



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 437 OF 2006

CHARLES KAGEMA MURAYA.....PLAINTIFF

- VERSUS -

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. This court pronounced itself through its judgment in this matter on **29th November 2018**. **Charles Kagema Muraya**, the plaintiff, has moved this court through an application of **Notice of Motion** dated **31st January 2019**. The plaintiff seeks an order for review of this court's judgment to include the effective date of inclusion of the plaintiff's name in the defendant's Equity Bank Limited, register of shareholders as at November 2004.

BACKGROUND

2. The plaintiff filed this case seeking the following prayers.

- a. A declaration that the purported sale of the plaintiff's shares by the defendant is fraudulent, incompetent, illegal, invalid and null and void.*
- b. An order directing the defendant to issue the plaintiff with a share certificate for 150,000 ordinary shares in Equity Bank Limited.*
- c. An order that the plaintiff's name be included in the register of shareholders of Equity Bank Limited holding 150,000 ordinary shares.*
- d. An order that the defendant do pay the plaintiff the total amount of the unpaid dividends.*
- e. Interest on (d) above at commercial rates.*
- f. Costs of the suit.*

3. The defendant confirmed in evidence, during trial, that the plaintiff held 7,500 shares in the defendant Bank. The defendant also confirmed it sold those shares to recover the debt plaintiff owed it because it held a lien over those shares.

4. This court by its judgment of **29th November 2018** found that a lien did not entitle the defendant, in law, to sell the plaintiff's shares. This court however found that the plaintiff failed to prove, on a balance of probability, what the unpaid dividends were. By its judgment this court granted the following prayers:

- a. Equity Bank Limited shall issue Charles Kagema Muraya share certificate for 150,000 ordinary shares in Equity Bank Limited.*
- b. The name of Charles Kagema Muraya shall within 30 days from today be included in the register of shareholders of Equity Bank Limited and that register shall reflect the shareholding of Charles Kagema Muraya as a holder of 150,000 ordinary shares in Equity Bank Limited.*
- c. The costs of the suit are awarded to Charles Kagema Muraya.*

5. The above Judgment is the subject of the application before me for review.

THE APPLICATION

6. The plaintiff by his affidavit in support of the application deponed that the court, by its judgment, found that the defendant was not entitled to sell his 7,500 shares of the plaintiff and further that the plaintiff was entitled to 150,000 ordinary shares in the defendant's Bank as at November 2004. That despite that finding that this court failed, in making its final orders, to give effective date on which the plaintiff's name should be entered in the defendant Bank's share's register.

7. The defendant in opposition to the application has argued that there is no error or mistake apparent in the Judgment which necessitates correction. That the plaintiff by his application for review seeks relief which was not sought in the plaint and in respect to which no evidence was tendered.

ANALYSIS

8. The only issue for determination is whether there is a basis for granting review as sought.

9. Under section 80 of the Civil Procedure Act a party aggrieved by a decree or order from which an appeal has not been preferred may apply for review of the Judgment of the court which passed the decree or made the order. In this case the plaintiff has not preferred an appeal against the judgment of this court, he is therefore entitled to seek review on the ground that he is aggrieved by the decree thereof. An application for review is made under order 45 Rule 1 of the Civil Procedure Rules. Such an application is made by a party aggrieved by a decree or order not appealed against,

“..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.”

10. By that Order 45 the plaintiff should either prove discovery of new and important matter/evidence which was not within his knowledge; or mistake or error apparent on the face of the record; or any other sufficient reason why a review should be granted.

11. The plaintiff in this case has relied on the ground that there was a mistake or error apparent on the face of the judgment of the court.

12. The plaintiff by his submissions relied on cases which are distinguishable to the facts of this case. The plaintiff relied on the case **KINGECHA NYOTA & ANOTHER V LUCY WANGUI** (*SUING as the Legal Representative of the Estate of Ephraim Wanjohi Wairimu*)[2018] eKLR. The facts of that case are entirely different to those in this case. In that case the learned judge was hearing an application to reinstate a dismissed appeal. That case is not applicable in this matter. The plaintiff also relied on the case **TABITHA NJERI KINUTHIA V SAID SWALEH SAID & ANOTHER**. In that case the learned judge reviewed the order made against a person who was not a party to the action. Finally the plaintiff placed reliance on the court of appeal decision in **PHILIP OCHILO ORERO V AMBROSE SEKO** (1984) eKLR. In that case the court of appeal considered an appeal against the High Court's decision which declined to review the order summarily dismissing an appeal under section 79B of the Civil Procedure Act. The court of Appeal referred the matter back to the High Court for the re-hearing of the review application.

13. I have analyzed above the prayers presented by the plaintiff in this action in the plaint. None of those prayers sought that the court do order the effective date of inclusion of the plaintiff's name in the register, of shareholders, to be as at November 2004. Even looking at the plaintiff's evidence in chief the plaintiff simply adopted the prayers in the plaint. It follows even by his own evidence, the plaintiff did not seek the order he now seeks by this review. It would seem, and defendant's submission are right on the spot in this regard, that the plaintiff is seeking for review on a matter not supported by the pleadings before court. In other words the plaintiff did not plead for the effective date of inclusion into the defendant Bank's register of shareholders to be as at November 2004. Parties, as correctly submitted by the defendant, are bound by their pleadings. The defendant relied on the case *Malawi Railways Ltd v Nyasulu* (1998) MWSC 3 as follows:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

14. I also place reliance on the holding in the cited in the case **Daniel Otieno Migore v South Nyanza Sugar Company Limited** (2018) eKLR thus:

“The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

15. The plaintiff has failed to show any discovery of new and important matter; has failed to show a mistake or error apparent on the face of the record; and has failed to show sufficient reason why a review should be grant. The plaintiff in my view, by the present application, seeks to re-open and re-litigate the case a fresh. He cannot be allowed to re-open or re-litigate the matter which is not supported by the pleadings or evidence. The plaintiff’s pleadings do not pray for the effective date reflecting the plaintiff’s shares to be as at November 2004.

CONCLUSION

16. As a result of the above finding the Notice of Motion application dated 31st January 2019 is dismissed with costs to the defendant.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of October, 2019.

MARY KASANGO

JUDGE

Judgment read in open court in the presence of

SophieCourt clerk.

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT