



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 89 OF 2020

JAMES KIIRU MWANGI.....APPELLANT/APPLICANT

-VERSUS-

GIBSON KIMANI MWANGI.....1ST RESPONDENT

CHRIS GANSURE.....2ND RESPONDENT

RULING

1. This ruling is the product of the Notice of Motion dated 15th October, 2020 taken out by the appellant/applicant under the provisions of Section 80 of the Civil Procedure Act and Order 45, Rules 1, 2 and 3; and Order 51, Rule 1 of the Civil Procedure Rules. The Motion is supported by the grounds laid out on its face and the facts deponed in the affidavit of the applicant, who sought for the following orders:

i. Spent.

ii. THAT there be a stay of execution of the warrants of arrest issued against the appellant/applicant pending the hearing and determination of the application.

iii. THAT the order of 24th September, 2020 dismissing the appellant's/applicant's application be reviewed, varied and/or set aside.

iv. THAT costs of the application be provided for.

2. To oppose the Motion, the 1st respondent filed Grounds of Opposition dated 16th November, 2020 and whereof he put forward the following grounds:

a) THAT the Motion discloses no just cause for prayer 2, the same being brought under the wrong procedural laws.

b) THAT the same is an act of desperation and time wasting aimed at frustrating the 1st respondent from enjoying the fruits of his judgment.

c) THAT no reasonable and logical grounds have been adduced to warrant the application for review.

d) THAT the supporting affidavit is not factual, is muddled and is a misrepresentation of material facts.

e) THAT the application is frivolous, vexatious, scandalous and an abuse of the court process and should be dismissed with costs to the 1st respondent.

3. The Motion was canvassed through written submissions. In his submissions dated 22nd December, 2020 the applicant contends that there are sufficient reasons for reviewing the ruling and order issued by this court on 24th September, 2020 since the applicant had indicated that he is at risk of losing his liberty and paying the decretal sum and yet the essence of a stay of execution is to preserve the subject matter of the dispute.

4. The applicant referred this court to the case of **RWW v EKW [2019] eKLR** in which the court held that:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

5. The applicant contends that should the 1st respondent be allowed to proceed with execution and the appeal succeeds, the same will be rendered nugatory.

6. The applicant further submits that the assets and/or income of the 1st respondent are unknown and hence there is no guarantee that he will be able to recover the decretal sum from the 1st respondent upon payment of the same and upon a successful outcome on appeal.

7. It is also the submission of the applicant that there is an error apparent on the face of the record, thereby necessitating an order for review of this court’s earlier ruling. He cited the case of **Muyodi v Industrial and Commercial Development Corporation & Anor [2006] 1 EA 243** in which the Court of Appeal had the following to say concerning the phrase “error apparent on the face of the record:”

“In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case.

8. On the basis of the above arguments, the applicant urges this court to review and set aside its earlier ruling delivered on 24th September, 2020.

9. In reply, the 1st respondent through his submissions dated 4th January, 2021 argues that the decree sought to be satisfied is derived from a regular judgment which has not been challenged on appeal, and that he is only exercising his legal and lawful right to execute the decree against the applicant.

10. On the subject of error apparent on the face of the record, the 1st respondent is of the view that this issue was exhaustively addressed before this court on the previous occasion and that there is no indication of there being an error apparent on the face of the record to necessitate a review of the ruling of 24th September, 2020.

11. The 1st respondent therefore contends that the applicant has not satisfied any of the grounds applicable in an application seeking a review of an order and hence the Motion is deserving of dismissal.

12. On his part, the 2nd respondent did not file any documents in respect to the Motion or participate at the hearing.

13. I have considered the grounds set out on the face of the Motion, the facts deponed in the affidavit supporting it, the Grounds of Opposition, and the contending submissions and authorities cited therein.

14. A brief background of the matter is that the 1st respondent instituted a suit against the applicant and the 2nd respondent before the subordinate court, and sought for various reliefs arising out of a road traffic accident.

15. Following the failure by the applicant and the 2nd respondent to enter appearance or file a statement of defence upon service of summons, an interlocutory judgment was entered against them and the matter proceeded for formal proof, before judgment was entered in favour of the 1st respondent on 10th June, 2016.

16. The applicant and 2nd respondent successfully applied to have the judgment set aside and the suit went for a retrial. In the end, judgment was entered in favour of the 1st respondent and against the applicant and the 2nd respondent on 31st January, 2019, with the subordinate court noting that the absence of the applicant and the 2nd respondent at the trial.

17. Subsequently, the applicant filed an application before the trial court and sought to have the judgment set aside and for

unconditional leave to defend the case. Upon hearing the parties on the said application, the trial court dismissed it vide its ruling delivered on 30th January, 2020.

18. The applicant lodged an appeal against the aforesaid ruling with the High Court, by filing his memorandum of appeal on 25th February, 2020.

19. Soon thereafter, the applicant filed the application dated 2nd March, 2020 before this court and sought for an order of a stay of execution pending the hearing and determination of the appeal. The application was opposed by the 1st respondent.

20. Upon hearing the parties, this court in its ruling delivered on 24th September, 2020 and without delving into the merits of the aforementioned application, dismissed it on grounds of incompetency of the supporting affidavit to the application following a preliminary issue raised by the 1st respondent.

21. It is the aforesaid ruling that the applicant now seeks to set aside upon review.

22. The applicable provisions in addressing the question of review are encapsulated under **Order 45, Rule 1(1)** of the **Civil Procedure Rules, 2010** and are reaffirmed under **Section 80** of the **Civil Procedure Act Cap. 21 Laws of Kenya**, thus:

“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.”

23. From the foregoing provisions, in particular **Order 45, Rule 1(1)** (supra), the following are the principles/grounds upon which an order for review can be granted:

a) the discovery of new and important matter or evidence, or

b) some mistake or error apparent on the face of the record, or

c) any other sufficient reason.

24. It is also imperative that applications seeking an order for review should be brought without unreasonable delay. On this subject, the applicant states in his affidavit that the instant Motion has been brought without unreasonable delay.

25. The ruling in question was delivered on 24th September, 2020 whereas the instant Motion was brought on or about 15th October, 2020. In my view therefore, there has been no unreasonable delay in bringing the Motion.

26. On the merits of the Motion, it is clear that the Motion rides on the grounds that there is an error apparent on the face of the record and that there are sufficient reasons to warrant an order for review.

27. Under the principle of error apparent on the face of the record, the applicant states in his affidavit that in his grounds to the application which was previously before this court, he had set out the reasons for seeking the order for a stay of execution, whereas the contents of his supporting affidavit were essentially meant to provide a history of the matter. The applicant further states that his supporting affidavit did not replicate his grounds to the application.

28. In reply, the 1st respondent contends that the instant Motion does not raise any reasonable grounds for a review.

29. The Court of Appeal in the case of **Muyodi v Industrial and Commercial Development Corporation & Anor**

[2006] 1 EA 243 cited by the parties herein, rendered itself thus:

“In Nyamogo and Nyamogo v Kogo [2001] EA 174 this court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

30. From the foregoing, it is clear that an error apparent on the face of the record must be a self-evident error which need not require elaborate arguments to support it.

31. It is noted from the record that in the grounds to the previous application dated 2nd March, 2020, the applicant argued that warrants of arrest had been issued against him and that he risked going to jail. Other than that, the remaining grounds related to the background of the dispute.

32. Further to the above, the applicant does not dispute that his supporting affidavit did not make reference to the application it was intended to support; rather, it addressed a notice to show cause which has previously been issued by the subordinate court.

33. It is on that basis that this court; upon considering the preliminary issue raised by the 1st respondent on competency of the affidavit; found it to be improper and struck it out, thereby resulting in the dismissal of the application on grounds of incompetency.

34. In my view therefore, the applicant has not demonstrated that there is an error/omission apparent on the face of the record which would necessitate a review of the judgment.

35. This brings me to the second principle touching on sufficient reasons. On his part, the applicant states that the 1st respondent has proceeded with execution and that he stands the risk of civil jail which will then render the appeal nugatory, since he will be unable to satisfy the decretal sum which he is convinced is the result of a fraudulent ruling/order.

36. The applicant further states that he is ready and willing to abide by the conditions that will be set by this court.

37. The 1st respondent on his part argues that the instant Motion is purely intended to frustrate him and hinder his enjoyment of the fruits of his judgment.

38. Upon my perusal of the record, it is noteworthy that the application dated 2nd March, 2020 previously before me concerned itself with an order for a stay of execution pending appeal. It is also noteworthy that this court did not make a determination on the merits of the aforesaid application.

39. Suffice it to say that I am satisfied that the reasons afforded by the applicant in the present instance are sufficient enough to warrant the order sought.

40. Furthermore, I am convinced that it would be in the interest of justice for the applicant to be granted a second chance to prosecute his application.

41. In the end therefore, I allow the Motion in terms of order (iii), thereby giving rise to the following orders:

a) An order be and is hereby issued setting aside the dismissal order issued by this court on 24th September, 2020 and the application dated 2nd March, 2020 is hereby reinstated on the condition that the applicant shall amend accordingly; file and serve a copy of the amended application to the 1st respondent within 14 days from today's date failing which the application shall stand dismissed.

b) The applicant shall, upon filing and service, set down the amended application for hearing at the earliest opportunity.

c) In the circumstances of this case, each party shall bear its own costs of the Motion.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 12TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent