



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL (O.S) NO. 21 OF 2019

HENRY NYABUTO ONDIEKI.....APPLICANT

VERSUS

DR. GEDION MURIUKI (CEO COOPERATIVE BANK OF KENYA)....1ST RESPONDENT

COMPANY SECRETARY (COOPERATIVE BANK OF KENYA).....2ND RESPONDENT

STEVEN OYUCHO,

(MANAGER COOPERATIVE BANK OF KENYA, KISUMU.....3RD RESPONDENT

RULING

1. On 31st October, 2019, the lower court in NYANDO SPMCC 69 OF 2016 issued order attaching funds in the account of Chemelil Sugar Company (*Sugar Company*) held by Cooperative Bank (*Bank*) to satisfy the Applicant's claim against the *Sugar Company*.
2. Further to the foregoing, the court also ordered that the Agency Notice dated 05th September, 2019 issued by Kenya Revenue Authority (*KRA*) to the *Bank* to collect a total of Kshs. 2,032,584.495/- from the *Sugar Company* shall not apply to the sums owed to the Applicant.
3. Aggrieved by the said orders, the *Bank* filed **HCCA NO. 128 OF 2019** together with an application dated 13th November, 2019 for stay of the magistrate's orders.
4. After hearing the arguments of both parties, this court by a ruling dated 13.02.2020 issued the following orders:
 - a. **This Honourable Court be and is hereby pleased to grant a stay of execution of the ruling and order dated 31st October, 2019 against the Applicant (Bank) pending the hearing and determination of HCCA NO. 128 OF 2019**
 - b. **HCCC NO. 21 OF 2019** by which the 1st Respondent seeks to cite the Applicant's officers for contempt of the impugned order is similarly stayed pending the hearing and determination of HCCA NO. 128 OF 2019
 - c. **The Applicant (Bank) is directed to file and serve its record of appeal within 30 days from today's date**
 - d. **Costs shall abide the outcome of the appeal**
5. Subsequently and more particularly on 26.02.2020, the Applicant filed a notice of motion dated 24.02.2020 seeking review of the orders dated 13.02.2020

Analysis and Determination

6. I have considered the application in the light of the supporting affidavit the grounds of opposition and the oral submissions for both parties.

7. The issue in question is whether the Applicant has satisfied the threshold for grant of an order of review. Order 45 of the Civil Procedure Rules which as follows:

1. (1) Any person considering himself aggrieved-

(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.

8. In the case of *National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*, the Court of Appeal stated with regard to review: -

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

9. From the totality of the Applicant’s notice of motion, Applicant has not demonstrated 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 impugned judgment was passed, or some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle him to an order of review.

10. On the contrary, the Applicant repeatedly states that the court’s orders were made in error and gives reasons for his belief. In my considered view, the Applicant’s remedy lies not in seeking a review of the impugned orders but in filing an appeal.

Disposition

11. From the foregoing analysis, I have come to the conclusion that the notice of motion dated 24th February, 2020 filed on 26th February, 2020 is devoid of merit and it is dismissed with costs to the Respondents.

DELIVERED THIS 14th DAY OF April 2020

T. W. CHERERE

JUDGE

Court Assistant - Ms. Amondi/Ms. Okodoi

Applicant - In person

For the Respondents - Ogejo, Oboto & Kijala Advocates

Order

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID -19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March, 2019.