



**King David Hospital & another v Mayver Enterprises Ltd (Civil Appeal E074 of 2022) [2023] KEHC 27322 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27322 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CIVIL APPEAL E074 OF 2022  
SN MUTUKU, J  
OCTOBER 18, 2023**

**BETWEEN**

**KING DAVID HOSPITAL ..... 1<sup>ST</sup> APPELLANT**

**DAVID NTHONYE ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MAYVER ENTERPRISES LTD ..... RESPONDENT**

**RULING**

**The Applications**

1. This Ruling relates to two applications. There is the Notice of Motion dated 6<sup>th</sup> June 2023 brought by Mayver Enterprises Ltd, the Respondent in this Appeal, and the Notice of Motion dated 27<sup>th</sup> June 2023 brought by the 2<sup>nd</sup> Appellant and director of the 1<sup>st</sup> Appellant. Both applications were canvassed simultaneously by way of written submissions as directed by this court on 24<sup>th</sup> July 2023. To avoid confusion in reference to the parties, I will refer to parties in both applications as the Appellants and the Respondent.
2. The Notice of Motion dated 6<sup>th</sup> June 2023, filed by the Respondent, seeks to cite the Appellants for contempt of court in respect to court orders dated 17<sup>th</sup> April, 2023, and striking out and dismissal of the Appellants' Memorandum of Appeal dated 14<sup>th</sup> September 2022 with costs.
3. The grounds advanced for seeking such orders are that the Appellants have failed to comply with the orders of this court issued on 17<sup>th</sup> April 2023; that the Appellants were ordered to deposit Kshs 3,562,200 being the decretal sum as security in a joint interest earning account in both names of the advocates representing the parties; that its advocates have written on numerous occasions to the Appellants' advocates requesting to be supplied with relevant documents to enable them to open a joint account but there has been no response to those letters and that this failure to comply with the orders of this court has caused harm to the Respondent.



4. The Appellants claim to have filed a Replying Affidavit sworn by the 2<sup>nd</sup> Appellant on 21<sup>st</sup> July 2023 in opposition to this application, but I have not seen the stated Replying Affidavit in the court file.
5. The second application under determination is the Notice of Motion dated 27<sup>th</sup> June 2023 by the Appellants. It seeks review, variation and/or alteration of the Ruling and orders of this court issued on 17<sup>th</sup> April 2023 and in its place accept security by way of a Bank Guarantee from the Appellant's banker, Equity Bank Limited, for the decretal sum of Kshs 3,562,200 as alternative security and costs of the application. The main ground in support of this application is that the Appellants are facing financial constraints and are unable to raise the security in the sum stated and therefore they seek to have this court review its earlier orders and allow them to substitute the said security with a Bank Guarantee from the Appellants' bank. They have argued that the purpose of security is to guarantee the due performance of such decree or order as may ultimately be binding on them in the event that the appeal fails and that the Bank Guarantee will serve the same purpose.
6. The application dated 27<sup>th</sup> June 2023 is opposed by the Respondent through a Replying Affidavit of Rogers Mutia, a director of the Respondent Company. He has deposed that the application dated 27<sup>th</sup> June 2023 is an afterthought and was only filed after the application dated 6<sup>th</sup> June 2023 was filed; that the Appellants have not demonstrated discovery of new and important matter or evidence that was not within their knowledge or existence of a clerical error or mistake apparent on the face of the ruling; that the time allowed to the Appellants to deposit the decretal amount lapsed on 17<sup>th</sup> May 2023 and that no extension of time to comply with the order was sought.

#### **Parties Submissions**

7. The Respondent's submissions are dated 4<sup>th</sup> August 2023. Three issues have been raised, namely:
  - i. Whether the appellants have established grounds to warrant review/setting aside of this court's ruling dated 17<sup>th</sup> April 2023.
  - ii. Whether the appellants are in contempt of court orders made on 17<sup>th</sup> April 2023.
  - iii. Whether the respondent is entitled to the relief sought.
8. On the first issue, it has been submitted that Order 45 Rule 2 of the *Civil Procedure Rules* provides to whom review may be made. The Respondent cited *Mumby's Food Products Limited & 2 Others v Co-Operative Merchant Bank Limited* Civil Appeal No. 270 of 2002 where it was held that:

“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 however 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.”
9. It was submitted that the Appellants have not demonstrated an apparent error on the face of the ruling and discovery of new and important evidence to warrant granting of the orders they are seeking.
10. On the second issue, it is submitted that court orders are binding on the party against whom it is addressed and remains valid until set aside and that the actions of the appellant of failing to comply with court orders issued on 17<sup>th</sup> April 2023 amounts to contempt of court. the Respondent cited



“It is essential for the maintenance of the rule of law and order that the authority and the dignity of the courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with the proved contemnors. It is the plain and unqualified obligation of every person against whom an order is made by court of competent jurisdiction, to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by the order believes it to be irregular or void.”

11. The Respondent, further cited Cromwell J, in *Carey v Laiken*, 2015 SCC 17 (16<sup>th</sup> April 2015) where the three elements of civil contempt of court were expounded as follows:
  - i. The order alleged to have been breached must state clearly and unequivocally what should and should not be done. This ensures a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example, it is missing an essential detail about where, when or to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
  - ii. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
  - iii. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.
12. It is submitted that the orders issued by this court to the extent that decretal sum be deposited in a joint account in the names of advocates representing the parties within 30 days were unequivocal and in the knowledge of the parties; that the Appellants have intentionally failed to comply with those orders and are now attempting to frustrate the decree holder by proposing to give a bank guarantee.
13. The Respondent seeks to have its application dated 6<sup>th</sup> June 2023 allowed and the Appellants’ application dated 27<sup>th</sup> June 2023 dismissed with costs.
14. The Appellants Submissions are dated 17<sup>th</sup> August 2023 and filed on 18<sup>th</sup> August 2023. In addressing the issue as to whether the orders sought in the Notice of Motion dated 27<sup>th</sup> June 2023 should be granted, the Appellants have submitted that the application is based on section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*; that a plain reading of section 80 and Order 45 is clear that the power of the court to review or set aside its orders is discretionary and that before exercising that discretion, the court must be satisfied that the Applicant has demonstrated any of the grounds provided under Order 45.
15. They have submitted that the Appellants have demonstrated sufficient reason in seeking review by showing that they have made efforts to raise security in order to comply with the court orders but they have been unable to do so for reasons that they are facing financial constraints; that they are still keen on complying with those orders and are willing to offer an alternative security in form of Bank Guarantee from their Banker, Equity Bank Ltd, which is a reputable bank. They urge that this court accepts the reasons offered as sufficient reason and allow the application.



16. The Appellants cited several authorities to emphasize on the meaning of the words “for any sufficient reason”, including *Pancras T. Swai v Kenya Breweries Ltd*, Nairobi CA No. 275 of 2010 where the Court of Appeal states that:
- “As repeatedly pointed out in various decisions of this Court, the words “for any sufficient reason” must be viewed in the context 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 sufficient in the order.”
17. The Appellants also cited several authorities to emphasize the point that this court has discretion to review its order for deposit of security and allow them to deposit a bank guarantee as an alternative security, including *John Mbaya Mucheke v Kaberia E Limukii* [2020] eKLR and *George Mutisya v Faith Mwendu Philip & another* [2021] eKLR.
18. In respect to the Respondent’s Application dated 6<sup>th</sup> June 2023, the Appellants have submitted on two issues: whether they should be cited for contempt of court orders dated 17<sup>th</sup> April 2023 and whether their Memorandum of Appeal dated 14<sup>th</sup> September 2022 should be struck out and dismissed with costs. The Appellants cited *Samuel M. N. Mweru & Others v National Land Commission & 2 others* [2020] eKLR, where the court held that:
- a. The terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;
  - b. The defendant had knowledge of or proper notice of the terms of the order;
  - c. The defendant has acted in breach of the terms of the order; and
  - d. The defendant’s conduct was deliberate.
19. They submitted that the standard of proof is higher than a balance of probabilities in civil procedure proceedings for the reason that contempt of court proceedings are quasi-criminal in nature. They cited *Katsuri Ltd v Kapurchand Depar Shali* [2016] eKLR cited with approval in *Gatharia K. Mutikika v Baharinin Farm Ltd* (1985) KLR 227 to emphasize the quasi-criminal nature of contempt of court proceedings. They submitted that they are still willing to abide by the orders of this court.
20. On the second issue, they submitted that they have demonstrated that their failure to comply with the orders of the court was not deliberate and that they are still willing to comply with those orders, it is in the interest of justice that this court declines the prayer to dismiss the appeal and instead allow the Appellants to deposit a bank guarantee and proceed to prosecute the appeal.

### **Analysis and Determination**

21. I have considered the two applications under determination. The orders of the court sought to be reviewed/varied and/or altered are the orders issued on 17<sup>th</sup> April 2023 directing the Appellants to deposit decretal sum of Kshs 3,562,200 as security. These orders were issued on 17<sup>th</sup> April 2023 and were to be acted upon within 30 days. The Application by the Appellants seeking review or variation is dated 26<sup>th</sup> June 2023. That is a period of slightly over one month after the expiry of 30 days. The main issue that arises from the application by the Appellants is whether they have satisfied the requirements under Order 45 (1) of the *Civil Procedure Rules*. It 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.

22. Clearly, an applicant seeking review under these provisions must prove:

- a. 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
- b. on account of some mistake or error apparent on the face of the record, or
- c. any other sufficient reason, desires to obtain a review of the decree or order, and
- d. must apply for a review of the orders to the court that made the orders without unreasonable delay.

23. I have noted that the Appellants are not arguing that they have discovered new and important matter of evidence which was not within their knowledge or error apparent on the face of the record. Instead, they are relying on “any other sufficient reasons” as their main ground for filing this application. They are pleading their attempts to source for the decretal amount within the time given was not possible because of financial constraints. They have cited various authorities all discussing “any other sufficient reason”.

24. The Court of Appeal in *Chanzu Investments Limited v Commissioner for Lands* (1993) eKLR cited with approval the decision in *Wangechi Kimita & Another v Mutahi Wakabiru* (1985) eKLR where that Court stated that “any other sufficient reason” need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the *Civil Procedure Act*. I am persuaded that the Appellants have proved “any other sufficient reason” for coming back to court.

25. The idea behind depositing security is to protect both parties pending the appeal. As stated in *Kilimanjaro Safari Club Limited v County Council of Olkejuado & another* [2007] eKLR, the money deposited as security is not money in the hands of the Respondent but simply “security” for the Respondent, that in the event the Respondent succeeds, the funds are available to satisfy the decree. The court was of the view that it would not make any difference if security in monetary form is substituted by a bank guarantee or an insurance bond.

26. I have noted that they did not bring this application immediately after the expiry of 30 days within which to deposit security but about one month thereafter. Can this be termed as an unreasonable delay? In my considered view, one month is not an unreasonable delay given the amount of money involved and the reasons advanced that they are facing financial difficulties.

27. The orders sought are discretionary upon satisfaction of the court that the Appellants have complied with the provisions of Order 45. Upon my careful consideration of both applications, it is my finding that the Appellants have satisfied this court why they should get the orders they are seeking. They



have shown sufficient reason, and their application was brought without an unreasonable delay. Consequently, having arrived at the above conclusion, it is clear that the Appellants cannot be held in contempt of court. However, they are ordered to pay costs for both applications to the Respondent.

28. The Appellants shall provide a bank guarantee within 7 days after this ruling. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 18<sup>TH</sup> OCTOBER 2023.**

**S. N. MUTUKU**

**JUDGE**

