



Thanawalla & 2 others v Njoroge (Sued as the Executor of the will of John Njoroge Keige-Deceased) & 2 others (Civil Appeal E377 of 2021 & Miscellaneous Civil Application E408 of 2021 (Consolidated)) [2023] KEHC 17579 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17579 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E377 OF 2021 & MISCELLANEOUS
CIVIL APPLICATION E408 OF 2021 (CONSOLIDATED)**

A MABEYA, J

MAY 19, 2023

BETWEEN

**TAJDIN THANAWALLA 1ST CLAIMANT
JANE MULII KAMENE 2ND CLAIMANT
VERONICA KAMENE MUSYIMI 3RD CLAIMANT**

AND

**DORCAS NDUGI NJOROGE (SUED AS THE EXECUTOR OF THE WILL OF
JOHN NJOROGE KEIGE-DECEASED) 1ST RESPONDENT
MICHAEL ROBERT KARANJA 2ND RESPONDENT
SHAZA TWO A LIMITED 3RD RESPONDENT**

RULING

1. The Notice of Motion dated 12/9/2022 was brought, inter alia, under Article 50 of the *Constitution*, Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*. The Applicant sought four orders two of which are spent.
2. The grounds for the application are set out in its body and the Supporting Affidavit of Michael Robert Karanja who stated that the finding of the Court in its ruling of 31/8/2022 was borne out of an error apparent on the face of the court's record as the applicants had filed their Replying Affidavit dated October 18, 2021 which rebutted the allegations raised in the application.



3. Further, that the applicants are at risk of not only being condemned unheard but also being directed to deposit a sum of Kshs 13, 435, 167.81 failure to which they would be in contempt of court.
4. In response, the Claimants filed a Replying Affidavit dated 3/10/2022 and contended that the applicants have not satisfied the strict grounds for review as stipulated under Order 45 Rule 1 of the Civil Procedure Rules. Further, that the applicants are to blame for filing the Replying Affidavit within the wrong suit and cannot now fault the court for their negligence.
5. I have considered the rival contestations. From the application, the response therewith and the submissions by the parties, there is only one issue for determination, Whether the court should review/ vary the orders dated 31/8/2022.
6. The jurisdiction to review an order of a Court is provided for under section 80 of the Civil Procedure Act and adumbrated by Order 45 Rule 1 of the Civil Procedure Rules. Under the said provisions, review can only be allowed if there is discovery of a new and important matter of evidence which despite exercise of due diligence was not known or could not be produced at the time the order was made; or there is a mistake or error apparent on the face of the record; or for any other sufficient reason.
7. The present application was predicated upon error apparent on the face of the record. The applicant submitted that there was an error apparent on the face of the record which was the court's finding that the applicants did not file any response in opposition to the Claimant's Application dated 6/7/2021.
8. They argued that they had filed a replying affidavit in opposition 18/10/2021 which was sworn by the 2nd applicant through the court's e-filing system albeit the same was filed under Misc No E408 of 2021.
9. At paragraph 9 of the impugned ruling, the Court noted that the applicants had not filed any replying affidavit to the Motion dated 16/2/2021. I have confirmed from the e-filing system and have confirmed that the replying affidavit was indeed filed in Misc No E408 of 2021 on 18/10/2021.
10. The record shows that on 29/7/2021 when the Court ordered the consolidation of the two files, Misc E377 of 2021. It is for that reason that the Court may have overlooked to look at Misc No E408 of 2021 at the time of writing the ruling. In this regard, the holding that the applicants had not responded to the application for security for costs and damages was a glaring error apparent on the face of the record.
11. In Law Society of Kenya vs Center for Human Rights & Democracy & 12 others [2014] eKLR, the Supreme Court of Kenya held: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”
12. In view of the foregoing, it would seem that for one reason or the other, the Court did not see the said replying affidavit in the court file before delivering the subject ruling. It therefore goes without saying that the applicant was condemned unheard as its averments in the said replying affidavit were never considered at all. There was indeed an error apparent on the face of the record. Accordingly, the application dated 12/9/2023 is meritorious and is allowed.
13. Having allowed the application and set aside the orders of 31/8/2022, I have considered the replying affidavit dated 8/10/2023. The applicants denied that they were impecunious. They stated that they were willing to complete the transaction which was the subject of the litigation.



14. Further, the applicant's submitted that by praying that the respondents do attach the apartments that the subject of the sale, that was a prima facie admission that the applicants were not impecunious. I agree with that submission.
15. In any event, it would be a grave injustice to deny a citizen access to the seat of justice on the basis of inability to pay damages or costs, as the case may be. That eventuality would most probably be in breach of Article 48 of the *Constitution*.
16. Accordingly, the orders dated August 31, 2022 are hereby reviewed and set aside. The application dated May 27, 2021 is hereby dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2023.

A. MABEYA, FCIArb

JUDGE

