on the face of the record or any sufficient cause to warrant review.



28. Upon perusal of the record, it is noted that this court granted stay of execution on 30th May 2024 on condition that the applicant deposit half the decretal sum in court within thirty (30) days. On 1st July 2024, Counsel for the applicant, Ms Mwangi of the firm of Ann & Steve Mbugua Law made an application for extension of time to comply with the said orders of depositing the decretal sum pursuant to the orders made on 30th May 2024. The counsel urged the court to grant her 14 days for her client to comply. The counsel told the court that her client was facing financial constraints and that she was pursuing a loan to obtain the funds. The respondent opposed the application and maintained that the stay orders should be vacated. The court after hearing the arguments of both parties extended the period of compliance with a further 7 days. The oral submissions of the applicant's counsel evidently demonstrate falsehoods on part of the applicant in claiming that her previous advocates on record informed her on 28th June 2024 of the conditional stay orders. From the record, the said advocates were still on record for the applicant and applied for extension of time to comply as the applicant was said to be experiencing financial constraints.
29. That notwithstanding the applicant through her new advocates wrote to the registry on 5th July 2024 requesting for an invoice for half the decretal sum but still failed to deposit the said sum. It is thus clear that the applicant is not being truthful and is wilfully disobeying court orders and yet at the same time blaming her previous counsels for the delay. While there is evidence that she was the one to blame.
30. It is my considered view that the present application is an afterthought and an abuse of the court process. This application in my view, does not meet the threshold set under Order 45 of the Civil Procedure Rules.
31. I find no merit in this application dated 17th July 2024 and it is hereby dismissed with costs to the respondent.
32. Similarly the application dated 30th April 2024 is dismissed for lack of compliance with court orders on deposit/security.
33. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 24TH DAY OF OCTOBER 2024.

F. MUCHEMI

JUDGE

