



**Transmara Sugar Company Limited v J.N. Marwa Ikimwanya Auctioneers Limited & another
(Miscellaneous Civil Appeal 33 of 2021) [2023] KEHC 27502 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 27502 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MISCELLANEOUS CIVIL APPEAL 33 OF 2021
RPV WENDOH, J
FEBRUARY 16, 2023**

BETWEEN

TRANSMARA SUGAR COMPANY LIMITED APPLICANT

AND

J.N. MARWA IKIMWANYA AUCTIONEERS LIMITED 1ST RESPONDENT

SAMUEL OUMA 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 10/6/2022, the applicant seeks the following orders:-
 - a. That this court be pleased to review and set aside its ruling delivered on 31st March 2022 on the issue of costs;
 - b. That the costs of this application be provided for.
2. The grounds upon which the application is premised are found in the body of application and the supporting affidavit of Wekhomba Victor Mackton, Counsel who has the conduct of this matter on behalf of the applicant. Counsel deposed that this court delivered its ruling on 31/3/2022 and struck out the appeal with costs on account of the preliminary objection raised by the respondent; that on 25/11/2021, this court delivered a ruling and declared that the decree which led to the taxation of the 1st respondent's bill of costs was illegal, null and void; that by virtue of the said ruling, the 1st respondent was therefore not entitled to payment on the illegal process carried out in line with the *Auctioneers Act* of 1995.
3. Counsel further deposed that this court should review its ruling delivered on 31/3/2022 on account of its ruling delivered on 25/11/2021 which brought new and important evidence that would have led to the withdrawal of the appeal thus making the ruling of 31/3/2022 unnecessary. Counsel further



- deposed that in the circumstances, it is highly prejudicial to the applicant to be condemned to pay costs from an illegal process and it would be just if everyone in the appeals struck out to bear their own costs.
4. The application was opposed. Johnes N. Marwa filed a replying affidavit on behalf of the 1st respondent. He deposed that the appeal herein emanated from Rongo SRMCC Misc. Application No. E009 of 2020; that this court issued its ruling on 31/3/2022 and dismissed it with costs; that it is the appellant who dragged him to court and he spent money defending the appeal and hence he is entitled to costs; that even if the applicant had withdrawn the appeal, he would have been entitled to costs.
 5. It was further deposed that the appellant has not shown any nexus of the ruling that was delivered and the appeal herein; that because the court issued another decision does not entitle for a review; that there is no sufficient cause shown, neither is there an error on the face of the record to warrant an order of review or setting aside. The 1st respondent stated that there has been a delay of 71 days in bringing this application which has not been explained by the applicant. The 1st respondent urged the court to dismiss the application with costs.
 6. The 2nd respondent did not respond to the application. Directions were taken that the application be canvassed by way of written submissions. It is only the 1st respondent who duly complied.
 7. I have considered the Notice of Motion dated 11/7/2022, the 1st respondent's response dated 4/7/2022 and the submissions dated 28/9/2022. The issue for determination is whether this court should review its ruling of 31/2/2022.
 8. The substantive law on review is found in Section 80 of the Civil Procedure Act while the procedural law is found in Order 45 (1) (b) Civil Procedure Rules. Order 45 Rule 1 (b) of the Civil Procedure Rules provides that any person considering himself aggrieved -

"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."
 9. An applicant seeking review has to satisfy any of the three grounds:-

That he has discovered new and important matter or evidence which could not be produced by him at the time when the decree was passed;

That there was a mistake or error apparent on the face of the record;

Other sufficient reasons.
 10. The basis for this application is that this court should review its ruling of 31/3/2022 which declared that the executions done were illegal on account of its earlier ruling delivered on 25/11/2021 which brought in new and important evidence that would have led to the withdrawal of the appeal thus making the ruling of 31/3/2022 unnecessary.
 11. As this court recalls, the ruling of 31/3/2022 was premised on a Chamber Summons filed by the applicant challenging the ruling delivered on 16/2/2021 by the Hon. R.K. Langat in Rongo SRMCC Misc Application No. E004, 005, 006, 007, 008, 009, 10 and 11/ 2020 on the 1st respondent's bill of costs. The applicant tried to have the trial court set aside its ruling but the application was dismissed.



The applicant tried to challenge the ruling of the trial court delivered on 16/2/2021 before this court but by this court's ruling of 31/3/2022, this court found that it had no jurisdiction to entertain the Chamber Summons filed by the applicant.

12. The ruling of 25/11/2011 related to the intended execution in Civil Appeals Nos. 123, 119, 120, 121, 122, 124, 125 and 126 all of 2019. The appeals emanated from Rongo SPMCC Case Nos. 165, 166, 167, 168, 169, 171, 175 and 205 all of 2017. This court found that since there was already a stay order pending the hearing and determination of the appeals, the execution proceedings commenced by the respondent in that appeal were null and void.
13. The ruling of 31/3/2022 particularly dealt with the jurisdiction of this court to entertain the appeals emanating from the ruling of the trial court in Rongo SRMCC Misc Application No. E004, 005, 006, 007, 008, 009, 10 and 11. The 1st respondent herein was named because its bill of costs was being challenged. On the other hand, the ruling of 25/11/2021 particularly challenged the execution process commenced by the respondent Charles Mbaka in Civil Appeal No. 123 of 2019 where there was already an order of stay of execution.
14. The appeal which was struck out was the one filed herein challenging the outcome of the bill of costs filed by the 1st respondent. The appeal challenging the judgement and decree of the trial Magistrate delivered in SPMCC No. 171 of 2017 on 27/8/2019 which came up for judgement on 23/1/2023 was not struck out. It should also be noted that the 1st respondent was not named as a party to the applications filed in Civil Appeal No. 123 of 2019.
15. I do not find any nexus between the findings in the rulings of 31/3/2022 and 25/11/2021 to warrant this court to review its orders on the issue of costs. The applicant has not satisfied this court that it has met the requirements outlined under Order 45 Rule 1 (b) of the Civil Procedure Rules. In any case, the 1st respondent did expend money in instructing Counsel to defend it in court and the principle is now well settled that unless otherwise directed, costs should follow the event.
16. From the foregoing, I find no merit in the Notice of Motion dated 10/6/2022 and the same is hereby dismissed with costs to the 1st respondent. These orders shall apply in Misc. Applications Nos. 34,35,36,37,38,39 and 40 all of 2021.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 16TH DAY OF FEBRUARY, 2023

R. WENDOH

JUDGE

Ruling delivered in the presence of:-

No appearance for the Appellant

Mr. Abisai holding brief for Ms. Apondi for the 1st Respondent

No appearance for the 2nd Respondent.

Nyauke Court Assistant

