



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL APPEAL NO. E006 OF 2020**

**JOHN KINGORI KIONI.....APPLICANT**

**VERSUS**

**NOBEL TYRES LIMITED.....RESPONDENT**

**RULING**

1. The applicant filed a Notice of Motion application dated **10th day of March 2021** for the following orders;

**a) THAT pending hearing and determination of this application inter parties, this honourable court to issue a temporary stay of execution of its orders issued on 25th February, 2021.**

**b) This honourable court be pleased to review its ruling issued on 25th February, 2021 and any subsequent orders made therefrom.**

**c) The costs of this application be provided for.**

2. The application is premised on grounds on the face of the record and the supporting affidavit of the applicant.

3. The applicant averred in his supporting affidavit that he is unable to comply with the set conditions of stay by this court since he suffered an accident which rendered him disabled. He averred that he has only managed to raise Kshs. 100,000 since his business ventures went down and his assets liquidated to meet high medical bills.

4. The applicant averred that he has an arguable defence to the lower court case and if he is not allowed to defend his interests thereon, he would have been denied a universal right to be heard. He therefore pleads with this honourable Court to review its orders issued on 25th February, 2021 requiring him to deposit a security of Kshs. 600,000 in a joint interest earning account and replace them with an unconditional stay of execution in CMCC 719 OF 2016 so that any costs payable will be determined finally after he has tendered his defence.

5. The applicant averred that in regards to the circumstances under which the debt was incurred, the respondent claim lies against Wonder price Mjengo Timber Yard and not against him. However, he has always wanted to defend his case and blamed his advocate for abandoning his case when he was hospitalized. He also averred that he has previously demonstrated his financial hardship due to his recently acquired disability and hence wants to deposit Kshs. 100,000 as a sign of good faith.

6. The respondent filed grounds of opposition and stated that the application for review is not available for a party who has preferred an appeal and that the application does not meet the threshold encapsulated under **Order 45, Rule 1 of the Civil Procedure Rules.**

7. The respondent also stated that the application is tainted with malafides, does not have sufficient grounds to warrant review and that it is intended to bog down the Respondent with litigation hence it is an abuse of the court process.

8. In his replying affidavit, **Joseph Wainaina** the human resource manager of the respondent averred that the applicant has not annexed any evidence to show his unsuccessful attempt to comply with the orders of Court. He averred that Kshs. 100,000 is manifestly inadequate given that the decreed amount in the lower court is Kshs. 1,145,959. The respondent averred that the applicant has not annexed any documents to demonstrate that he liquidated his assets to meet high medical costs hence the same should be disregarded.

9. The respondent averred that the applicant has preferred an appeal and that the execution alluded to is a lawful process that the Respondent is entitled to pursue and all what the applicant is raising in this application is not new as it was in his knowledge before the impugned orders and in any case the court gave the matters due consideration before it issued the order in question hence the said matters are *res judicata*.

10. The respondent averred that the applicant is not a credible individual and as such undeserving of the orders that he seeks. This is his 5th

application seeking stay since inception of this proceedings and in the circumstances, he is in abuse of the court process and seeks to delay the respondent from enjoying fruits of it's judgement.

11. The respondent averred that if at all the applicant holds the view that the court erred in law by issuing a conditional order then it behoves him to canvass the same in the intended appeal and not in the instant application for review.

12. The applicant filed a further affidavit and averred that he withdrew the notice of appeal and instead preferred a review. He averred that the monetary condition will take away his right to be heard and defend himself hence he has sufficient reason to warrant this honourable court to change its mind in regards to the conditions attached.

13. The applicant averred that the proclaimed properties are not his and as such attaching and selling them will be met with legal objections from the bona fide owners.

14. The perusal of the application herein demonstrates that there is only one issue for determination namely whether the applicant has met the threshold for review.

15. The grounds upon which one may seek review are set out in Order 45 Rule 1 which provides as follows: -

16. Order 45 Rule 1 - Application for review of decree or order

***“(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.”***

17. From the above, it will be seen that one may apply for review on the following grounds: -

**i. Discovery of new and important matter or evidence;**

**ii. Mistake or error apparent on the face of record; or**

**iii. Other sufficient reason.**

18. In this application the applicant has not intimated that there is any discovery of new and important matter or evidence. He hasn't shown that there is any error apparent on the face of the record. The only reason that the applicant seeks review is that he is unable to raise the amount of security. This application can be construed as coming under the ground of “other sufficient reason”.

19. The applicant has indicated that his involvement in an accident has led him to his financial constraints hence he is unable to raise Kshs. 600,000 security as ordered by the court. In his application that led to the court's ruling of 25th February 2021, he had indicated that he was willing to meet the conditions set out by the court. This court also took notice of the applicant's poor health before making the said orders. This court in its ruling of 25th February 2021 indicated that poor health does not mean that the applicant should not meet his obligations. In any case the amount of security is not pegged on the capacity of the applicant but rather the loss that the respondent stands to suffer.

20. In the case of **Akseli Lameck & 121 others v Methodist Church In Kenya Trustees & 7 others [2021] eKLR** Munyao J held that;

***“It should be understood that the level or amount of security is not pegged on the capacity of the applicants, but is pegged on the nature of the appeal, and the loss that the respondents stand to suffer in the event that the appeal fails. The value of security is thus objective, based on the circumstances of the case, and is not subject to the capacity of the applicant. If it was pegged on the capacity of the applicant, then it would fail the test of being security in favour of the respondent, for it may end up being too low to be of any worth to the respondent as security. My assessment of the value of Kshs. 12,200,000/= was thus objective based on what I thought would cover the respondents in the event that the applicants lost the appeal.***

***In my opinion, the claim that the applicants are not able to raise the amount of security ordered is not a sufficient reason to review the order of 23 April 2020. In fact, I do not think that the applicants ought to have come before court for review at all unless they were pointing out to an apparent mistake or error apparent on the face of record, or unless they were bringing forth some new evidence which would have assisted the court in arriving at a different figure in assessing the security to be deposited. If they were simply not happy with the orders of 23 April 2020, they ought to have moved to the Court of Appeal for a reconsideration of the terms of stay pending appeal.”***

21. For the above reasons, this court does not find any merit in the application. As a matter of good practice or even good faith the applicant should have delivered to the applicant or the court the said kshs. 100,000 he has managed to obtain. Even for argument sake, the ruling of this court was delivered on the 25<sup>th</sup> February 2021, about 5 months ago and if he was magnanimous enough he would have at least showed some good faith by probably settling even the costs which the court had ordered it be paid separately.

22. Nonetheless the application is hereby dismissed with costs.

**DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 22ND DAY OF JULY 2021.**

**H K CHEMITEI.**

**JUDGE**