



REPUBLIC OF KENYA



KENYA LAW

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Lustman & Company (1990) Limited v Corporate Business Centre Limited & 4 others (Civil Suit 311 of 2018) [2023] KEHC 19978 (KLR) (Commercial and Tax) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 19978 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 311 OF 2018**

EC MWITA, J

JULY 7, 2023

BETWEEN

LUSTMAN & COMPANY (1990) LIMITED PLAINTIFF

AND

CORPORATE BUSINESS CENTRE LIMITED 1ST DEFENDANT

KIRAN KUMAR MANUBHAI PATEL 2ND DEFENDANT

MANDIP SINGH AMRIT 3RD DEFENDANT

JOHN KARIMI NJIRAINI 4TH DEFENDANT

**KENYA REVENUE AUTHORITY STAFF PENSION SCHEME REGISTERED
TRUSTEES 5TH DEFENDANT**

RULING

Application.

1. This is a notice of motion dated February 14, 2022 by the 1st, 4th and 5th defendants for review of the ruling of the court delivered on February 4, 2022. The motion is brought under Order 45 rules 1 of the *Civil Procedure Rules*.
2. The motion is supported by the grounds on its face, the affidavit sworn by the 1st, 4th and 5th defendants' counsel and written submissions. The 1st, 4th and 5th defendants stated that the plaintiff filed motion dated May 28, 2021 seeking orders for production of certain documents particularized in the amended notice to produce.
3. On June 29, 2021, the court directed that the motion be canvassed by way of written submissions. In compliance, the 1st, 4th and 5th defendants filed a replying affidavit sworn on July 6, 2021 and



written submissions dated September 1, 2021. However, in its ruling issued on February 4, 2022, the court indicated that there was neither a response nor written submissions on record or on the online platform. As a result, the court made its decision without considering the 1st, 4th and 5th defendants' side of the story.

4. The 1st, 4th and 5th defendants contended that there is a mistake or error on the face of the record since they had put in their response and submissions which were not considered. They argued that they had been condemned unheard.
5. The 1st, 4th and 5th defendants relied on *Wachira Karani v Bildad Wachira* (Civil Suit No 101 of 2011) [2016] eKLR, to submit that the court ought to discharge or set aside the ruling issued on February 4, 2022 to ensure that they do not suffer injustice or hardship due to an excusable mistake or error.

2nd and 3rd Defendants' Response

6. When the matter came up for directions on October 27, 2022, the 2nd and 3rd defendants indicated that they were not taking a position on the application as they were pursuing an appeal.

Plaintiff's response

7. The plaintiff filed a replying affidavit by its counsel, Daniel Ndegwa Wokabi and written submissions opposing the application. the plaintiff argued that the court correctly noted that the 1st, 4th and 5th defendants did not file a replying affidavit or written submissions in response to the motion of May 28, 2021.
8. Referring to the entries on the Judiciary e-filing system and previous court attendances, the plaintiff contended that the 1st, 4th and 5th defendants did not prove that they filed and served the documents as alleged.
9. The plaintiff maintained that the 1st, 4th and 5th defendants were afforded an opportunity to be heard and directions were issued on filing their replying affidavit and written submissions but failed or neglected to do so. The plaintiff faulted the 1st, 4th and 5th defendants for failure to advance reasons for the delay in filing their documents.
10. The plaintiff asserted that the motion is a delaying tactic and an abuse of the court process in that it seeks to respond to and introduces new grounds of opposition to the motion of May 28, 2021. The plaintiff argued that the court having delivered its ruling, it is now functus officio; that the 1st, 4th and 5th defendant have not come to court with clean hands; and have not demonstrated what prejudice they will suffer should they comply with the court orders of February 4, 2022 to produce.
11. The plaintiff relied on *Esther Wamaita Njibia and 2 others v Safaricom Limited* (Civil Case No. 62 of 2011) [2014] eKLR that in an application such as this, the court cannot exercise its discretion to obstruct or delay the cause of justice; *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, that there is no error apparent on the face of the record and where one exists, it should be so self-evident that it would not require elaborate arguments to support it and *Magnolia Pvt Limited v Synermed Pharmaceuticals Limited* (Civil Case No. 233 of 2018) [2018] eKLR, where the court dismissed a similar application for lack of sufficient cause because the applicant had not filed the necessary documents despite clear and express court orders and despite being given an opportunity to participate in the hearing.



Determination

12. The jurisdiction of the court to review its decision, is provided for under section 80 of the [Civil Procedure Act](#) (the Act). Grounds on which such an application may be made are provided for under Order 45 rule 1 of the Civil Procedure Rules (the rules).
13. Section 80 of the Act provides:

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.
14. Order 45 of the rules augments section 80, providing for grounds for review. The court may exercise its discretion and allow an application for review if an applicant demonstrates 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 for any other sufficient reason. The jurisdiction for review involves exercise of discretion which must be exercised judiciously.
15. In *Pankras T. Swai v Kenya Breweries Ltd* [2014] eKLR the Court of Appeal opined that an application for review not be based on grounds of law which are grounds of appeal and not review. The court then stated:

(29) ...The power to review decisions on appeal is vested in appellate courts. Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or "for any sufficient reason." The appellant did not bring his application within any of the limbs nor did he show that there was any sufficient reason for review to be granted. As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the [Civil Procedure Act](#), Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order.
16. In *Benjob Amalgamated Ltd & another v Kenya Commercial Bank Ltd* [2014] eKLR, the Court of Appeal again stated:

(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.

17. 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.

18. The jurisprudence emanating from the above decisions, is that an application for review should be based on the three limbs in Order 45 rule, namely error, mistake or discovery on new matters or for any other sufficient reason.
19. In this application, the main argument by the 1st, 4th and 5th defendants is that there is a mistake or error on the face of the record because even though they had filed a replying affidavit sworn on July 6, 2021 and written submissions dated September 1, 2021, the court stated in its ruling delivered on February 4, 2022, that the 1st, 4th and 5th plaintiffs' response and written submissions were not on both the file and online platform. As a result, the court made its decision without considering their arguments, thus they were condemned unheard.
20. I have gone through the application and the ruling of this court that is sought to be reviewed. I have again, for avoidance of doubt, checked the record and the E-filing portal for this case. There is no replying affidavit sworn on July 6, 2021 or submissions dated September 1, 2021 filed by the 1st, 4th and 5th defendants. The court addressed itself on the application based on the material placed before it and made a considered decision on that application.
21. The 1st, 4th and 5th defendants have not demonstrated the apparent error or mistake on the face of the record, discovery of new and important matter or any other sufficient reason that would justify exercise of the court's discretion in their favour.
22. The 1st, 4th and 5th defendants merely wanted the court to review its ruling and to reopen the matter so that they could have a second chance to argue an issue that had been resolved in the ruling, the subject of this application.
23. In my respectful view, if this court failed to consider the 1st, 4th and 5th defendants' response and submissions that would not be a sufficient ground for review. It would also not be a ground for review that another Judge could properly have taken a different view of the matter. Neither will it be a ground for review where it is thought that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. (See *National Bank of Kenya Ltd v Ndungu Njau* [1977] eKLR).
24. The grounds raised in support of the application for review are not grounds for seeking exercise of the court's jurisdiction. The ground could at best support an appeal but not review. In the premise, the application is declined and dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2023

E C MWITA



JUDGE

