

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL APPEAL NO.E006 OF 2020

NADEEM A KANA.....APPELLANT

VERSUS

LUCY WAMBUI MWANGI.....RESPONDENT

R U L I N G

1. The Notice of motion dated 19th April 2021 comes essentially under **Order 45 Rule 1** of the **Civil Procedure Rules** which provides for review of rulings and/or orders made by a court on account of some mistake or error apparent on the face of the record.

The applicant herein seeks a review or recalling or setting aside of the orders issued by this court on 12th April 2020, dismissing the applicant's application dated 19th October 2020, for stay of execution and leave to file appeal out of time respecting the judgment and decree issued against the applicant by a lower court.

The grounds for the present application are set out in the appropriate notice of motion and supported by the applicant's supporting affidavit deponed on 19th April 2021.

Hearing of the application proceeded by way of written submissions which were filed by each party through **Muriu Mungai & Co. LLP** and **Ashioya & Co. Advocates**.

2. Having considered the application on the basis of the supporting grounds, and the rival submissions, it became apparent that the issue for determination is whether the applicant has provided credible and sufficient grounds for exercise of this court's discretion in his favour. The answer to the question is clearly discernable from the record which shows that the applicant was disappointed with the judgment and decree made against him by the trial court in **Busia PMCC No.4 of 2010** on the 13th March 2020. He thereafter conceived the idea of appealing the decision in this court and on the 23rd October 2020 filed an application dated 19th October 2020 for stay of execution of the decree and extension of time to file the appeal. The applicant actually requested for an extension of seven (7) days to file the appeal so that the memorandum of appeal dated 19th March 2020 be deemed to have been properly filed.

3. The court certified the application urgent and fixed it for inter-parties hearing on 18th November 2020 with interim orders being issued in terms of prayer (2) of the application. However, the matter was never mentioned in court on 18th November 2020. Instead, the applicant re-scheduled the date in the registry to the 16th December 2020 when both parties appeared in court and were directed by the court to file necessary affidavits and written submissions for a mention of the case on 2nd February 2021 on which date, the matter was mentioned in the registry and rescheduled for mention on 23rd March 2021, when the respondent appeared in court but not the applicant.

Due to the absence of the applicant, the mention date was pushed to the 12th April 2021, when both parties appeared in court for mention of the matter on the way forward as ordered on 23rd March 2021 and not for confirmation of filing of submissions by both parties as indicated by the applicant. In any event, the respondent's submissions had not been filed. The respondent requested for more time but brought it to the attention of the court that the pending application had been overtaken by events as the decree had already been executed.

4. The court noted that it seemed that the application had been overtaken by events as indicated by the respondent therefore it would be unnecessary to proceed with the hearing of the application in whichever manner. The respondent agreed with the court but the applicant indicated that he was not aware that the matter had been overtaken by events since he had not been shown any payment receipts.

The court then ruled that a matter overtaken by events cannot be tenable anymore and if it proceeds to success the victory would be pyrrhic. In the circumstances, the application dated 19th October 2020 was treated as having been overtaken by events and struck out accordingly with each party bearing their own costs of the application.

5. Clearly, the court did not separate the prayers in the application for purposes of striking them out. It was the entire application and all its prayers which was struck out including prayer (4) for extension of time so that the memorandum of appeal dated 19th October 2020 be deemed to have been properly filed. Since the impugned order and/or ruling was clear and unambiguous and indeed applied to the application in its entirety, it would follow that the applicant has not proved and/or established sufficient grounds for exercise of this court's discretion in his favour. Instead of filing the present application for review, he ought to have appealed the impugned order to the Court of Appeal or better still, filed a new and fresh application for extension of time or leave to file appeal out of time as his right to appeal against the impugned lower court judgment and decree remained intact and was never fettered by the impugned order of this court.

It is instructive to note that the striking out of the impugned application rendered any submissions that may have been filed in respect thereof obsolete and not worthy of any consideration by the court. In sum, this application is wanting in merit and is hereby dismissed with costs to the respondent.

J.R. KARANJAH

J U D G E

[READ AND SIGNED THIS 8TH DAY OF JULY 2021]