



**Kihara v Taibjee and Bhalla Advocates LLP & 2 others (Civil Case E360 of 2020)
[2023] KEHC 917 (KLR) (Commercial and Tax) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E360 OF 2020
EC MWITA, J
FEBRUARY 10, 2023**

BETWEEN

CAROLINE WAIRIMU KIHARA PLAINTIFF

AND

TAIBJEE AND BHALLA ADVOCATES LLP 1ST DEFENDANT

MADHAV BHALLA 2ND DEFENDANT

EIGHTY EIGHT NAIROBI LIMITED 3RD DEFENDANT

RULING

1. The plaintiff took out a notice of motion dated October 18, 2021, under sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Order 45 rules 1 (1) (a), 2 (2), 3 (2) and 5 of the *Civil Procedure Rules, (the Rules)*, seeking review and setting aside the ruling dated September 28, 2021 and reinstatement of the suit against the 1st and 2nd Defendants heard on merit together with the suit against the 3rd Defendant. The plaintiff also seeks costs of the application

Background

2. The brief background to this matter is that the plaintiff entered into an agreement with the 3rd defendant to purchase an off-plan apartment that was to be constructed on LR No 209/3006, Upper Hill, Nairobi. The purchase was subject to the terms and conditions in the letter of offer dated September 3, 2018. The purchase price was Kshs 12,770,000 (less the reservation fees paid). The plaintiff paid 10% deposit (Kshs 1,177,000) to the 1st defendant as stakeholder.



3. For reason of some failures on part of the 3rd defendant, the plaintiff issued a notice of intention to withdraw from the transaction and requested a refund of the 10% deposit. The 3rd defendant refunded Kshs 1,085,400 to the plaintiff after deducting Kshs 191,550 as cancellation fees.
4. The plaintiff filed a suit arguing that the 3rd defendant breached the terms of the letter of offer by failing to refund the full deposit and blamed the 1st and 2nd defendant for breached duty of care by releasing the deposit to the 3rd defendant before execution of the agreement for sale. The plaintiff sought judgment against the defendants for Kshs 191,550/- and general damages, exemplary damages as well as aggravated damages of Kshs 1,000,000 against each defendant totaling to Kshs 3,000,000.
5. The 1st and 2nd defendants filed an application to strike out the plaintiff's suit against them or strike their names from the suit for failure to disclose a reasonable cause of action against them.
6. In a ruling delivered on September 28, 2021, the court, Mativo J (as he then was), agreed with the 1st and 2nd defendants that the suit did not disclose a reasonable cause of action against them and struck out the suit against them. The court also found the argument that the 1st and 2nd defendants owed the plaintiff a duty of care unsustainable.

Application

7. The motion is premised on the grounds that there is an error apparent on the face of the record as the court erred in applying the principle of privity of contract without considering its exceptions. The court also failed to consider the fact that 1st defendant breached stakeholder's duty in clause 6 (a) of the letter of offer dated September 3, 2018, to hold the deposit of the purchase price paid by the plaintiff.
8. The plaintiff asserts that the application meets the threshold for granting review under Order 45 Rule 1 of the Rules. The plaintiff argues that the court failed to consider and determine that the 1st defendant was to hold the deposit as stakeholder. The plaintiff relies on the decision in *Nyamogo and Nyamogo Advocates v Kogo* [2001] 1 EA 173 and *Muyodi v Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 on what amount to an error on the face of record.
9. The plaintiff also argues that the court erred by failing to consider the exceptions to the doctrine of privity of contract, and cites the decisions in *William Muthbe Muthami v Bank of Baroda* [2014] eKLR, *Aineah Liluyani Njirah v Agha Khan Health Services* [2013] eKLR and *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR where the Court of Appeal affirmed the existence of exceptions to the doctrine of privity of contract.
10. On whether counsel could swear a supporting affidavit, the plaintiff relies on Order 19 Rule 3 of the Rules that in interlocutory proceedings, an affidavit may contain statements of information and belief showing the sources and grounds thereof. The plaintiff further relies on *Ruth Kwachimoi & another v Charles Nalika Cheloti & another* [2021] eKLR where an application for review was supported by an affidavit by counsel.
11. The plaintiff urges the Court to allow the application.

Response

12. The 1st and 2nd defendants oppose the application on grounds that there is no error apparent on the face of the record. The 1st and 2nd defendants rely on the decision in *Nyamogo & Nyamogo v Kogo case* [supra]. According to the 1st and 2nd defendants, the issue of privity of contract requires elaborate arguments and may, therefore, be a good ground for appeal but not for review.



13. The 1st and 2nd defendants assert that the plaintiff seeks a re-hearing of the because of exceptions to the privity doctrine which were not raised before the court They rely on *Wananchi Group (Kenya) Limited v Communications Commission of Kenya & another* [2014] eKLR for the proposition that review process is not meant to give the losing party an opportunity to raise new arguments to obtain a different result more favourable to it.
14. Regarding the validity of the supporting affidavit sworn by counsel, the 1st and 2nd defendants posit that an advocate may swear an affidavit only in exceptional circumstances in respect to matters either solely within the advocate's personal knowledge or matters not in controversy. The 1st and 2nd defendants point out that counsel deposed to contentious matters. They cite the decisions in *Gerphas Alphonse Odhiambo v Felix Adiego* [2006] eKLR and *Republic v Nairobi City County Government & others ex parte Mike Sonko Mbuvi* [2015] eKLR and urge the Court to dismiss the motion with costs.

Determination

15. This being an application for review, the issue for determination is whether the application meets the threshold for review. Section 80 of the *Civil Procedure Act* (the Act) grants the court jurisdiction for review. The section provides that a person who considers himself aggrieved by a decree or order from which an appeal lies but no appeal has been preferred, or by a decree or order from which no appeal lies, may apply for a review of the judgment to the court which passed the decree or made the order, and the court may make such order as it thinks fit.
16. On the other hand, Order 45 rule 1 of the Rules sets the grounds on which the court may grant review. That is, the court may allow an application for review where an applicant shows that there is a mistake or error apparent on the face of the record; discovery of new and important matter that was not in the applicant's knowledge, or any other sufficient reason. The jurisdiction for review involves exercise of the court's jurisdiction which must be exercised judicially.
17. Courts have also pronounced themselves on when review may or may not be granted. For instance, in *Pankras T Swai v Kenya Breweries Ltd* [2014] eKLR, the Court of Appeal stated that a party cannot seek review on grounds of law since those are grounds of appeal and not review as the power to review decisions on appeal is vested in appellate courts.
18. In *Benjob Amalgamated Ltd & another v Kenya Commercial Bank Ltd* [2014] eKLR, the Court of Appeal again stated thus:
 - (26) The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice. In some jurisdictions, courts have felt the need to cull out such power in order to overcome abuse of process of court or miscarriage of justice.
 - (27) In the High Court, both the *Civil Procedure Act* in section 80 and the *Civil Procedure Rules* in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.
19. And in *National Bank of Kenya Ltd v Ndungu Njau* [1977] eKLR, the Court of Appeal rendered itself thus:

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. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

20. The theme flowing from the decisions above, is that an applicant must base his application for review on the three limbs in Order 45 rule 1. That is, to correct an error or omission on the part of the court or for any other sufficient reason.
21. The plaintiff argument as I see it is that the court allowed the application to strike out the suit against the 1st and 2nd defendants by applying the doctrine of privity of contract but without considering its exceptions. The plaintiff again blames the court for failing to consider the fact that the 1st defendant, as stakeholder, breached stakeholder's duty in clause 6 (a) in the letter of offer dated September 3, 2021. The 1st defendant was to hold the deposit as stakeholder of the deposit of the purchase price paid by the plaintiff but released it to the 3rd defendant (the vendor).
22. Failure to consider exceptions in the doctrine of privity of contract is not in my view, an error apparent on the face of the record. That seems to be a legal argument that the court may have erred in failing to consider exception in the doctrine in privity of contract. This observation is true, if anything, because the plaintiff argued that the Judge erred" in applying the doctrine but failed to consider the exceptions.
23. The plaintiff further blames the court for failing to consider 1st defendant's breach of the duty of care imposed on him by clause 6(a) in the letter of offer. According to the plaintiff, the 1st defendant, as stakeholder, was to hold the deposit of the purchase price but released it to the 3rd defendant (the vendor).
24. The plaintiff has not shown that there is an error, mistake or omission on the face of the record that this court should correct. The plaintiff has also not shown discovery of new or important matter, or still, any other sufficient reason on which the court should allow the application for review. In the impugned ruling, the court allowed the application and struck out the suit against the 1st and 2nd defendants because they were not parties to the contract/agreement.
25. The plaintiff's argument that the court failed to consider exceptions in the principle of privity of contract, is in my view, an issue of law. I say so because a perusal of the ruling reveals the court considered the matter and reached a conclusion that can only be appealed against but not changed through review. At paragraph 38, the court stated:

38][[T]he contract upon which the plaintiff's case is founded is between the plaintiff and vendor not between the plaintiff and the vendor's advocates or the firm of Advocates. Each party was represented by his/its advocates. Each advocate owed a duty of care to his /its client. the plaintiff's claim that the 1st and 2nd defendants owed her a duty of care in (sic) legally frail. To me, the core issue is whether the vendor's decision to retain the deposit is supported by the agreement. this is a matter for full trial. If there is any breach, then it will be on either the plaintiff or the 3rd defendant and not the 1st and 2nd defendants who were not parties to the contract.

26. The court was clear that not being parties to the contract, there was no privity of contract. If the plaintiff was aggrieved with that finding, the only recourse she had to reverse that finding was to file an appeal but not to seek a review as this is not a ground for review. The court further found that the



plaintiff was represented by her own advocate who owed her a duty of care. Whether the court was wrong or not, would be a ground for appeal and not review.

27. It was for that reason that the court of Appeal made it clear in *Pankras T. Swai v Kenya Breweries Ltd* [supra] that a party could not seek review on grounds of misapprehension of the law because these are grounds of appeal and not review.
28. Similarly, as the same court observed in *National Bank of Kenya Ltd v Ndungu Njau* [supra], that a review is granted when it is necessary to correct an apparent error or omission on the part of the court. such error or omission must be self-evident and should not require an elaborate argument to be established. (See also *Nyamongo & Nyamongo Advocates v Kogo* [supra] on the distinction between mere erroneous decision and an error apparent on the face of the record.)
29. An application for review should not be made merely because the applicant thinks another Judge would have taken a different view of the matter, or because the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law, as this is not a ground for review.
30. In *Yani Haryanto v E D & F Man (Sugar) Limited* (Civil Appeal No 122 of 1992), the Court of Appeal emphasized that the facility of review under Order 44 of the *Civil Procedure Rules* is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. The application for review must not, however, be on legal arguments that are grounds for appeal.

Conclusion

31. Having considered the application, arguments by parties and read the impugned ruling, the conclusion I come to is that grounds raised by the plaintiff in support of the application are grounds for appeal and not review. This is plain from a reading of the grounds on the face of the application; that the judge applied the principle of privity of contract without considering exceptions to that principle. This is argument attacks the ruling for being erroneous in law.
32. Similarly, the argument that the judge failed to consider the legal implications of the breach of duty of care by a stakeholder is, with respect, an argument on a point of law and is not a ground for review.

Disposal

33. The application dated October 18, 2021 has no merit. It is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2023

E C MWITA

JUDGE

