



**Munguti & another v Simiyu & another (Suing as Administrators  
of the Estate of the Late Frank Mwasi Mwabaga) (Civil Appeal  
45 of 2019) [2023] KEHC 22376 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22376 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL 45 OF 2019  
RN NYAKUNDI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**FRANCIS NZIVO MUNGUTI ..... 1<sup>ST</sup> APPELLANT**

**SOUTH SIOUX FARM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LINDA MUTIEMBU SIMIYU ..... 1<sup>ST</sup> RESPONDENT**

**JANET NDATA SIMIYU ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE FRANK  
MWASI MWABAGA**

**RULING**

Coram: Before Hon. Justice R. Nyakundi

Ngala & Co. Adv. For the Respondent

Nyairo & Co. Adv. For the Appellants

1. By a Notice of Motin dated 5/6/2023 the Appellants/Applicants seek the following ordes:-
  1. Spent.
  2. That the ruling/order made the Court on 10/5/2023 in respect to the application dated 11/11/2023 be reviewed and/or set aside and the order for stay of execution granted in favour of the Respondent be vacated forthwith.
  3. That the ruling/order made by the Court on 10/5/2023 in respect to the application dated 25/1/2023 be reviewed and/or set aside ex dilitio justicae.



4. Upon grant of prayers 2 and 3 above, there be an order dismissing the Respondents' application dated 11/11/2023 and a further order setting the application dated 25/1/2023 down for hearing inter partes on merit.
  5. That costs be in the cause.
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn on 5/6/2023 by Anne Halwenge Odwa.

### **The Applicants Case**

3. The Applicants' case is that vide an application dated 14/1/2019 filed in Eldoret High Court Miscellaneous Application No.13 of 2019, they sought leave of Court to file an appeal against the judgment delivered in Eldoret CMCC No. 579 of 2007 and stay of execution pending appeal. The Applicants deposed that on 12/3/2019, this Court delivered its ruling granting them leave to file the intended appeal out of time and further stayed the execution of the decree that was issued in Eldoret CMCC No. 579 of 2007 pending the hearing and determinations of their intended appeal on condition that they were to pay half of the decretal sum to the Respondents within (30) days and the balance thereof was to be deposited in an interest earning account in the joint names of the Advocates on record within a period of (30) days.

The Applicants maintain that pursuant to the orders made by the Court on 12/3/2019, the appeal herein was filed upon complying with the conditions for stay of execution granted.

The Applicants further deposed that the appeal herein was heard and judgment was delivered on 12/10/2022 setting aside the lower Court award and substituting it with an award of Kshs.2,023,050/=.

4. According to the Applicants the effect of the said judgment was that they were not only entitled to sum of Kshs. 2,417,001/= that was deposited in the joint interest earning account but were also entitled to a refund of Kshs.393,951/= which had been paid to the Respondents as a condition for stay of execution pending appeal before this Court.

The Applicants maintain that being aggrieved by the judgment of the judgment delivered on 12/10/2022, the Respondents lodged a notice of appeal and an application dated 11/1/2023 seeking stay pending appeal. The Court on 24/1/2023 gave directions that the Respondents' application dated 11/1/2023 be canvassed by way of written submissions and proceeded to be issue a ruling dated for 28/2/2023.

The Applicants further deposed that after the Court proceedings of 24/1/2023 and in view of the fact that the funds in the joint account deposited by them had served their purpose, they filed an application dated 25/1/2023 seeking the release of the funds held in the joint account as a condition of stay of execution pending the hearing and determination of the appeal as the appeal had been determined. The Applicant further deposed that the file was placed before judge and orders were given directing that their application dated 25/1/2023 be served and for the parties to appear before the judge on 28/2/2020 for direction on the application, the same day the Court was to rule on the application by the Respondents seeking stay of execution pending appeal the Court of appeal.

5. The Applicants maintain that in compliance with the directions given by the Court, the Appellant's Advocate served the application dated 25/1/2023 upon the Respondent for direction on 28/2/2023. Further that on 28/2/2023 when parties appeared before the Court, the Applicants' Advocate sought directions on the Applicants' application dated 25/1/2020



seeking release of the funds held in the joint account now that the appeal had been determined. That upon inquiring on the directions in respect of the application dated 25/1/2023, strangely the Court indicated that the Court's record did have the directions on the said application or a copy of the said application and as such, the Court could not give direction in view of the said application and that the Applicants' Counsel 's efforts to persuade the Court to give directions on the said application bore no fruits as the Court proceeded to fix the Respondents' application dated 11/1/2023 for ruling on 28/3/2023 and advised the Applicants' Counsel to follow up with the Deputy Registrar on where the application dated 25/1/2023 went to.

Further that on the Court's advise the Applicants' Counsel wrote to the Deputy Registrar seeking directions on the application dated 25/1/2023 but also appeared before the Deputy Registrar to inquire about the application dated 25/1/2023. The Deputy Registrar then indicated that she would follow up on the matter and get in touch with the Applicants' Counsel. The Applicants contend that however no communication was received from the Court regarding their application dated 25/1/2023 and whether the same was ever traced and if the Court had issued any directions on it.

The Applicants further deposed on 10/5/2023 the matter herein came for ruling on the Respondents' application dated 11/11/2023 which Court proceeded to allow. However, to their surprise, the Court when on to determine their application dated 25/1/2023 which it had indicated that it was not record and had not given directions on how it was to be canvassed. According to the Applicants, the determination by the Court regarding the application dated 25/1/2023 was premature and was made without affording them an opportunity to be heard on the said application.

6. The Applicants further deposed that in the Court's ruling, the basis for allowing the Respondent's application dated 11/1/2023 was that there was already security deposited. The Applicants maintain that the Respondents herein have never deposited security to warrant the holding and is an error apparent on the face of the record which ought to be corrected.

The Applicants contend that the Court proceeded under the mistaken belief that it is the Respondents who had initially deposited security when the correct position is that it is them who had deposited security as a condition for stay of execution pending the determination of this appeal. The Applicants maintain that at no time did the Court direct the Respondents to deposit security to warrant the Court's holding which is clearly erroneous. The Applicants further contend that no security was offered by the Respondents in line with the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules to warrant the orders of stay of execution being granted hence the orders of review being sought.

According to the Applicants, it is unjust for them to be subjected to another episode of litigation before the Court of Appeal when the chances of the intended appeal succeeding or being concluded in the near future is not guaranteed without any security being offered. Further the Applicants contend that the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules are very clear and that this Court is bound to apply the law when considering an application such as the one dated 11/1/2023 filed by the Respondents.

The Applicants maintain that they stand suffer if the order allowing the application dated 11/1/2023 stands yet there is no guarantee in form of security that Respondents will pay the costs of the appeal in the likely event the appeal fails.



7. The Applicant further deposed that the conditions of Order 42 Rule 6(2) of the Civil Procedure Rules cannot be complied with selectively but are intertwined such that if a party fails to meet any of the conditions then the orders of stay of execution cannot be issued.

The Applicants further contends that it would be discriminatory and unconscionable for them to have been condemned to offer security as a condition for stay of execution pending appeal to this Court while the Respondents are allowed to pursue their appeal to the Court of Appeal without offering any security and further to have the very security offered by them as condition of stay of execution in this appeal be used for the Respondents' benefit as their own security for costs yet the said funds have since served their purpose and ought to be released to them now that this appeal was determined.

The Applicants maintain that had they been given the opportunity to be heard on the application dated 25/1/2023 then the Court would have been given sufficient facts to enable it make a just determination based on the correct set facts on record. Further that it would be in the interest of justice to set aside the orders made on 10/5/2021 so that the application dated 25/1/2023 be heard on merit before a determination is made.

According to the Applicants, there is an error apparent on the record of this Court that ought to be corrected.

### **The Respondents' Case**

8. The application is opposed by the Respondents vide the Replying Affidavit sworn by Linda Mutiambu Simiyu on 6<sup>th</sup> July, 2023.

The Respondents maintain that this instant application is incompetent, an afterthought, devoid of merit, scandalous, frivolous and vexatious and thus ought to be dismissed with costs.

The Respondents admit that indeed judgement was delivered in this appeal on 12/10/2022 by this Court in favour of the Appellants making a final award of Kshs.2,023,050/= being the damages payable to them.

The Respondents contend that in making the said decision the Court did consider their submissions.

Aggrieved by the said decision, the Respondents instructed their advocates to prefer an appeal to the Court of Appeal and a Notice of that effect was duly filed and served.

9. The Respondents further deposed that they had applied for review of the judgment dated 12/10/2022 which application was dismissed as they already preferred an appeal to the Court of Appeal.

The Respondents further deposed that on 11/1/2022, they lodged an application for stay of execution of the said judgment and that on 24/1/2023 the Court gave directions that the said application be canvassed by way of written submissions which submissions were filed. Further that after the said application was filed, the Appellants filed their application dated 25/1/2023 seeking the release of funds amounting to Kshs.2,417,001/= held in a joint account by the parties Counsels on account of the refusal of their Advocates to sign the consent forms for withdrawal.

That consequently, the Court granted the Respondents stay of execution and further delivered a ruling on 19/5/2023 where it stated that it lacked jurisdiction to entertain the appellants' Application for restitution dated 25/1/2023.



10. According to the Respondents, the unfortunate fact that the Applicants' application for restitution dated 25/1/2023 was missing in the Court file on the date of its hearing is not sufficient to set aside the dismissal orders made on 10/5/2022 since the prayer for restitution is implausible. Further the Respondents maintain that it is unnecessary that the order dismissing the application for restitution dated 25/1/2022 be set aside as the Court lacks authority to make a determination on the same and thus would result in the same outcome as per the orders of 10/5/2022.

The Respondents maintain that their application for stay of execution dated 11/1/2023 was heard and determined on merit. Further that in the said application their Advocates argued that the decretal amount of Kshs.2,417,001/= which was deposited in the joint names of the Advocates on record in this case is the security for due performance of the decree. The Respondents further maintain that the Appellants are very much aware that the appeal touches on the above decretal sum and thus their absence of security as condition for Stay of execution is absurd.

11. The Respondents maintain that they have already filed their appeal in the Court of appeal against the judgment delivered on 12/10/2022. The Respondents further contend that in any case, the Appellants application for restitution was brought after the Court had given directions on their application for stay of execution thus demonstrating a possible malicious intent on the part of the Applicants. According to the Respondents the Appellants have brought this instant application with the intention of trying to frustrate and circumvent the cause of justice to their loss and detriment.

The application was canvassed vide written submissions. The Respondents filed their submissions dated 25/7/2023 on 27/7/2023 whereas the Applicants did not file any. I have carefully, read and considered the Respondents submissions and need not reproduce them here. The Respondents relied on the following cases to buttress their submissions: Winnie Wambui Kibinge & 2 Others V Match Electricals Limited Civil Case No.222 of 2010 and David Kiptanui Yego & 134 Others V Benjamin Rono & 3 Others [2021] eKLR.

### **Analysis and Determination**

12. From onset it must be noted that the power of review is available only when there is an error apparent on the face of the record.

For purposes of clarity review proceedings are not an appeal. The review must be confined to error apparent on the **face** of the record and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.

Section 80 of the [Civil Procedure Act](#) Cap 21 provides 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.”

Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides 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.”

13. In Republic v Public Procurement Administrative Review Board & 2 others [2018] e KLR it was held: -

Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”

14. Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793 where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.

Discussing the scope of review, the Supreme Court of India in the case of Ajit Kumar Rath vs State of Orisa & Others, 9 Supreme Court Cases 596 at Page 608. had this to say:-

the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression “any other sufficient reason” ..... means a reason sufficiently analogous to those specified in the rule”

15.. In Tokesi Mambili and others vs Simion Litsanga the Court held as follows: -

- i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was



not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.

- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
16. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR High Court of Kenya Nairobi Judicial Review Division Misc. Application No. 317 of 2018 John M. Mativo Judge culled out the following principles from a number of authorities: -
- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
  - ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
  - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
  - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
  - v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
  - vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
  - vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.
  - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
  - ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
  - x. The power of a civil court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.



17. In the present case, the Applicants argue that when rendering its ruling dated 10/5/2023 on the Respondents application dated 11/1/2023, the Court herein proceeded on the mistaken belief that it was the Respondents who had initially deposited security when the correct position is that it is the Applicants who had deposited the said security as a condition of stay of execution pending the determination of the appeal herein.

I have carefully perused the impugned ruling and I find it necessary to reproduce the Court's finding on the issue of security

## Security

The decretal sum is already deposited in a joint interest earning account in the names of the parties' advocates therefore, there is already security provided and such, this requirement has been satisfied."

18. There is no doubt that the Court proceeded on the understanding that there is already security provided and as such, thus requirement has been satisfied. While it is indeed true that there was security provided, the same had been provided by the Applicants herein for purposes of stay of execution of the decree by the trial Court pending the hearing and determination of this instant appeal. The said security clearly was not issued by the Respondents as had been observed.

From the above analysis, it clear that there was an error/mistake on the face of record in view of the security that had been provided as condition for stay of execution of the decree that had been issued by the trial Court.

Be as it may, however I need to remind parties stay of execution orders are discretionary in nature. The Court for that matter enjoys the discretion to issue the same or not. With that said, in my view it would not be in the interest of justice to vacate the stay of execution orders issued to the Respondents on grounds that she did not furnish security for due performance.

19. Further, from the record it also evident that the Respondents have since filed their appeal at the Court of Appeal being Eldoret Civil Appeal No. E039 of 2023; Linda Mutiembu Simiyu & Another V Francis Nzivo Minguti & Another and as such the prayer herein has since been overtaken by events as it cannot issue.

With regard to the Applicants' application dated 25/1/2023. The Applicants contend that they were not given an opportunity to be heard before the Court made a determination on the said application. The Applicants want the Court to set aside the said ruling so that the same can be determined on merit.

I must re-emphasize that a review is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited. The Court when dealing with said application observed that the subject matter of the appeal is the quantum of the decretal sum as it forms the substratum of the suit and thus a deduction of any amount of money from the security deposited would interfere with the subject matter of the appeal.

20. Having found so, setting aside and or reviewing the said decision would be in my sitting in my own appeal. If the Applicants are really aggrieved by the said decision, they should seek a recourse in the proper forum.



In the end, the Applicants have failed to demonstrate that there was mistake or error apparent on the face of the record and/ or any sufficient reason to enable this Court review/ or set aside its ruling delivered on 10/5/2023.

Accordingly, the Applicants' application dated 5/7/2023 is without merit and is hereby dismissed with costs to the Respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THE 21<sup>ST</sup> DAY SEPTEMBER 2023**

.....

**R. NYAKUNDI**

**JUDGE**

