



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 32 OF 2020

MUYA CHIBANZA MUNGA

MOHAMED SAID ABUBAKAR.....APPELLANTS

VERSUS

ADNAN MOHAMMED OMAR

KHADIJA KADZO KAHINDI (Suing as legal representatives of the estate of the late

FAHIMA MOHAMMED ADNAN.....RESPONDENTS

CORAM: Hon. Justice R. Nyakundi

Kairu & Mc Court Advocates for the Appellants

Munyithya, Mutugi, Umara & Muzna Advocates for the Respondents

RULING

Background

This Court on **21.3.2020** in its ruling made the following decisions *inter alia*; -

a. That corresponding stay of execution is allowed on condition that the applicant do deposit the decretal sum of Kshs.5,132,190/- in a joint earning interest account of both counsels within 30 days from the date of ruling.

b. The balance of damages contributing a total sum of Kshs.750,056/- be partially released to the respondent with the respondent within the specified period in (2) above.

Those decreed conditions happened not to have been complied with necessitating a follow up application dated 12.10.2020. The applicant in the aforesaid Notice of Motion expressed to be brought under section 1(A), 1(B), 3, 3(A), 66 and 95 of the Civil Procedure Act, order 22 Rule 22, Order 45 Rule, Order 50, Rule 6, Order 51 Rule 1 of the Civil Procedure Rules seeking review of the ruling and orders as premised by the Court it was also the prayer that execution be stayed of the impugned judgement subject matter of the appeal. The motion is supported by an affidavit dated 6.10.2020.

Grounds for seeking the Court's discretion on review;

a. That the time limit by which the appellants were supposed to deposit the decretal sum in the joint names of the previous advocates as secretary lapsed on 21.9.2020.

b. That due to the financial crisis that has hit the appellants insurance company as a result of the effects of Covid 19 pandemic has made it impossible to fulfil the conditions upfront and within the 30 days period.

c. That the honourable court be pleased to review and or vary the decretal amount of 5,132.190/= to 3 months as per the insurance motor vehicle third party – Rules amended Act 2013(Cap 405) of the Laws of Kenya.

The Law

Section 80 of the Civil Procedure Rules provides that; -

“Any person aggrieved with the decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred may apply for a review of judgment to the Court hence passed the decree it made the order, and the Court may make such orders therein; as a nus fir.”

Furthermore, in order 45 rule 1 of the Rules provides; *inter alia* ***“that an application for review or judgement from an order, decree which has been preferred may be reviewed for reason of discovery of new important matter of evidence, which after the exercise of due diligence was not within the knowledge of the applicant at the time when the decree was passed or order made.”***

On account of this provisions the statute confers unfettered discretion for the Court to grant a remedy under review jurisdiction in which the applicant’s case miss the above threshold. (See *Nyamogo and Nyamogo Advocates V Moses Kipkotum Kogo (CA No.322 of 2000(2001) 1 EA173*. Further in *Zacharia Ogamba Omari & Another V Otando Ndeliache CA Number 195 of 2001*.

“An application for review is based on any other sufficient reason which is not analogous to the other two grounds on error, mistake apparent on the face of the record and which amounts to discovery of new matter or evidence not within their knowledge, the word review as defined in the English dictionary means act of looking after something again with a view to correction or improvement.” Carefully considered review should not be confused with inherent power of the Court under section 1(A), 3(A) of the Civil Procedure Act.”

In the case of *Hari Vishnu Kamath V Ahmad Ishaqibe AIR (1955) SC 233* the Supreme Court observed; -

“It is essence that it should be something more than a mere error, it must be one which must manifest on the face of the record, the real difficulty with reference to this matter however is not so which in the statement of the principles as in its application to the facts of a particular case. When does an error cease to be mere error, and became an error apparent on the face of the record?”

In the first instance while considering the application for review I have confined myself to the material availed at the time of the initial decision. In my view I appreciate the scope of the record and its objects when considered within the ambit of the insurance motor-vehicle Third Party Rules Amendment Act 2013(Cap 405 of the Laws of Kenya which capped compensation at Kshs.3 million (Three million. This is a substantive provision for review as this new evidence was not presented to the court at the time of making the decision on security for the due performance of the decree. It is for that reason the impugned order is unsustainable and deserves to be varied and set aside to be in line with the provisions of the statute. The notice of motion 6th day of October, 2020 succeeds to that extent and with no orders as to costs.

DATED, SIGNED AND DELIVERED via Email AT MALINDI THIS 6TH DAY JULY, 2021.

.....

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.

(info@kghazina.co.ke, jpjurists@gmail.com, jpjurists@mmum.co.ke)