



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL CASE NO. 1 OF 2021

EQUITY BANK(KENYA) LIMITED.....PLAINTIFF

VERSUS

DORIS MAKENA.....DEFENDANT

CORAM: Hon. Justice R. Nyakundi

Kioko Munyithya, Ngugi & Co. Advocates for the Plaintiff

Khaminwa & Khaminwa Co. Advocates for the Defendant

R U L I N G

This is an application by way of Notice of Motion under section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules seeking a substantive order that; -

- 1) That the Ruling delivered by this Court on 29th April, 2021 be reviewed.**
- 2) Costs of and incidental to the motion be in the cause.**

The grounds in support areas stated in the body of the motion and an affidavit sworn by **Doris Makena** the applicant depones *inter alia*; -

- a) That the impugned Ruling was heard and determined in absence of her participation and input.**
- b) That the said Ruling was neither served upon her nor the advocates on record rendering the Exparte orders prejudicial and likely to occasion a misjustice.**
- c) That there are therefore apparent errors on the face of the record calling for a review of the Ruling in the interest of justice.**

The grounds opposing the Notice of Motion are as averred in the replying affidavit of **Moses Mwacharo** dated 31.5.2021. The Respondent representative depones; -

- 1. That from the litigation history of the matter it was the indolence on the part of the applicant which led to the determination of the issues Exparte.**
- 2. That the failure by the applicant not to comply with the strict timelines is not excusable to warrant any equitable relief in her favor.**
- 3. That the Court in whatever direction it looks at the Notice of Motion, there is no evidence of any error apparent on the face of the record or mistake that occurred in the course of the trial and determination to call upon it to invoke review jurisdiction.**

At the hearing of the application both counsels agreed to file brief submissions on the various perspectives for this Court findings and decision. I have borne all this in mind, without the necessity of reproducing them in this respect.

Determination

The central issues to mirror through the Court determination include on; -

i. Whether there is a mistake or error apparent on the face of the record to necessitate a review of the Ruling of the Court dated 29.4.2021.

ii. Whether there is discovery of new and important matters of evidence previously overlooked by the Court as it determined the previous Notice of Motion.

Issue No. 1

According to the applicant counsel submissions, the impugned ruling is tainted with falsehoods hence the Mareva injunction against the applicant ought to be lifted and or set aside. Counsel argued that from the documentary evidence availed the questioned motor vehicle registration Number **KCW 611D** had already been seized by banking fraud unit to be used as an exhibit in a pending criminal case. That the respondent being the complainant in the criminal case was fully aware of the existence of the facts of the subject motor vehicle being held by Malindi Police Station. Counsel further citing the principles in *National Bank of Kenya V Ndungu Njau CA No. 211 of 1996* submitted that this error or mistake on the part of the respondent resulted in the erroneous Ruling against the applicant which orders unless set aside will occasion a grave injustice.

As regards the respondent, counsel submitted that the criteria outlined under section 80 of the Civil Procedure Act and Order 45 Rule (1) of the Civil Procedure Rules has not been satisfied by the applicant for the orders on review to be granted. Counsel further submitted that the applicant has failed to disclose any mistake or error apparent on the face of the record to vitiate the findings of the Court in the impugned Ruling. For this legal proposition counsel cited and relied on the guidelines. In *R V Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] eKLR and Motion City Ltd V IDB Capital Ltd [2021] eKLR*. At this juncture it is apposite to recall as to how the law defines error on the face of the record. In the case of *Independent Medico-Legal Unit V Attorney General of the Republic of Kenya No. 2 of 2012[EACJ]*, the Court explained itself on the issue as follows;

“The error apparent must be self-evident not one that has to be detected by a process of reasoning, no error can be an error apparent where one has to travel beyond the record to see the correctness of the judgement. It must be an error which strikes one by mere looking at the record, and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. A clear case of error apparent on the face of the record is made one where without elaborate argument, one could point to the error and say, here is a substantial point of law which stares that one on the face, and there could reasonably be no two opinions entertained about it. In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish.”

Whether or not the applicant is entitled to the reliefs under review jurisdiction is a matter to be evaluated in consonant with the laid down principles in the *Independent medico – legal unit (supra)* and further in *Edison Kanyabwera V Pastori Tumwebaze Supreme Court of Uganda CA No. 6 of 2004* in which the Court had this to say;-

“In order that an error may be a ground for review, it must be one apparent on the face of the record that is an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no Court would permit such an error to remain on record, the error may be one of the facts but it is not limited to matters of fact and include also error of law.”

On these principles and the facts of the case there is no dispute that this Court has the jurisdiction under section 80 and order 45 Rule (1) of the Civil Procedure Act and Rules to set aside, revoke or modify the decision made which may be affected by the above provisions.

The power of review is therefore given expressly by the applicable statute. The hallmark of this discretionary power requires consideration of the whole context of the challenged ruling, judgement or order by which the Court exercised its judicial authority. It is only one of the many weapons in the armory a litigant may use and is primarily important in the expeditious administration of justice.

In light of the events as encapsulated by the applicant in her affidavit the basis of review is on the decision being *ultra vires*. To this ground the applicant alleged on oath that despite being served with the plaint and other suit processes she was never given an opportunity to be heard with regard to the Notice of Motion dated 13.3.2021.

The applicant therefore contends that the Court reached a decision Exparte without taking into account some evidence of probative value. That argument is predicated on the fact that the subject motor vehicle prior to the decision making 29.4.2021 it had become a subject of a criminal litigation between the applicant and the respondent respectively. As things stand it is clear this sort of evidence and submission, so to speak remain unchallenged by the respondent. Accordingly, the detailing authority having not been enjoined in the present proceedings leading to the impugned ruling rendered the decision voidable. Similarly, it has come out clearly that the respondent withheld information in a particular way which if availed to the court could have affected the making of the value judgement or ruling. In considering the circumstances prevailing at the relevant time, the rigor of the logic to the decision was somewhat impaired by that non-disclosure of the vital essential material by the respondent.

These were therefore errors and mistakes that this Court identifies and which are apparent on the face of the record to apply the test under section 80 and Order 45 Rule (1) of the Civil Procedure Act and Rules to review the Ruling dated 29.4.2021 on mareva injunction against motor vehicle registration **KCW 611D**. Severance of this order substantially affects interim orders against the bank accounts held in the name and style of the applicant. In a nutshell I accept the submissions by the applicant that the available evidence which was necessary and material to the respondent case should have been put before the court at that earliest opportunity, and at the proper time during the hearing of the Notice of Motion.

That being the case I pose the question has good cause been shown by the applicant to justify interference of the ruling to the extent of the Rule in order 45 Rules (1) of the Civil Procedure Rule? Admittedly, I answer the question in the affirmative. Finally, the applicant has

referred to the fundamental question in this case where she alleged that the Court erred in not permitting her to canvass the objection to the Notice of Motion by the applicant. In its broadest sense the applicant meant denial of a right to be heard quoting the words by the **Privy Council in A.G V Ryan [1980] AC 718**; -

“It has now; been settled law that a decision which offends against the principles of natural justice is outside the jurisdiction of the decision making authority”.

In its wider aspect natural justice and legal justice contains the very kernel of the fairness in the administration of justice. Those are the salient features enshrined in Article 50 of our Constitution. It should be pointed out from the outset the conduct of the proceedings as instituted by the respondent against the applicant violated Article 50 of the constitution. In the circumstances, because constitutive elements of this novel concept were lacking. The material annexed to the applicant’s Notice of Motion carefully demonstrates the specific components of being served with the suit papers of the claim prior to the Ruling of 29.4.2021. In other words, by that service of process and procedure she was brought within the jurisdiction of the Court and the right of access had ripened and its legal substratum. A turning point came when the respondent moved the Court in contravention of the sphere of this doctrine which imposes a standard of fairness. The right of access here concerned the right to a proper notice and preparation of the defence by the applicant against the claim being pursued by the respondent before a Court of law. The measures taken by the respondent and subsequent decision interfered with the rights of the applicant.

On the other hand, the notion of equality of arms premised under Article 27 as read with Article 50 of the Constitution guarantees that everyone who is a party to civil or criminal proceeding shall have a reasonable opportunity of presenting his or her case to the Court under conditions which do not place him or her at substantial disadvantage visa viz his or her opponent.

It is self-evident that the applicant never had a chance to position her evidence for the Court to conclusively determine the issues at stake. It follows that I must allow the review of the Ruling dated 29.4.2021 with no orders as to costs.

DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 7TH DAY OF JULY, 2021.

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R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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