REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 134 OF 2020

MIGORI TEACHERS CO-OPERATIVE SAVINGS

& CREDIT SOCIETY LIMITED.....APPELLANT/APPLICANT

-VERSUS-

MSL SAVINGS & CREDIT CO-OPERATIVE

SOCIETY LIMITED.....RESPONDENT

AND

CO-OP HOLDINGS CO-OPERATIVE SOCIETY LIMITED....INTERESTED PARTY

RULING

1. The appellant/applicant took out the Notice of Motion dated 27th October, 2020 supported by the grounds set out on its face and the facts stated in the affidavit of its Chairman, John Osewe. The applicant sought the substantive order for a review and/or varying of the ruling delivered by this court on 15th October, 2020 in respect to the condition for a stay of execution, and a further order that the security for costs be substituted with the furnishing of shares held as KUSCCO LTD in the value of Kshs.2,959,827/=.The respondent opposed the Motion by putting in the replying affidavit of Paul Muiruri Mwangi, its Chairman, to which John Osewe rejoined with a supplementary affidavit

2. From the record, the interested party did not file any documents in response to the Motion or participate at the hearing thereof.

3. The Motion was dispensed with by way of written submissions, which I have considered alongside the grounds set out on the face of the Motion and the facts deponed in the affidavits supporting and opposing the Motion.

4. A brief background of the matter is that, the respondent instituted a claim against the applicant before the Co-operative Tribunal ("the Tribunal") vide Co-operative Tribunal Cause No. 361 of 2015 and which claim was opposed by the applicant. Upon hearing the parties, the Tribunal delivered its judgment on 26th February, 2020 in favour of the respondent and against the applicant, essentially ordering the applicant to pay the respondent an aggregate sum of Kshs.18,373,500/ plus costs of the claim.

Aggrieved by that judgment, the applicant lodged an appeal to the High Court and subsequently sought an order for a stay of execution against the judgment, until determination of the appeal. Upon hearing the parties on the application, this court granted an order for a stay of execution on the condition that the applicant files a bank guarantee in the sum of Kshs.15,000,000/= as security for any decree and costs that may be declared against it.

5. It is clear from the instant Motion that the applicant now seeks to have this court review and vary the aforesaid condition for stay.

6. The applicable provision in addressing the question of review is **Order 45, Rule 1(1)** of the **Civil Procedure Rules, 2010** and is 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."

7. On the subject of whether there has been unreasonable delay in bringing the Motion, upon establishing that the Motion was filed less than one (1) month from the delivery of the ruling in question, I find that the Motion has been brought without unreasonable delay.

9.On the merits of the Motion and in respect to the principle of error apparent on the face of the record, John Osewe avers in his affidavit that the security for costs ordered by this court is manifestly excessive and yet the Tribunal in its judgment had not declared the costs payable to the respondent.

10. The deponent further avers that, any costs would be assessed on the basis of the subject matter of the dispute, being the shares valued at Kshs.95,792,080/. The above was reiterated in the applicant's submissions save to add that it was a genuine mistake on the part of this court to overlook the value of the subject matter.

11. In response, Paul Muiruri Mwangi states that the Motion does not meet the threshold for a review since it has not been demonstrated that there is an error apparent on the face of the record. His sentiments were echoed in the respondent's submissions.

12. In the case of **National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR** the Court of Appeal had the following to say regarding an error on the face of the record:

"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 be self-evident and should not require an elaborate argument to be established."

13. The above position was also stated by the court in the case of **Anthony Chelimo v Kenya Commercial Bank Limited [2020] eKLR** cited by the applicant, where the court with reference to the case of **Zablon Mokua v Solomon M. Choti & 3 others [2016] eKLR** appreciated that, an apparent error is one that is clearly established without requiring deeper investigation.

14. It is clear from the ruling that the condition for stay given by this court was intended to act as security for the due performance of the decree and is therefore not limited to costs. Furthermore, it is apparent from the record that the subject shares constitute one of the issues raised in the memorandum of appeal and cannot therefore be addressed by this court at this time.

15. For all the foregoing reasons, I am not convinced that there is an error/omission apparent on the face of the record which would necessitate a review of the ruling

16.On the subject of 'new and important evidence,' it is the applicant's position that, at the time of filing the application which gave rise to the ruling delivered on 15th October, 2020, it had not extracted the decree from the Tribunal and was therefore unable to ascertain the costs awarded therein.

17. On its part, the respondent is of the view that the applicant has not established any new and important evidence requiring a review of the ruling.

An insight into what constitutes new and important evidence was discussed by the court in the case of **Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR** thus:

"For material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence. It must be such evidence or material that was not available to the applicant or the court."

18. Upon my reading of the record and consideration of the arguments by the applicant, I am not convinced that the explanation given would qualify as 'new and important evidence.'

19. Similarly, I find that the applicant has not given any sufficient reason(s) to warrant a review of the ruling delivered on 15th October, 2020. In any event, I am convinced by the explanation of the respondent that should the applicant be allowed to substitute the security with a lesser security of shares allegedly valued at Kshs.2, 959,827/= it might be difficult to liquidate the said shares. The law is well settled that security offered should be commensurate with or be as close as possible to the decretal amount.

20. Accordingly, the Motion dated 27th October, 2020 has no merit and on that basis, it is dismissed with no order on costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Gitange for the Appellant/Applicant

Ms. Thuku holding brief for Mr. Kaburu for the Respondent

Mr. Kariuki for the Interested Party