



REPUBLIC OF KENYA



**Mwangi v Gachuru (Environment and Land Appeal 20 of 2022)
[2025] KEELC 989 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 989 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 20 OF 2022
TW MURIGI, J
FEBRUARY 27, 2025**

BETWEEN

JOHN MAINA MWANGI APPLICANT

AND

CHARITY NJERI GACHURU RESPONDENT

RULING

1. By Notice of Motion dated 12th November, 2024 brought under Order 51 Rule 1, Order 40 Rule 1 of the Civil Procedure Rules and Section 63(e) of the *Civil Procedure Act* the Applicant seeks the following orders:-
 - a. Spent.
 - b. That this Honourable court be pleased to reinstate the stay of execution orders granted by this court on 18th January, 2023.
 - c. That the costs be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of John Maina Mwangi sworn on even date.

The Applicant's Case

3. The Applicant averred that he filed the present application because of the harassment by auctioneers dispatched by the Respondent's Advocate to satisfy the decree in MCC No.1334 of 2021 (Charity Njeri Gachuru vs John Maina Mwangi). He further averred that on more than 3 instances, the auctioneers had sought to break into his matrimonial home in Utawala and is apprehensive that they may succeed and render the appeal an academic exercise.



4. He further averred that in a meeting held at the Respondent's Advocates offices on 28th October, 2024, the Respondent disclosed that she had not given her Advocates consent to dispatch auctioneers since they had agreed that after paying Kshs.1.8 million which he settled on 12th June, 2023, the outstanding balance would be settled on 31st December, 2024.
5. He deposed that during the aforementioned meeting, it came out that the Respondent's Advocate was demanding Kshs. 550,000/= for professional fees as opposed to the amount indicated in the decree from the lower court. In conclusion, the Applicant urged the court to allow the application as prayed.

The Respondent's Case

6. The Respondent opposed the application through a replying affidavit sworn on 28th November 2024 by Muturi Kamande Advocate. He averred that the order of stay of execution granted to the Applicant on 18th January 2023 lapsed after he failed to comply with the conditions. He admitted that the Respondent had initiated steps to recover the decretal sum of Kshs. 3,185,678/= out of which the Appellant had paid Kshs. 1,800,000 leaving a balance of Kshs. 2,015,678/=.
7. He was categorical that no consent had been recorded reducing the debt sum as claimed.

Analysis And Determination

8. At the onset, the court notes that while the Notice of Motion is brought under Order 51 Rule 1 and Order 40 Rule 1 of the Civil Procedure Rules, the Appellant is seeking a review of the order dated 18th January 2023. The order sought falls under Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules.
9. The law that governs applications for review is set out in Section 80 of the *Civil Procedure Act* and in Order 45 Rule 1 of the Civil Procedure Rules.
10. Section 80 of the *Civil Procedure Act* provides that;
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 a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
11. Order 45 Rule 1 of the Civil Procedure Rules provides that: -
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 a review of the judgment to the court which passed the decree or made the order without unreasonable delay.



12. The provisions of Order 45 were restated by the Court of Appeal in the case of Benjoh Amalgamated Limited & Another Vs Kenya Commercial Bank Limited (2014) eKLR where the Court held that:-

“In the High Court both the Civil Procedure Act in Section 80 and the Civil Procedure Rules in Order 45 Rule 1 confer on the court power to review.

Rule 1 of order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but Section 80 gives the High court greater amplitude for review.”

13. Similarly, in Republic vs Public Procurement Administrative Review Board & 2 Others (2018) eKLR the court held that: -

“Section 80 gives the power of review and Order 45 sets out the rules. These rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review.”

14. As regards the first requirement, the Applicant must show that there is discovery of new or important matter of evidence which after due diligence was not within his knowledge or could not be produced at that time.

15. The Applicant has not shown that there is discovery of new or important matter of evidence that he could not have placed during the hearing of the application.

16. With regards to the second requirement, the Applicant must establish that there is an error apparent on the face of the record. In the case of Nyamogo & Nyamogo vs Kogo (2001) EA 170 the court held that;

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning where there may be conceivably be two opinions 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 possible. Mere error or wrong is certainly no ground for review though it may be one for appeal.”

17. Similarly, in the case of Timber Manufacturers and Dealers vs Nairobi Golf Hotels (K) HCCC No. 5220 of 1992, Emukule J held that:-

“For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established.”

18. The Applicant has not pin pointed the errors that are apparent on the face of the record.

19. The Court is also mandated to consider if there are sufficient reasons to review the Court’s order.



20. Discussing what constitutes sufficient cause for purposes of review, the Court of Appeal in the case of *The Official Receiver and Liquidator Vs Freight Forwarders Kenya Ltd (2000)* eKLR stated that:-
- “These words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot with out at times running counter to the interest of justice limited to the discovery of new and important matter or evidence or occurring of an error apparent on the face of the record.”
21. In exercising its discretion under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, this court granted the Appellant stay of execution of the lower court’s judgement and decree issued in MCC No.1334 of 2021 (*Charity Njeri Gachuru v John Maina Mwangi*) in the following conditions:-
- i. that he would file the record of appeal within the next 120 days.
 - ii. That he was to deposit a bank guarantee for the decretal sum.
 - iii. costs within the next 30 days.
22. The Appellant failed to comply with the conditions, following which the order of stay automatically lapsed. Consequently, the Respondent commenced execution proceedings to recover the outstanding decretal sum prompting the Applicant to file the present application.
23. The Applicant claimed that the parties herein signed a consent dated 6th August 2024.
24. The said consent was filed on 1st October 2024 and it is to the effect that parties had agreed on a decretal sum of Kshs.2.5 million, out of which the Appellant has paid Kshs.1.8 million leaving a balance of Kshs. 7,00,000/= payable in December 2024. The Appellant had also committed to withdraw the appeal.
25. The record shows that the consent was not placed before the court for adoption as an order of the court.
26. Even if the agreement was considered as an order of the court, there is no indication that the Appellant paid the Respondent Kshs. 700,000/= in December 2024 as contemplated.
27. The Applicant heavily relied on the consent between him and the Respondent to show that the parties were attempting to settle the matter amicably. The Respondent did not deny that she appended her signature on the consent.
28. From the foregoing, I will in the interest of justice extend the time within which the Applicant is to comply with the order dated 18/1/2023 for a further 14 days from the date hereof. In default the stay of execution shall automatically lapse.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY, 2025.

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T. MURIGI

JUDGE

In The Presence Of:-

Kuria for the Applicant

Ahmed – Court assistant

