



REPUBLIC OF KENYA



KENYA LAW
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**Keter v Ecobank Kenya Limited (Civil Case 16 of 2018)
[2023] KEHC 23607 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 16 OF 2018
RN NYAKUNDI, J
OCTOBER 16, 2023**

BETWEEN

DAPHINE BELINDA KETER PLAINTIFF

AND

ECOBANK KENYA LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 5/5/2021, the Applicant seeks for the following orders:
 1. Spent.
 2. That the Honourable Court be pleased to review its ruling and order delivered on 20/4/2021.
 3. That the Honourable Court be pleased to make an order allowing the Defendant's Notice of Motion application dated 2/6/2020.
2. The application is premised on the grounds therein and is further supported by the affidavit sworn by Sammy Miringu on 6/5/2021.

The Applicant's Case

3. The Applicant's case is that on 4/5/2021 their Advocates on record received an email from this Court forwarding a ruling dated 20/4/2021 erroneously dated 2020 with regard to its application dated 2/6/2020. In the said ruling the Applicant deposed that the Court dismissed its application for reasons that there was a pending application before the Court of appeal and thus the Applicants could not proceed with the application dated 2/6/2020 as all of them intended to achieve the same result.
4. The Applicant further deposed that the Court of Appeal sitting in Nairobi on 29/1/2021 delivered a ruling in Civil Application No. 14 of 2020 striking out the Plaintiff's /Respondent's Notice of Appeal with costs. That the said ruling was with respect to the Applicants application. Further that *vide* a letter



dated 1/2/2021, the Applicant's Advocates on record wrote to the Environment & Land Court which was then seized of this suit of the findings at the Court of Appeal and tendered to this Court a copy of the said ruling. The Applicant maintained that it would seem that this Court inadvertently did not notice the said letter and the attached ruling or the letter was not placed before the Court file hence the findings at paragraphs 21 (a) and (b) subject to the application herein.

5. The Applicant further deposed that the ruling of the Court of Appeal was crucial evidence which the Court herein would have considered and arrived at a different finding as there is currently no Notice of Appeal or Appeal or pending at the Court of Appeal and thus a basis for this Court to review its decision and findings.
6. The Applicant further deposed that there is an order of stay of execution and or sale awaiting the determination of an appeal at Court of appeal and which appeal has been found not to exist and Notice of Appeal struck out. The Applicant maintained that its heavily prejudiced by the stay order as the guarantor and the borrower are not serving the loan and are riding on the strength of the orders subsisting in this suit.

The Respondent's Case

7. The application is opposed by the Respondent *vide* her Replying Affidavit dated 2/6/2021.
8. According to the Respondent, the Applicant has not raised any new issue that was not captured in Court's ruling of 20/4/2020. The Applicant maintains that even if her Notice of Appeal was struck out, the same notwithstanding the Court herein is now bound by law to commence a fresh suit.
9. The Respondent contends that all orders and all decisions made by the Environment and Land Court prior to the transfer of this suit to the Court herein are null and void as they were made by a Court devoid of jurisdiction.
10. The Respondents position is that this Court correctly and rightly addressed itself to the issue the appeal before the Court of appeal.
11. The Respondent wants the Court herein to start this instant suit denovo as it is now a commercial transaction and no longer a land and environment matter.
12. The Respondent further maintained that all issues, decisions and orders previously made by the Land and Environment Court cannot be matched with the decisions and orders now to be made by this Commercial Court. That this Court has to start handing the matter afresh and differently as a commercial transaction and that the decisions made by the previous Court have to stand a part.
13. The Respondent deposed that whether or not this Court was to review the ruling of 20/4/2020, the review will not change the position because the Land and Environment Court was handling issues touching on the sale of land that was used as collateral which land is family land. That the Court herein is now handing the commercial aspect of the case at that the contention at the moment is over the unpaid balance of the loan facility.

Analysis and Determination

14. Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#) provides as follows:-

Section 80. Review

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.] Application for review of decree or order.

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 judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate



court the case on which he applies for the review”

15. From the above provisions, it is clear that while Section 80 of the *Civil Procedure Act* grants the court the power to make orders for review, Order 45 sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

16. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR 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.”

In *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal held: -

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.....”

17. In the instant case, the Applicant seeks that the Court reviews its ruling delivered on 20/4/2020 wherein it dismissed the Applicant’s application dated 2/6/2020 as it was not aware that the Respondent’s Notice of Appeal had already been struck out by the Court of Appeal. The Applicant submitted that at the time when the ruling by the Court of Appeal was being remitted, this suit was before Honourable Justice S.M. Kibunja of the Environment & Land Court and was before he made a ruling transferring the same to the High Court. According to the Applicant there are thus sufficient reasons to review the ruling by this Court.

18. A court can review a judgment for any other sufficient reason. In the case of *Sadar Mohamed vs Charan Singh and Another* it was held that any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter. Sir Dinshah Fardunji Mulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 *Civil Appeal No. 90 of 2001*; [2001] LLR 6937 (CAK) (writing on Order 47 Rule 1 of the *Civil Procedure Code* of India), (the equivalent of our Order 45 Rule 1), states that the expression ‘any other sufficient reason’...means a reason sufficiently analogous to those specified in the rule. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out..., would amount to an abuse of the liberty given to the tribunal under the *Act* to review its judgement.

19. In the case of *Tokesi Mambili and others vs Simion Litsanga* [2004] eKLR 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.(Emphasis added)



- ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.
20. The question that Court that this juncture needs to answer is whether there are sufficient reasons to review the ruling of 20/4/2020. From the record it is clear that *vide* a ruling dated 29/1/2021 the Court of Appeal in Civil Application No. 14 of 2020 struck out the Respondent's Notice of appeal and thus by the time the Court herein was rendering its ruling the Court of appeal had already dealt with the application filed by the Applicant, striking out the Respondent's Notice of Appeal.
21. In view of the foregoing, the Applicant now wants this Court to allow its Notice of Motion application dated 2/6/2020 in which it had sought that Court reviews its ruling and/ or orders issued on 7/9/2018 and or varied on 4/12/2018 granting stay of execution by barring the sale of Land Reference Nos. 9699/32, 9399/34 and 9399/36 and set the same aside, and substitute the same with an order granting leave to the Applicant to sell the properties by public auction. It is noteworthy to mention that the matter herein was initially filed at the Environment & Land Court and that the application dated 2/6/2020 was initially filed therein before the said Court made a determination to transfer it to this Court for want of jurisdiction.
22. From the record it evident that the orders issued on 7/9/2018 and or varied on 4/12/2018 granting stay of execution by barring the sale of Land Reference Nos. 9699/32, 9399/34 and 9399/36 were granted by the Environment and Land Court and not by this Court. As such the prudent thing to do was for the Applicant file a fresh application in this Court as this Court cannot review orders issued by a Court downed its tools for want of jurisdiction.
23. The applicant submits that this honourable court has the jurisdiction to hear and determine this suit. That is correct but does it have the jurisdiction to exercise the powers of review donated by Section 80 of the [Civil Procedure Act](#) and order 45 (1) of the [Civil Procedure Rules](#) as to the decision made by Environment and land court which in essence conceived and appreciated that it had no personal or subject matter jurisdiction. In my view this court has such jurisdiction to review the orders issued and in the opinion of the judge the court had no jurisdiction to entertain the suit. The appropriate forum to hear and determine the matter on review is exactly the Environment and Land Court. By dint of Section 18 of the [Civil Procedure Act](#) and the statement by Mulla on the [Code of Civil Procedure \(Act V OF 1908\) 13th Edition](#) it was observed:” Jurisdiction an order for the transfer of a suit from one court to another cannot be made under this section unless the suit has been in the first instance brought in a court that has jurisdiction to try it. But if after the transfer is made, the parties without objection join issue and go to trial upon the merits, the order of transfer cannot subsequently be impeached.”
24. From the reading of the record and subsequent findings made the substantive suit as was filed before ELC suffers the same fate as expressed in the persuasive case of [Macfoy v United Africa Co. Ltd \(1961\) 3 ALL ER, 1169](#) where the court held that: “if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there, it will collapse.
25. The decision by the Court of Appeal in [Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel \(2016\) eKLR](#) discussed so far has final and binding determinations of particular questions raised by the Applicant seeking this court to exercise review jurisdiction over the decision arising out of the proceedings in Environment and Land Court. In challenging the decision the question will usually be whether the court should as a matter of discretion refuse permission to grant orders taken before that court not of concurrent jurisdiction. The limiting circumstances are as stated herein under in reference to the Equity Bank case: “In numerous decided cases, courts including this court have held that it would



be illegal for the High Court in exercise of its powers under Section 18 of the [Civil Procedure Act](#) to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, it is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot ever seek refuge under the O2 principles or the overriding subjective under the [Civil Procedure Act](#), the [Appellate Jurisdiction Act](#) or even Article 159 of the [Constitution](#) to remedy the same. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.

26. The nature of the impugned decision in question strictly speaking is non justiciable and unsuitable for resolution by this court. This interpretation has been justified on the grounds that review as stipulated in Section 80 of the [Civil Procedure Act](#) and Order 45(1) is quite unconnected with the facts of the notice of motion dated 5/5/2021 to grant any such orders within the scope of the statute. There must be sufficient close nexus between the Applicant seeking review jurisdiction and the subject matter of the dispute. In the case at bar, such threshold being a court of distinct jurisdiction with that of ELC renders the application moot. The take home is for the application to be dismissed as a whole with costs to the respondent.

DATED SIGNED AND DELIVERED AT ELDORET ON THE 16TH DAY OF OCTOBER, 2023

R. NYAKUNDI

JUDGE

