



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 68 OF 2014

PETER NDUNGU KIBE.....APPELLANT

VERSUS

EMILY ATIENO OGUTU (the personal representative of the estate of

Leonard Odindi Ng'ong'a).....RESPONDENT

RULING

1. The defendant/respondent through an application dated 5th June, 2017 brought under the Provisions of Order 45 rule 1, (1)A, 2(1) of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and all enabling provisions of the law prays for the following orders:-

(i) That the Honourable court be pleased to review the Judgment delivered herein on 20th April, 2017 on account of some mistake or error apparent on the face of the court's record and/or for any other sufficient reasons; and

(ii) That the costs of the application be provided for.

2. The application is supported by the affidavit of the respondent, Emily Atieno Ogutu sworn on 5th June, 2017 and grounds on the face of the application. The plaintiff/appellant, Peter Ndungu Kibe, filed grounds of opposition on 12th July, 2017 and a replying affidavit on 28th September 2017. On 9th October, 2017, the respondent filed a reply to the appellant's replying affidavit.

3. On 12th June, 2017, the appellant filed an application under the provisions of Order 51 rule 1 of the Civil Procedure Rules and Sections 3A, 1 and 1B of the Civil Procedure Act and all enabling provisions of the law. He seeks the following orders:-

(i) That the decretal sum of Kshs. 577,456/= plus all accrued interest deposited in a fixed deposit joint account between Asige Keverenge & Anyanzwa Advocates and M. Ananda & Co Advocates at CFC Stanbic Bank Mombasa Account No. 010000021202 be released to the Appellant/Applicant Advocates Messrs M. Ananda & Co Advocates forthwith; and

(ii) That Costs be provided for.

4. The application is predicated on the grounds in support of it and the affidavit of Manase Calleb Ananda, the Advocate for the appellant sworn on 8th June, 2017. The respondent filed replying affidavit on 4th July, 2017 to oppose the application.

5. I have perused the written submissions, affidavits on record and the annexures thereto. The issues for determination are- (a) if this court should review its judgment delivered on 20th April, 2017 and (b) if the deposit of the decretal amount deposited in a fixed deposit joint account should be released to the appellant.

6. Section 80 of the Civil Procedure Act provides as follows with regard to applications for review:-

“Any person who considers himself aggrieved;

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or

(b) by a decree or order from which no appeal is allowed by this Act, May apply for review of judgment to

the court which passed the decree or made the order, and the court may make such order hereon as it thinks fit.”

7. The provisions of Order 45 rule 1 of the Civil Procedure Rules are more elaborate and state as follows:-

"Any person considering himself aggrieved-

a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

8. On 12th May, 2016, Emily Atieno Ogotu, was substituted as a party to this appeal by consent as she had obtained letters of administration in respect to the estate of Edward Odindi Ng'ong'a, the former respondent.

9. In her application, the respondent states that she seeks orders for review due to an error apparent on the face of the record. A thorough perusal of her affidavit yields nought with regard to elaboration of the error which she is referring to. Her affidavit contains general depositions of the proceedings that took place in the lower court but lacks specificity as to the error that this court made that should be reviewed.

10. In the Judgment dated 20th April, 2017 this court considered in minute details the proceedings that took place in the lower court and was guided by the same in making the determination to remit Mombasa SRMCC No. 4992 of 1997 to lower court for hearing. It is worth noting that the appeal that was filed in the High Court emanated from the said lower court case. This court based its Judgment on the Record of Appeal filed on 10th March, 2015. At the time when the appeal was heard, the respondent was represented by the law firm of Asige Keverenge & Anyanzwa Advocates.

11. In ***Tokesi Mambili and others vs Simion Litsanga, Kisumu Civil Appeal 90 of 2001***, the Court of Appeal held as follows:-

"i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason. (emphasis added).

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion."

12. At the time of hearing of the appeal, this court was not informed that some documents that were relied on before the lower court were not included in the Record of Appeal. The foregoing issue has been brought up through the submissions filed in support of the respondent's application. The respondent cannot now come before the court to take a second bite in a matter in which she was adequately represented with no objection having been raised with regard to the non-completeness of the Record of Appeal. It is therefore the finding of this court that the application dated 5th June, 2017 is incompetent and that no justifiable cause has been given for review of this court's decision. It is hereby dismissed with costs to the appellant.

13. The ripple effect of the foregoing decision is that the appellant's application has merit and he is entitled to release of the sum of Kshs. 577,456/= deposited in a joint fixed deposit account in the names of the Advocates on record. The appellant is also entitled to all accrued interest in the said bank account. The said amount was so deposited as security pursuant to the grant of an order for stay of execution pending appeal. The appeal was determined in favour of the appellant and he is entitled to the said amount. The appellant's application dated 8th June, 2017 is therefore allowed. Costs of the two applications are awarded to the appellant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 2nd day of November, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff

Ms Ng'endo holding brief for Mr Asige for the defendant

Mr. Oliver Musundi - Court Assistant