



Bank of Africa Limited v Mits Electrical Company Limited & 2 others (Civil Appeal 34 of 2018) [2023] KEHC 20016 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 34 OF 2018
A MABEYA, J
JULY 17, 2023**

BETWEEN

BANK OF AFRICA LIMITED APPELLANT

AND

MIT'S ELECTRICAL COMPANY LIMITED 1ST RESPONDENT

SATYA GANDHI 2ND RESPONDENT

PRIEYA GANDHI 3RD RESPONDENT

RULING

1. The 2nd respondent/applicant in the Notice of Motion dated 21/9/2021 sought the review and/or setting aside of the judgment dated 17/9/2020. The application was brought inter-alia pursuant to Order 45 Rule 1 of the Civil procedure Rules 2010.
2. The application was supported by grounds set out in the body of the application and in the supporting affidavit sworn by the applicant on even date.
3. The grounds were that; the appellant filed an appeal on 24/11/2017 challenging the decision of the Learned trial Magistrate Hon. D.O. Mbeja (Mr.) SRM delivered on 6/11/2017 in Milimani Commercial Court Civil Suit No. 3928 of 2009 which dismissed the appellant's suit with costs. That at the time when the appellant filed this appeal on 24/11/2017, the 1st respondent had ceased to exist at the Companies registry as of 30/1/2017 and the 3rd respondent had passed away on 6/11/2017. That in the premises, no suit and/or appeal could be lodged against them unless it was brought against the estate of the deceased.



4. The applicant contended that the counsel for the appellant was aware of this information but did not bring it to the attention of the Court. That the Court would not have arrived at the decision made on 17/9/2020 if it had been aware of the above information.
5. That the entry of a judgment against a dissolved company and a deceased person was erroneous and thus there exists an error apparent on the face of the record to warrant a review of the said judgment.
6. Further that the appellant did not effect service of the appeal on the 1st and 3rd respondent which is sufficient reason for the Court to review and/or set aside the judgement made on 17/9/2020. That the appellant intends to execute the decree obtained from the said judgement for the recovery of Kshs.4,829,264/= as against the applicant as the guarantor of the loan facility advanced to the 1st defendant which abated upon the cessation of operation of the 1st defendant.
7. The applicant pleaded that she would suffer irreparable damage if the Court does not review the said judgment and order that the appeal was not properly filed before this Court.
8. In opposition, the appellant filed a replying affidavit sworn on 1/3/2022 by George Nyamai, its recoveries officer. He averred that the application had failed to establish requirements for the orders sought. That there was inordinate and unexplained delay in filing the application of more than one year since delivery of the judgment on 17/9/2020. That there was no error apparent on the face of the record to warrant a review of the judgment and that the judgment was entered jointly and severally against the respondents.
9. That the dissolution of a company does not in any way extinguish accrued liabilities such as the decretal sum owed to the appellant in this case. That the obligation of the applicant as guarantor is that liability accrues upon default of the principal debtor and must pay on demand the guaranteed sum.
10. The appellant averred that the applicant was seeking to circumvent payment of the decretal amount with the intention of frustrating the conclusion of the matter whereas judgment was entered against the respondents jointly and severally.
11. The issue the court must determine is whether the application meets the grounds for review.
12. Order 45 Rule 1 of the [Civil Procedure Rules](#) provides that: -
 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 judgement to the court which passed the decree or made the order without unreasonable delay.”



13. From the foregoing, an applicant seeking to review an order of the court must demonstrate that 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 any other sufficient reason.
14. At least one of the above grounds must be met before a court can review.
15. In the present case, the applicant sought the review of judgment of 17/9/2020 on the grounds that the entry of the same against a dissolved company and a dead person was erroneous and thus there exists an error apparent on the face of the record. That no suit and/or appeal could be lodged against them unless it was brought against the estate of the deceased.
16. I have seen the impugned judgement. The Court held that;

“Judgement is entered for the appellant as against the respondents jointly and severally as prayed in the plaint dated October 30, 2008...”
17. This meant that even though the 1st respondent company did not exist anymore and the 3rd respondent had passed away, the appellant could still pursue execution of the judgment as against the 2nd respondent. It therefore holds no water for the applicant to claim that her liability abated upon dissolution of the 1st respondent company. Her liability was personal.
18. In view of the foregoing, I hold that the applicant has failed to demonstrate the existence of an error apparent on the face of the record.
19. I note further that a review application ought to be filed without unreasonable delay. In the present case, judgment was entered on 17/9/2020. The present application was filed on 21/9/2021 which was more than a year later which in my opinion constitutes unreasonable delay. The applicant did not explain the inordinate delay. It seems that the applicant only sprung to action when the threat of execution of the judgment was looming against her.
20. The upshot is that the application for review lacks merit and is dismissed with costs to the appellant.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCIArb

JUDGE

