



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 61 OF 2021

JAPHET NOTI CHAROAPPELLANT

VERSUS

KAZUNGU FONDO SHUTU.....1ST RESPONDENT

KATANA SHUTU.....2ND RESPONDENT

CHARLES MUTAWALI SHUTU.....3RD RESPONDENT

SAFARI KAZUNGU MASHA.....4TH RESPONDENT

FURAHA KATANA KITHEMBE.....5TH RESPONDENT

ZABLON KATANA SHUTU.....6TH RESPONDENT

KAHINDI KATANA SHUTU.....7TH RESPONDENT

Coram: Hon. Justice R. Nyakundi

Richard O. Advocate for the Appellant

Mwaure & Mwaure Waihiga Advocates for the Respondent

RULING

The notice of motion in Court by the appellant expressed to be brought under Section 1A, 1B and 3A of the Civil Procedure Act, and order 45 Rule (1) of the Civil Procedure Rules seeks one key substantive order: That the Court be pleased to review its Ruling and/or by allowing the appellant to deposit a title deed Reference as **Kilifi/Viriko 'A'/121** as security in lieu of a sum of Kshs.600,000/= for due performance of the decree in **Malindi CMCC NO. 27 of 2016**.

The grounds for the appellant are set out in the body of the motion and the corresponding affidavit sworn by **Japhet Charo** and are briefly that:

- (1). That the stay order was conditional to the effect that the applicant do deposit a sum of Kshs.600,000/= in cash in court or in a joint interest earning account in the names of both counsels.***
- (2). That it happened that the said order was made in times when the entire nation and world at large is having economic constraint due to the current (covid – 19) pandemic.***
- (3). That raising the said amount of Kshs.600,000/= within the stated period might be a challenge to the appellant/applicant.***
- (4). That as a sign of good faith, the appellant/applicant has offered one of his properties valued at a sum of Kshs.1,500,000/= as security.***

(5). That at the appropriate time in the cause of the appeal, the appellant/applicant may redeem his said property in exchange of the said Kshs.600,000/=.

(7). That orders sought in the application herein do not prejudice the respondent in any manner whatsoever.

The respondent was served with the application but as stated in the affidavit of service, there was no rejoinder to the notice of motion. That is what the Court usually refers to as undefended application.

Determination

The issue for determination are whether there is an error of Law or mistake of fact to warrant review of the Ruling on stay of execution. Second, whether the applicant has demonstrated existence of new evidence as a ground which was not available at the trial when the ruling was made. In the persuasive case of **FX Mubwike v VEB Misc. Application No. 98 of 2005 by the High Court of Uganda** it was held as follows:

“that for an applicant to be entitled a remedy of review the following conditions precedent must prevail.

(1). That there is a mistake or manifest mistake on the face of the record.

(2). That there is the discovery of new and important evidence which after exercise of due diligence was not within the applicant’s knowledge or could not be produced by him or her at the time when the decree or the order made.

(3). That any other sufficient reason exists.

In **Mugodi v Industrial and Commercial Development Corporation & Anor {2006} 1EA 243 at 246** the Court also observed that:

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. When an error on a substantial point of law stares one on the face, and there could reasonably be no two options, a clear case of error apparent on the face of the record would be made out. An error which has to be established by along drawn process of reasoning or on points where there may conceivably be two options, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal.” (See also **Nyamogo & Nyamogo v Kogo {2001} EA 170**)

A Ruling or Judgment is the center piece of our legal system. The application to review it should be done so sparingly within the bounds of Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules which provides the ideals of review. The reviewing Court should systematically scrutinize the Ruling or Judgment set to be reviewed to identify procedural errors, mistakes or discovery of new evidence before reversing the impugned order.

The rationality for the Court to do that grudgingly and unfrequently is founded on the fact that all institutional actors to a litigation performed their roles within the sphere of the Law and discretion and there was neither malfunction, in the process nor the verdict of the trial Court. Our legal system assumes that Court are to generate accurate results in general and the Ruling or Judgment in any specific case reflects the truth. The nature of review jurisdiction provided for under Order 45 Rule 1 of the Civil Procedure Rules is not an ordinary power donated to the Courts. The Law recognizes Judges/Magistrates decision making process undergoes scrutiny before pronouncement or delivery to the parties. Therefore, there would be howls of outrage if a Judge or Magistrate were to admit that he or she affirmed a case despite serious errors of ignoring relevant evidence in the judicial task of applying of the Law to specific situations.

Here, the Court is asked to review the order on deposit of security of Kshs.600,000/= in lieu of title deed for due performance of the decree such as could be decided by way of an appeal, currently pending before the Court for determination.

What then is the role given by the statute for this condition on deposit of security for due performance of the decree. The remedy of stay of execution sought by the applicant is grounded and provided for under Order 42 Rule 6 of the Civil Procedure Rules. Its crystal clear beyond any misgivings that justice demands that the applicant to that application for stay of execution be compelled to furnish reasonable security for due performance of the decree, taking into account the circumstances of each particular case.

The Court of Appeal in **Nduhiu Gitahi v Anna Wambui Warugungo {1988} 2 KAR 621** making reference to the case of **Sir. John Donaldson M. R. in Rosengrens v Safe Deposit Centers Ltd {1984} 3 ALL ER 198** observed:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in away, which is least disadvantageous to the party giving the security it may take the form of payment into court or bank guarantee”

In the instant case to permit the applicant to deposit his Land title deed with the Court would work hardship against the respondent to realize the fruits of the Judgment. It means that the title deed ought to undergo some form of registration under the Land Registration Act to charge it to the Court as security for the due performance of the decree.

The objective of this condition on security is intended to ensure that there would be no delay in execution of decrees of the Court. This is an issue where the Court must balance the right of appeal with the existence of a valid Judgment obtained by the respondent on its merits. I am

conscious of the fact that usually money decrees are not to be stayed on appeal as a universal, principle of Law. The Court has to keep in view in exercising discretion to grant a stay of execution all facts and circumstances of the case, including the manner in which the trial of the suit was conducted and the impugned decree that was passed subject matter of the appeal.

After a close scrutiny of the aforesaid notice of motion, I am of the opinion that the applicant has not met the criteria enunciated under Section 80 and Order 45 Rule (1) of the Civil Procedure Rules to vary, review or substitute a title deed in lieu of the cash deposit of Kshs.600,000/= as a condition for due performance of the decree then in that event the notice of motion dated 12.7.2021 be and is hereby dismissed with costs.

DATED, SIGNED ON 15TH DAY OF SEPT 2021 and DISPATCHED via email ON 15TH DAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE