



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**HIGH COURT CIVIL APPEAL NO. 219 OF 2018**

**TAWAKAL AIRBUS LIMITED.....OBJECTOR/APPLICANT**

**-VERSUS-**

**MARY NYAGUTHI MBURU.....PLAINTIFF/RESPONDENT**

(Being an Appeal from the ruling of Hon. J.M. Nang'ea, Chief Magistrate,

delivered on 23<sup>rd</sup> October, 2018 in Mombasa Chief Magistrate's Court

Civil Case No. 2145 of 2016).

**BETWEEN**

**MARY NYAGUTHI MBURU.....PLAINTIFF**

**-VERSUS-**

**MARYAM ABDULREHMAN T/A PWANI TAWAKAL**

**MINI COACH & INSURED PWANI TAWAKAL.....DEFENDANT/RESPONDENT**

**AND**

**TAWAKAL AIRBUS LIMITED.....OBJECTOR/APPLICANT**

**RULING**

1. The application before me is a Notice of Motion dated 31<sup>st</sup> May, 2019 brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Order 45 Rule 1(a) of the Civil Procedure Rules and all other enabling provisions of the law. The objector/applicant seeks the following orders-

i. Spent;

ii. Spent;

iii. That this Honourable Court be pleased to review its ruling and/or set aside its initial orders issued on the 2<sup>nd</sup> May, 2019 directing the objector/applicant to thereby deposit the decretal sum awarded in Mombasa CMCC No. 2145 of 2016 in a joint account as the basis for a conditional stay pending appeal; and

i. iv. That the costs of this application be borne in the cause.

2. The application is supported by an affidavit sworn on 31<sup>st</sup> May, 2019 and a further affidavit sworn on 3<sup>rd</sup> December, 2020 by Ahmed Mohamed Abdalla, one of the directors of the objector/applicant.

3. The plaintiff/decree holder filed a replying affidavit and a supplementary affidavit sworn on 17<sup>th</sup> October, 2019 and 12<sup>th</sup> March, 2020, respectively, in opposition to the application herein.
4. On 5<sup>th</sup> March, 2020, directions were given for parties to file submissions. The law firm of Ochieng, Kokul and Velo Advocates representing the objector/applicant did not file submissions for a long duration of time which necessitated the law firm of Njoroge & Njoroge Company Advocates representing the decree holder to file its submissions on 24<sup>th</sup> September, 2020.
5. The Counsel for the objector/applicant filed its written submissions on 13<sup>th</sup> October, 2020. In highlighting the said submissions, Mr. Kokul stated that the objector/applicant was not enjoined as a party in the lower court proceedings, where the party who was sued was Mariam Abdulrehman T/A Pwani Tawakal Mini Coach which is a business name registered as BN/2010/181179. He further stated that the decree holder was seeking to levy distress against the objector/applicant by the name of Tawakal Airbus Limited and that the motor vehicle involved in the accident, namely, Motor vehicle Registration No. KBT 248D did not belong to the objector/applicant herein.
6. Mr. Kokul submitted that the respondent failed to disclose the nexus between Pwani Tawakal and Tawakal Airbus Limited. It was indicated that the said Mariam Abdulrehman has never been a director of the objector/applicant and that the only assertion was that the 2 entities share a similar postal address. He further contended that the respondent's Counsel sought to give credence to a police abstract which did not tally with the motor vehicle search records. Reliance was placed on the decision in **Tawakal Airbus Limited v Irene Muthoni Njirati & another** [2020] eKLR, where the High Court in Malindi held that the objector should not furnish security for costs as it had not been initially joined as a party.
7. Counsel for the objector/applicant submitted that the motor vehicle search records gave credence on who the owner of the motor vehicle which caused the accident was and that the use of the same postal address by the objector/applicant and the Judgment debtor did not of necessity mean that the former was the same as the latter. He further submitted that since the objector/applicant was not a party in the lower court case, some of the evidence they have relied on, in this application could not have been availed before the lower court. He relied on the decision in **John Kiplangat v Isaiah Kiplangat** [2013] eKLR, on circumstances where parties can adduce evidence at the appellate stage.
8. Mr. Kokul submitted that the PIN Certificate for the objector/applicant has two dates, one being the date when the search verification was done on the 5<sup>th</sup> February, 2019 and the effective date of registration being on the 12<sup>th</sup> of July, 2017. He submitted that Order 45 Rule 1(b) of the Civil Procedure Rules gives the objector/applicant the right to have an application for review considered based on a decree/order upon discovery of new and important matters or evidence, which after exercise of due diligence was not within its reach, knowledge and if an application for review is made without unreasonable delay.
9. He stated that the same does not deter the objector/applicant from adducing new evidence which was not brought to the attention of the Court while rendering its decision. Counsel submitted that at the end of the day, it is a matter of whether indeed justice shall be rendered as truly served and that the Honourable Court shall have a clear conscience that indeed it was done.
10. In highlighting the submissions filed on behalf of the respondent, Mr. Njoroge Simon relied on the decision in **Francis Njoroge v Stephen Maina Kamore** [2018] eKLR, where the Court held that Order 45 Rule 1 of the Civil Procedure Rules, 2010 gives conditions that have to be satisfied by a litigant seeking an order for review before the High Court. He stated that in the said case, the High Court dismissed an application for review stating that none of the grounds necessary had been established.
11. He further submitted that before the Malindi High Court in Civil Appeal No. 36 of 2020 (**Tawakal Airbus Limited v Irene Muthoni Njirati & Another**) (supra), was an application under Order 42 Rule 6 of the Civil Procedure Rules while the application herein is for review under Order 45 of the Civil Procedure Rules, which has been brought on the basis that the objector/applicant has found some new and important matter. Counsel for the respondent submitted that no new matter had been discovered and that in the lower court, the respondent annexed a certificate showing the directors of the objector/applicant. He indicated that the postal address of the defendant/Judgment debtor was similar to that of the objector/applicant herein.
12. Mr. Njoroge Simon stated that apart from the vehicle that caused the accident, all the others were transferred to the objector/applicant but it has never been shown how the properties of the Judgment debtor were transferred to itself. He was of the view that the said transfers were done so as to defeat the enforcement of the decree. He submitted that with regard to the aforementioned case in Malindi High Court, the learned Judge misdirected himself on a fundamental principle of law on what objection proceedings are all about. That it was not a must that an objector/applicant be a party to the main suit for it to file objection proceedings. That the Judge in the Malindi Case cited the case of **Chotabhae M. Patel v Chaphrahi Patel** [1958] EA 743, where the principles for objection proceedings were established in 1958 and the said Court held that a Court should proceed as if the objector was a party to the main suit.
13. Counsel for the decree holder submitted that the application for review should be dismissed as the documents annexed to the objector/applicant's affidavit were obtained way after the decision of the lower court had been delivered which evidently shows that some details have been changed to suit the application herein.
14. In response to the submissions made by the Counsel for the decree holder, Mr. Kokul submitted that the Counsel who appeared for the Judgment debtor in the lower Court availed a copy of the log book but the documents they had availed before this court were never supplied to the lower court. He further submitted that the postal address shown by the objector/applicant and the decree holder was the only issue and not the physical address. He also submitted that the Judgment debtor's motor vehicles were not directly transferred to the objector/applicant but were transferred to Shaban Rajab Shaban before being transferred to it.
15. Mr. Kokul submitted that the transfers took place before the Judgment and proclamation and that none of the documents they had relied on were falsified to support the objector/applicant's case.

## ANALYSIS AND DETERMINATION

16. I have considered the issues raised in the present application, the depositions of the parties and the submissions advanced by the Counsel on record. The issue that arises for determination is whether this court should review the orders of 2<sup>nd</sup> May, 2019.
17. In the affidavits filed by the objector/applicant, it is deposed that it is a company duly established under the new Companies Act No. 15 Laws of Kenya, engaged in the business of ferrying passengers and/or public transport while the Judgment debtor is a sole proprietor trading in the name and style of Pwani Tawakal Mini Coach and licensed as business number BN/2010/181179.
18. The objector/applicant further averred that vide the ruling of 2<sup>nd</sup> May, 2019, the High Court ordered for the deposit of the decretal sum awarded in Mombasa CMCC No. 2145 of 2016 as a basis for a conditional stay pending appeal. That according to the CR12 for the objector/applicant, the Judgment debtor is neither a director nor a shareholder of the objector/applicant company. It also averred that it was only a *bonafide* purchaser for value of some of the assets previously owned by the Judgment debtor and that the immediate purchaser of some of the said assets was one Shaban Rajab Shaban.
19. The objector/applicant deposed that some of the assets were transferred to it from the said Shaban Rajab Shaban without first having the same registered under his name. It was also deposed that the subject motor vehicle in Mombasa CMCC No. 2145 of 2016 was not part of the assets purchased by the objector/applicant and that in the event it deposits the said decretal sum, it shall cease operations and be wound up.
20. The objector/applicant deposed that whereas the particulars of its postal address were availed before this court, the one for the Judgment debtor was not availed before the lower court, thus it could not be conclusively determined how the two entities shared similar postal addresses. The objector/applicant asserted that the postal address 86127-80100 solely belongs to it.
21. It was further averred that at no material time has the Judgment debtor, Maryam Abdulrehman T/A Pwani Tawakal, been a director of Tawakal Airbus Limited and the assertion that she had a business registered under her sole name had not been refuted by the decree holder. It was deposed that the decree holder's assertion that the PIN Certificate for the objector/applicant was registered as at 5<sup>th</sup> February, 2019 was misguided as the said certificate bears two dates, being the date when the verification was done, on the 5<sup>th</sup> February, 2019 and 12<sup>th</sup> July, 2017 being the effective date.
22. The objector/applicant further deposed that it cannot be a party to the proceedings so as to deposit the decretal sum on behalf of the Judgment debtor.
23. The decree holder in her affidavits averred that the application herein amounts to impunity and an abuse of the court process. She deposed that the details regarding the address of the directors appearing on annexure MNM 3 attached to her supplementary affidavit were different from what had been exhibited in the objector/applicant's affidavit. She also deposed that by the time the objection proceedings were being canvassed before the lower court, the objector/applicant and the Judgment debtor shared the same address.
24. The decree holder asserted that the objector/applicant had fraudulently acquired the assets of the Judgment debtor with a view to defeat the Judgment as there was nothing to show whether the buses were a gift, inheritance or a purchase from the Judgment debtor to the objector/applicant. She further asserted that the details on the CR12 annexed to the applicant's affidavit were made on 29<sup>th</sup> May, 2019 whilst in her affidavit the details were dated 27<sup>th</sup> August, 2018 and the address for the directors were different.
25. She also deposed that a PIN certificate showed that the objector/applicant only registered with the Kenya Revenue Authority on 5<sup>th</sup> February, 2019 and not earlier thus the said details had been obtained subsequent to initial objection proceedings that are the subject of the appeal herein.
26. It is the decree holder's case that the proper forum for review would have been the lower Court and not this Court. That the High Court's ruling of 2<sup>nd</sup> May, 2019 captures the applicant's desperation in trying to assist the Judgment debtor to avoid paying the decretal sum or providing security during the purported appeal.
27. The decree holder averred that the present application discloses nothing new, as the objector/applicant had not demonstrated anything in law that would warrant a review of the Court's orders of 31<sup>st</sup> May, 2019 (sic). She also averred that the objector/applicant could not file an appeal as it had done, then apply for stay pending appeal, but fail to abide by the conditions set and then midway apply for review, all at the same time, with a view of stalling execution.
28. The decree holder asserted that the plaint between the objector/applicant and the Judgment debtor in Malindi High Court shows that the said case was filed on 29<sup>th</sup> May, 2019 two days before the ruling of this Court (sic) and raising issues which had already been adjudicated upon in the lower Court in Mombasa CMCC No. 2145 of 2016 thus amounting to forum shopping and an abuse of the Court process.
29. That the only bus which was not transferred to the objector/applicant fraudulently was the vehicle which had caused the accident being motor vehicle registration No. KBT 248D, which bus was conveniently transferred to one Shaban Rajab Shaban while the others were transferred to the objector/applicant.
30. The decree holder also averred that the address of the Judgment debtor as contained in the police abstract as at 29<sup>th</sup> September, 2016 is the same one as that of the objector/applicant as at the time of the objection proceedings in the lower court. A fact which was clear to the Trial Magistrate as the said Court record had the relevant police abstract.
31. This court notes that the decree holder in her affidavit seems to have mixed up the dates of the orders which form the subject of review. The orders the subject of this application are the ones dated 2<sup>nd</sup> May, 2019 and not the interim orders granted on 31<sup>st</sup> May, 2019, following an application of the same date.

32. The present application has been brought under the provisions of Order 45 Rule 1(a) of the Civil Procedure Rules, 2010 among other provisions of the law. The right to apply for review is provided for under Section 80 of the Civil Procedure Act in the following terms-

**“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.”**

33. The above provisions are elaborated under the provisions of Order 45 Rule 1 of the Civil Procedure Rules 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.**

**(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.” (emphasis added).**

34. In determining whether the application herein has merit, this Court has to first establish whether the said application falls within the provisions of Order 45 Rule 1 of the Civil Procedure Rules. In **Boniface Kivindyo Mutisya v Alfred Kavila Kivindyo & 2 others** [2019] eKLR, the court in determining **what constitutes an application for review under Order 45 of the Civil Procedure Rules stated thus-**

**“There are three limbs which are discernible from part (b) above i.e;**

**a) Discovery of new and important matter or evidence.**

**b) Mistake or error apparent on the face of the record.**

**c) Any other sufficient reason.”**

35. The objector/applicant in his depositions stated that the time within which it could have filed an application for review against the ruling of the Trial Court had elapsed by the time its current Advocates on record were appointed thus they resolved to lodge an appeal against the ruling of the Trial Magistrate. This court has gone through the said ruling delivered on 23<sup>rd</sup> October, 2018 and found that it touches on the relationship between the Judgment debtor and the objector/applicant and the transfer of vehicles which were previously owned by the Judgment debtor and are currently owned by the objector/applicant. In his ruling, the Trial Magistrate stated as follows-

**“I note that the objector failed to disclose how it acquired ownership of the attached Motor Vehicles. Neither was the consideration revealed. The objector and the defendant also curiously share the same postal address.....the Court cannot resist entertaining the impression that the transfer of ownership of the vehicles was meant to defeat the plaintiff’s decree also considering that the date of the transfer is not disclosed.”**

36. The Trial Magistrate dismissed the objector/applicant’s application. It was dissatisfied with the said ruling and appealed to the High Court where it sought orders for stay of execution pending the hearing and determination of the said appeal. Judge P.J. Otieno granted stay of execution on condition that the objector/applicant deposits the decretal sum in a joint interest earning account. The objector/applicant has now filed the present application seeking review of that order.

37. The objector/applicant maintains the position that the substantive appeal is yet to be embarked on for determination by this Court hence its application for review is based on the application for stay of execution pending appeal. Further, that nothing bars the said applicant from adducing new facts before the Court on matters which were not brought to its attention in arriving at a conclusive finding in the best interest of justice.

38. It is noteworthy that the issues that the objector/applicant seeks to have determined by this Court as an appellate Court, are the same ones being raised in the present application. I find that a proper reading of Section 80 of the Civil Procedure Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules makes it clear that a party cannot apply for both review and appeal from the same decree or order.

39. The objector filed an appeal herein and thereafter came back to the same Court and filed an application for review on grounds of

discovery of new and important matters or evidence. The actions by the objector/applicant as explained herein above, offend the provisions of Section 80 of the Civil Procedure Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules.

40. This court's view is that litigation cannot be conducted on the basis of trial and error since to deal with all the issues raised in this application would mean getting into the merits of the appeal.

41. It is my finding that the present application does not meet the threshold provided for under Section 80 of the Civil Procedure Act and Order 45 Rules 1 and 2 of the Civil Procedure Rules. The objector/applicant has failed to establish the discovery of a new and important matter or evidence.

42. I also find that the objector/applicant has failed to satisfy this Court that it should review its orders since the issues raised in its application pass for an appeal camouflaged as an application for review. I am in total agreement with Mr. Njoroge Simon, Counsel for the decree holder that the application for review of the ruling of 2<sup>nd</sup> May, 2019 by Judge P.J.Otieno is an abuse of the court process.

43. An applicant who moves to court must be sure footed on the course of action to take but should not play ping pong and blame his former Advocate when an appellate court grants a conditional stay of execution, requiring an applicant to deposit the decretal amount, as is the case here. An Advocate can only build a good case when he has adequate information availed to him by his client, which he can rely on in the filing of any application or case. In the lower court case the objector/applicant seems to have failed his Advocate, not the other way round.

44. The upshot is that I find the objector/applicant's application dated 31<sup>st</sup> May, 2019 bereft of merit and the same is dismissed with costs to the decree holder. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 12<sup>TH</sup> DAY OF MARCH, 2021. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of -**

Mr. Munguti holding brief for Mr. Kokul for the objector/applicant

Mr. Njoroge Simon for the respondent/decreed holder

Mr. Oliver Musundi - Court Assistant.