



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 193 OF 2018

IKECHUKWU ANOKE.....APPELLANT

VERSUS

CFC STANBIC BANK LIMITED.....RESPONDENT

(Being an appeal against the Ruling of Mr. P. Muholi, Senior Resident Magistrate given in the Nairobi CMCC No 982 of 2016 on 11th April 2018)

RULING

INTRODUCTION

1. The Appellant's Notice of Motion application dated 18th December 2018 and filed on 19th December 2018 was brought pursuant to the provisions of Section 1A and 3A of the Civil Procedure Act, Order 42 Rules 1 and 6 and Order 45 Rule 1 of the Civil Procedure Rules 2010. Prayers Nos (1) and (2) were spent. It sought the following remaining orders:-

1. Spent.

2. Spent.

3. THAT the Honourable Court be pleased to review the amount of security to be deposited from Kshs 3,000,000/= to Kshs 774,283.01/=

4. THAT costs of the application be provided for.

2. On 17th January 2019, this court directed that he deposits a sum of Kshs 1,500,000/= in a joint earning account in the names of his advocates and those of the Respondent by 17th February 2019. This was ordered purely in the interests of justice as the court determined this present application as he was complaining that the sum he was to deposit was lower than Kshs 3,000,000/= that he had been directed to deposit by this court on 22nd November 2018.

3. His Written Submissions were dated 19th March 2019 and filed on 20th March 2019 while those of the Respondent were dated 1st April 2019 and filed on 2nd April 2019.

4. Parties asked this court to deliver its decision based on the Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE APPELLANT'S CASE

5. The Appellant swore his Supporting Affidavit on 18th December 2018.

6. He contended that although this court had directed him to deposit a sum of Kshs 3,000,000/=, he had made several payments so that the outstanding amount stood at Kshs 774,283.01. He annexed a copy of the Report from Interest Rates Advisory Centre (IRAC) which confirmed the said outstanding amount.

7. He pointed out that his advocates had requested the Respondent's advocates to consider the same but the latter rejected his proposal

without any explanation.

8. He averred that he was willing to abide by the orders of this court and thus urged it to allow his application as prayed.

THE RESPONDENT'S CASE

9. In response thereto, on 14th January 2019 the Respondent's Recovery Manager, Hamilton Suba swore a Replying Affidavit. The same was filed on 15th January 2019.

10. The Respondent contended that the present application was incompetent unmerited, an abuse of the court process and that the same did not meet or satisfy the conditions of an applicant being granted a review. It stated that the Appellant was asking this court to sit on appeal of its own Ruling.

11. It was categorical that this court considered all the conditions set out for the granting of an order for a stay of execution pending appeal and that the IRAC Report was before the court before it rendered its decision.

12. It termed the said Report as an opinion that was not binding on it or on the court and averred that reliance on it was a futile attempt towards a second bite at the cherry.

13. It therefore asked this court to dismiss the present application with costs to it.

LEGAL ANALYSIS

14. The Appellant submitted that he had already deposited a sum of Kshs 1,500,000/= that was ordered to be deposited by the court and that taking that sum and the other monies that had been paid previously into consideration, he had already paid the facility from the Respondent.

15. It was his further submission that he had an arguable appeal and placed reliance on the case of **Susan Njoki Mwaniki (suing as the administratrix of the Estate of Francis Mwaniki Theuri vs Joseph Kiiru & Another [2017] eKLR** where it was held that the court may consider exercising discretion under Section 3A of the Civil Procedure Act and **“make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”**

16. On its part, the Respondent relied on Order 45 Rule 1(b) of Civil Procedure Rules to buttress its argument that the present application did not meet the conditions therein for a review order to be granted.

17. It was categorical that there was no error on the face of the court record, there was no discovery of new and important matter or evidence which after the exercise of due diligence could not have been produced at the time the Ruling was delivered and that there was no sufficient reason why the order should be granted.

18. It relied on the case of **Evan Bwire vs Andrew Aginda Civil Appeal No 147 of 2006** that was cited in **Stephen Githua Kimani vs Nancy Wanjira Wanungi t/a Providence Auctioneers [2016] eKLR** where the Court of Appeal held that an application for review will only be allowed on strong grounds if its effect will amount to re-opening the application or case afresh.

19. It further referred this court to the case of **National Bank Ltd vs Ndungu Njau Civil Appeal No 211 of 1996 (unreported)** where it was held that:-

“...the error or omission must be self-evident and should not require an elaborate argument to be established”

20. It also placed reliance on the case of **Dry Foam Cleaners vs Farid M. M. Al-Marry [2009] eKLR** where Serگون J stated that:-

“...The purpose of giving security is to ensure that at the end of it all, the Respondent is able to enjoy the fruits of its judgment...”

21. It was its contention that the Trial Court determined the decretal amount that was payable by the Appellant and that determining the issue at this preliminary stage would amount to a re-trial of a matter that had already been determined by the lower court.

22. It further submitted that the Appellant was relying on grounds that ought to be canvassed during the hearing of the Appeal.

23. Notably, Order 45 Rule 1(b) of the Civil Procedure Rules stipulates as follows:-

“Any person considering himself aggrieved 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.”

24. In other words, for an order of review to be granted, an applicant has to demonstrate the following:-

1. **That there was discovery of new and important matter or evidence, which after due diligence was not within his knowledge or could not be produced when the decree or order was made; or**
2. **That there was a mistake or error apparent on the case of the record; or,**
3. **That there was other sufficient reason for the order for review to be granted.**

25. A perusal of the decision of the lower court showed that judgment had been entered in favour of the Respondent for a sum of Kshs 2,768,176.16 and the same was to accrue interest until payment in full. The issue of the IRAC Report was alluded to in the said decision.

26. The Appellant had in a Notice of Motion application dated 23rd April 2017 filed in the lower court sought to have the interlocutory judgment entered against him in favour of the Respondent set aside and that the court review the said judgment. The Learned Trial Magistrate dismissed the said application. It was the said Ruling that culminated in the Appeal herein.

27. In its Ruling of 22nd November 2018, this court granted the Appellant an order for stay of execution pending appeal. He had contended that he was not given an opportunity to be heard. He also alluded to the IRAC Report which he had now forwarded to this court. This was not new matter or evidence as he could have annexed it to his Notice of Motion application dated 9th May 2018 and filed on 16th May 2019.

28. Having said so, the said IRAC Report was not relevant for purposes of granting an order for stay of execution pending appeal. Indeed, this court was only concerned with establishing whether or not the Appellant had met the conditions that are set out in Order 42 Rule 6(2) of the Civil Procedure Rules for purposes of granting an order for stay of execution, which it found he had.

29. Going further, the Appellant did not demonstrate the mistake or error on the face of the record. The IRAC Report had not been presented before this court and not considered when it heard and determined his application for a stay of execution pending appeal. However, as has been stated herein, it was not a relevant fact for consideration when granting the order for stay of execution pending appeal as it was a matter of evidence.

30. Whether or not the Appellant could be given a chance to defend the suit in the lower court, which he could do by presenting the IRAC Report in a trial, interlocutory judgment having been entered against him, was what the appellate court was being asked to determine in the pending appeal. Indeed the grounds of appeal were that the Learned Trial Magistrate erred when he failed to set aside the *ex parte* judgment passed against him and thus refused to accord him an opportunity to be heard.

31. The Appellant's reliance on the IRAC Report to demonstrate that he had made several payments leaving a balance of Kshs 774,283.01 could not therefore be determined at an interlocutory stage. It was a matter of fact to be interrogated during trial. The fact that the IRAC Report had established the figure he was required to pay was therefore not within the purview of the appellate court at this point.

32. Notably, the IRAC Report could not be introduced vide an application to prove the Appellant's case, when the same had not been tendered in evidence during trial.

33. Accordingly, having considered the affidavit evidence, the Written Submissions and the case law that was relied upon by the parties herein, this court came to the firm conclusion that the Appellant had not made out a strong case for review under any of the grounds set out under Order 45, Rule 1(b) of Civil Procedure Rules. He appeared to be litigating at the appellate stage which this court could not permit as there were certain preliminary issues that had to be dispensed with before he could start relying on the IRAC Report.

34. It was the considered opinion of this court that the Appellant's reliance on the IRAC Report was premature as it was not known at this stage if his appeal would be allowed and/or successful and whether the appellate court would refer the case back to re-trial where he could then adduce in evidence the said IRAC Report.

35. This court also took the view that in the event the interlocutory judgment was set aside on appeal and the matter proceeded for re-trial and it was established that the Appellant had already paid the entire loan as he had contended, then he would be refunded all his money. He would suffer no loss and/or prejudice as the monies would have been deposited in a joint interest earning account in the names of his advocates and those of the Respondent.

36. This court was thus not persuaded that it should review its orders of 22nd November 2018 as the Appellant's application had not met the threshold that has been set out in Order 45 Rule 1(b) of the Civil Procedure Rules. Reviewing the orders would amount to this court sitting on appeal on its own ruling.

37. Whereas it was true as the Appellant argued that courts could exercise their discretion under Section 3A of the Civil Procedure Act, this was not a suitable case that could be determined thereunder as Order 45 Rule 1(b) of Civil Procedure Rules was very specific as to what had to be demonstrated and considered before an order for review could be granted. The case of **Susan Njoki Mwaniki (suing as the Administratrix of the Estate of Francis Mwaniki Theuri vs Joseph Kiiru & Another** (Supra) that was relied upon by the Appellant was thus not relevant in the circumstances of the case herein.

38. On the other hand, this court fully associated itself with the holdings in the case of **Stephen Githua Kimani Vs Nancy Wanjira Waruingi t/a Providence Auctioneers** (Supra), **National Bank of Kenya Ltd vs Ndungu Njau** (Supra) and **Dry Foam Cleaners vs Farid M. Al-Marry** (Supra) that were relied upon by the Respondent.

DISPOSITION

39. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application that was dated 18th December 2018 and filed on 19th December 2018 was not merited and the same is hereby dismissed with costs to the Respondent.

40. The effect of this court's decision is that its Ruling of 22nd November 2018 remains undisturbed. However, as the Appellant had since deposited a sum of Kshs 1,500,000/= into a joint interest earning account in the names of his advocate and those of the Respondent, he is hereby directed to top up the sum by depositing a further sum of Kshs 1,500,000/= within the next forty five (45) days from today.

41. In the event the Appellant will default on Paragraph 40 hereinabove, the conditional stay of execution shall automatically lapse and the Respondent be at liberty to execute the decree herewith.

42. Either party is at liberty to apply.

43. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of July 2019

J. KAMAU

JUDGE