



**Ikumbi Estate Investment Limited v Nyambura (Civil Application
150 of 2019) [2023] KECA 833 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 833 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION 150 OF 2019
HM OKWENGU, JA
JULY 7, 2023**

BETWEEN

IKUMBI ESTATE INVESTMENT LIMITED APPELLANT

AND

JOHN MBUGUA NYAMBURA RESPONDENT

*(Being an application for review of the Ruling of R. N. Nambuye, JA delivered
on 8th November 2019 in Civil Application No. NAI 150 of 2019 UR 105/2019)*

RULING

1. The applicant, Ikumbi Estate Investment Limited moved this court by way of a motion dated June 26, 2020, brought under article 259(1) & (3) of the Constitution, rule 57(2) of the Court of Appeal Rules 2010, and sections 3 & 3A of the Appellate Jurisdiction Act cap 9, Laws of Kenya. The orders sought by the applicant in the motion were as follows:
 - i. Spent...
 - ii. This honourable court be pleased to review and/or set aside its ruling and order of court made on November 8, 2018.
 - iii. The costs of this application be provided for.
2. The applicant is aggrieved by the ruling of Nambuye JA sitting as a single judge, in which she dismissed the applicant's motion for leave of court to appeal out of time. The applicant maintains that there is sufficient reason to review the ruling of the learned Judge as the ruling was made in error and/or mistake and is highly prejudicial to the applicant, who has an intended appeal which is arguable and the delay was not so inordinate as to disentitle it to the reliefs sought. Further, the applicant contends that the learned judge mistakenly dismissed the application on the basis that he did not have authority



to institute the suit, and yet the application arose from High Court No ELC 332 of 2017 where the applicant had authority.

3. The applicant has filed written submissions in support of the motion reiterating that the learned judge was wrong in dismissing the application on a technicality; that the ruling is unfair and highly prejudicial to the applicant; and that there is sufficient reason to review the ruling in the interest of justice. The applicant relied on *Equity Bank Limited v West Link M-B-O Limited* [2013] eKLR, in which Musinga, JA held that:

“Courts of law exists to administer justice and in so doing, they must balance between competing rights and interest of different parties but within the confines of law to ensure the ends of justice are met.”

4. The applicant submitted that the authority to swear was already part of the record, and therefore the person who swore the affidavit had locus standi. The applicant also cited *Tokesi Mambili & others v Simeon Litsanga; Benjo Amalgamated & anor v Kenya Commercial Bank Limited; Official Receiver; and Provisional Liquidator, Nyayo Bus Service Corporation v Firestone East Africa (1969) Limited*, civil appeal No 172 of 1998. He also referred to two decisions from India and Tanzania whose citation unfortunately he did not provide.
5. This matter was listed before me for hearing as a single judge and a hearing notice was duly served on the applicant through an email on November 29, 2022, with instructions to the applicant’s advocate to serve the respondent with a hearing notice. The applicant has filed an affidavit of service sworn by a process server Willis Agai on December 18, 2020. That affidavit of service relates to service of the notice of motion and not service of the hearing notice. This means that the respondent was actually not served with a notice for the hearing of the motion.
6. Apart from the fact that it would not be appropriate to deal with this matter as the respondent has not been served with a hearing notice, it is apparent that this matter has been wrongly placed before me for hearing as a single judge.
7. Rule 57 of the *Court of Appeal Rules 2010* which deals with rescinding of orders (now rule 59 of the *Court of Appeal Rules, 2022*) states as follows:

“57

- (1) Any order made on an application heard by a single judge may be varied or rescinded by that judge or in the absence of that judge, by any other judge or by the court on the application of any person affected thereby, if –
 - a. The order was one extending the time for doing any act, otherwise than to a specific date; or
 - b. The order was one permitting the doing of some act without specifying the date by which the act was to be done and the person on whose application the order was made has failed to show reasonable diligence in the matter.
- (2) An order made on an application to the court may similarly be varied or rescinded by the court.”



8. From the prayers on the face of the motion, the order that is sought to be reviewed by the applicant is not one extending the time for doing any act or permitting the doing of any act without specifying the dates as provided under rule 57(1) (a) or (b). The order sought to be reviewed is one that dismissed the application for extension of time. The ruling can therefore only be referred to the full bench by way of reference under rule 57 of the [Court of Appeal Rules, 2022](#) (formerly Rule 55 of the [Court of Appeal Rules, 2010](#)).
9. For the above reasons, I remit the application back to the Registry for the application to be listed before a full bench and the respondent to be duly served with a hearing notice.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

