



REPUBLIC OF KENYA



**KENYA LAW**

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**Njuca Consolidated Limited & another v Olang & another (Civil Appeal E356 of 2020) [2023] KEHC 18645 (KLR) (Civ) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18645 (KLR)

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

**CIVIL**

**CIVIL APPEAL E356 OF 2020**

**JN MULWA, J**

**JUNE 8, 2023**

**BETWEEN**

**NJUCA CONSOLIDATED LIMITED ..... 1<sup>ST</sup> APPELLANT**

**BONIFACE MODICK KHAGULA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**CAROLINE AKINYI OLANG ..... 1<sup>ST</sup> RESPONDENT**

**MWANGO FRED EZRA ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Ruling and Order of the Chief Magistrate's Court at Milimani in CMCC No. 5080 of 2017 delivered by Hon. E. M. Kagoni (PM) on the 1st day of December 2020)*

**JUDGMENT**

1. A brief background of this appeal is that judgment was entered in favour of the Respondents against the Appellants for Ksh 7,388,060/- in CMCC No 5080 of 2017. Being dissatisfied with the decision, the Appellants lodged an appeal against it being Milimani HCCA No 186 of 2020 and filed an application in the lower court for stay of execution pending appeal. The lower court allowed the said application vide a Ruling delivered on September 10, 2020 on the following conditions: -
  - a. The Applicants to pay the Respondents Ksh 2,462,686.70/- being 1/3 of the decretal amount within the next 21 days.
  - b. The remainder of the decretal amount being Ksh 4,925,373.30/- to be deposited in a joint account in the names of both advocates for the parties within 21 days from today's date, failing which execution shall issue."



2. By a consent order dated September 29, 2020, the parties agreed to extend the time required to pay the one third of the decretal amount to October 2, 2020. They also agreed to an extension of 14 days from the date of the consent to allow the Appellants more time to deposit the balance in the joint account. Further, that in default of the aforesaid conditions, execution would issue against the Appellants for the entire decretal sum and costs.
3. On October 2, 2020, the Appellants' insurer, APA Insurance Company Ltd, paid the Respondents the sum of Ksh 3,000,000/-. Thereafter, on 7/10/2020, the Appellants reached out to the Respondents with a proposal to secure the balance of the decretal sum by way of a bank guarantee payable on demand upon conclusion of the appeal. The Respondents rejected the proposal and thus the Appellants filed an application dated October 15, 2020 seeking for review of the Ruling of September 10, 2020 to allow them issue the bank guarantee. The lower court dismissed the said application in a Ruling delivered on December 1, 2020 thus precipitating the instant appeal.
4. The Appeal was lodged through a Memorandum of Appeal dated December 9, 2020 in which the Appellants raised the following grounds:
  1. The Learned Magistrate erred in fact and law by disregarding the Appellants' submissions and authorities on the application dated October 15, 2020 stipulating the rationale for reviewing the ruling delivered on September 10, 2020.
  2. The Learned Magistrate erred in law and fact by narrowly construing the application of the provisions of Order 45 of the Civil Procedure Rules.
  3. The Learned Magistrate erred in fact and law by failing to take into account the negative impact of Covid-19 on the economy and more specifically on the business of the Appellants.
  4. The Learned Magistrate erred in fact and law by failing to take into consideration the supporting evidence of the Appellants.
  5. That the Learned Magistrate erred in awarding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents costs against the Appellants.
  6. The Learned Magistrate erred in fact and law by failing to review the ruling delivered on September 10, 2020.
5. The Appellants seek that the appeal be allowed, the Ruling and Order delivered by the lower court on December 1, 2020 be set aside and substituted with an order allowing the application, and the Respondents be ordered to pay the costs of this appeal.
6. The Appellants submitted that the trial magistrate erred by failing to consider several undisputed facts. Firstly, the adverse effect of the Covid-19 virus on the Appellants' business, which severely limited their ability to raise the balance of the decretal amount to be deposited in a joint interest account within the timeline given by Court. Secondly, that the Appellants provided evidence that they reached out to the Respondents to seek more time to provide alternative security but the proposal was rejected and thus they faced the threat of execution. Thirdly, that there was partial compliance with the court order of September 10, 2020. Fourthly, that the Appellants offered alternative security in the form of a bank guarantee which in their view is sufficient security under the law. The Appellants further argued that the trial Court failed to consider that the Respondents having already been paid the sum of Ksh 3,000,000/- were already enjoying part of the fruits of their judgment and therefore faced no prejudice. In addition, the Appellants contended that in the event that the appeal succeeds, it would be challenging to recover the money from the Respondents whose residence and source of income are unknown.



7. The Appellants relied on the following cases: -
- a. [\*Pithon Waweru Maina v Thuka Mugiria\*](#) [1983] eKLR where the appellate Court set out the conditions for interference with the exercise of discretion by a trial court.
  - b. [\*Alice Gathigia Karuku v Maisha Floor Mills\*](#) [2013] eKLR where the Court reviewed a consent order that required the Applicant to deposit the decretal amount in court and directed that the Applicant furnish any other form of security to include but not limited to a title deed or a bank guarantee or log book.
  - c. [\*Shanzu Beach Restort Limited v Crown Marble & Quartz Ltd\*](#) [2020] eKLR where the Court noted the adverse impact of Covid-19 on the economy and businesses in the country and allowed the Applicant to provide security by way of a bank guarantee.
  - d. [\*Philmark Systems Services Limited v Andmore Enterprises Limited\*](#) [2017] eKLR where the Court set aside and reviewed a consent order and substituted the security to be provided by the Applicant by directing it to furnish a bank guarantee as security for stay of execution.
8. On their part, the Respondents submitted that the learned magistrate did not err in her decision as the Appellant did not provide any proof of the bank guarantee or any documentation from the bank that it was engaging with in that regard to support their averments.
9. The court has carefully considered the grounds and Record of Appeal as well as the rival arguments by the parties herein. The only issue that falls for determination is whether the learned trial magistrate erred by disallowing the Appellants' application for review.
10. Section 80 of the [\*Civil Procedure Act\*](#) provides for the substantive power for review as follows:-
- “ Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
  - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”
11. Order 45 Rule 1 of the [\*Civil Procedure Rules\*](#) provides for the conditions necessary for review 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.”

12. The Appellants application for review in the lower court was based on the ground of any other sufficient reason. In the impugned ruling, the learned magistrate disallowed the application for review on the basis that the Appellants had not provided any evidence of their financial constraints or the bank guarantee they were proposing to use, for the court’s consideration.
13. It is a cardinal principle of the law of evidence that he who alleges must prove. Although the court appreciates that the Covid-19 pandemic occasioned economic hardship to many businesses, the record is clear that the Appellants did not annex any evidence to demonstrate how their business operations were adversely affected to the extent that it was impossible for them to comply with the lower court’s order of September 10, 2020 requiring them to deposit the balance of the decretal sum in a joint account as a condition for stay. Bare allegations such as the ones made by the Appellants in support of their application for review have no place in a court of law for a party who desires to be believed by the court.
14. In *Coastal Bottlers Limited v Commissioner of Domestic Taxes* [2009] eKLR, the Court of Appeal declined to grant stay after the Applicant failed to place relevant evidence before the court such as the balance sheet of its businesses, from which the court could come to the conclusion that if the applicant was to be compelled to pay the outstanding tax balance, it might be forced out of business. Similarly, in *Regional Institute of Business Management v Lucas Ondong’ Otiemo* [2021] eKLR, the High Court declined to review the conditions for stay where the Applicant failed to provide evidence of how its business had been adversely affected by the covid-19 pandemic.
15. In addition, the court notes that the Appellants did not annex the draft bank guarantee that it was proposing to offer in place of the security ordered by the learned magistrate and neither did it show any effort made towards obtaining the bank guarantee such as engagement with any reputable bank(s) in that regard. Indeed, it suffices to point out that the purpose of requiring provision of a security as a condition for grant of stay pending appeal is to ensure that the successful litigant is guaranteed of accessing the fruits of his or her judgment without undue difficulty in the event that the losing party is unsuccessful in the appeal.
16. For the foregoing, the court is satisfied that the Appellants application for review was bereft of merit and the learned magistrate cannot be faulted for failing to be persuaded by bare averments that are not supported by any evidence.
17. The upshot is that the Appeal lacks merit and is hereby dismissed with costs to the Respondents.  
Orders accordingly.

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 8<sup>TH</sup> DAY OF JUNE 2023.**

**JANET MULWA**  
**JUDGE**

