



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nobel Trading Company Limited v Nduati (Civil Appeal E035 of 2022)  
[2023] KEHC 22393 (KLR) (20 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22393 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL E035 OF 2022  
GMA DULU, J  
SEPTEMBER 20, 2023**

**BETWEEN**

**NOBEL TRADING COMPANY LIMITED ..... APPELLANT**

**AND**

**JOHN CHEGE NDUATI ..... RESPONDENT**

**RULING**

1. Before me is a Notice of Motion dated April 28, 2023 filed by the applicant/appellant under section 1A, 1B, 3A and 80 of the [Civil Procedure Act](#) (Cap 21), and Order 45 Rule 1 and 2 of the [Civil Procedure Rules](#) 2010.
2. The application was brought by the applicant through counsel Oundo Muriuki & Company Advocates and seeks the following orders:-
  1. (Spent).
  2. (Spent).
  3. Upon hearing and determination of this application the court be pleased to review, discharge, vary/or vary the ruling delivered on April 28, 2023 and all consequential orders emanating therefrom and substitute the same with an order that:-

The appellant/applicants' Notice of Motion application dated September 1, 2022 be allowed as prayed.
4. The costs of this application be provided for.
3. The application has grounds on the face of the Notice of Motion that the court dismissed the application dated September 1, 2022 without taking into consideration four key elements that is that the appellant had already filed a Memorandum of Appeal. Secondly, that the ruling of the Magistrate



in Voi Magistrate's Civil Suit No 6 of 2022 was on the applicant's application for setting aside the judgment delivered on January 31, 2022, that the Memorandum of Appeal dated September 1, 2022 impugns the judgment in the Magistrate's case, and that the applicant has a valid appeal on record with high chances of success.

4. It is also a ground that the court did not consider the weighty grounds raised in the Memorandum of Appeal, and that consequent upon the ruling of April 28, 2023 the respondent is poised to take out warrants of attachment and proclaim the assets of the applicant for Kshs 14,071,504.87 before the substantive appeal is determined and thus render the appeal nugatory.
5. The application was filed with a supporting affidavit sworn on April 28, 2023 by Ahmed Imtiaz a Director of the applicant amplifying the grounds above.
6. The application is opposed through Grounds of Opposition filed by Waithera Ngigi & Company Advocates for the respondent in the following terms:-
  1. That there is no error apparent on the face of the record and the appellant/applicant has not shown any and/or an error apparent on the face of the record.
  2. The appellant/applicant is in the application challenging both the Hon. Judge's exercise of discretion and findings.
  3. The application therefore discloses no just cause to warrant grant of prayer 3 of the application.
  4. The application is therefore an abuse of the court process and ought to be dismissed with costs to the respondent.
7. The application was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by counsel for the applicant as well as the submissions filed by counsel for the respondent, both of whom relied upon decided court cases. I have also perused the subject ruling.
8. This being an application for review of this court's orders, it is governed by the provisions of Order 45 Rule 1 of the *Civil Procedure Rules*.
9. Thus the applicant is required to show the court that either he has discovered new and important matter or evidence which, after 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.
10. From what I can deduce from this application for review, documents filed as well as the submissions, I am of the view that the appellant considers that he is entitled to a review of this court's ruling because the court did not appreciate that a Memorandum of Appeal had been filed, and that presently there are no restraining orders against execution by the respondent, and that the appeal filed will be rendered nugatory.
11. With regard to the two last grounds that the effect of the ruling is that there will no restraint against execution, and that the appeal filed herein will be rendered nugatory, none of those are grounds for review of judgment or court orders. They may be grounds for appealing against the court's ruling but they are not valid grounds for review orders under Order 45 Rule 1 of the *Civil Procedure Rules*.
12. With regard to the first ground that the Judge missed to appreciate that a Memorandum of Appeal had already been filed, if valid, that would go to an error on the face of the record, assuming that the issue of filing the appeal was a live issue brought up in the application.



13. There was however no such error on the face of the record committed by the court in the ruling. In this regard, the court was very alive to the existence of the Memorandum of Appeal when under paragraph 4 of the ruling it referred to counsel's arguments, wherein it was submitted that the applicant, had an arguable appeal. Under paragraph 8 of the ruling also the court noted that the applicant's counsel argued that the appeal would be rendered nugatory if their application was disallowed.
14. Further, and in particular reference to the Memorandum of Appeal filed, the court stated as follows under paragraph 26 of the ruling:-
  - “26. The above notwithstanding and looking at the Memorandum of Appeal, the subject of the instant appeal is a ruling dismissing the applicant's application dated May 30, 2022 seeking to set aside the trial court's judgment. This in itself is a negative order that cannot be executed.....”
15. It cannot thus be said that the court made any error on the face of record by not acknowledging the appeal, which would call for its review. If the court made or is perceived to have erred in its determination of the subject ruling, in my view that being a substantive decision of the court can only be challenged through an appeal to a higher court. It does not fall within this court's review jurisdiction.
16. I thus find no merits in the application for review dated April 28, 2023, and dismiss the same with costs to the respondent.

**DATED, SIGNED AND DELIVERED THIS 20TH DAY OF SEPTEMBER 2023 AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Nusura/Alfred – court assistants

Mr. Juma for the appellant/applicant

