



**Consolidated Bank of Kenya v Mutisya & 2 others (Civil Appeal  
396 of 2019) [2021] KECA 346 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 346 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 396 OF 2019  
AK MURGOR, J MOHAMMED & KI LAIBUTA, JJA  
DECEMBER 17, 2021**

**BETWEEN**

**CONSOLIDATED BANK OF KENYA ..... APPELLANT**

**AND**

**BONIFACE KIVINDYO MUTISYA ..... 1<sup>ST</sup> RESPONDENT**

**ALFRED KAVILA KIVINDYO ..... 2<sup>ND</sup> RESPONDENT**

**ALMA SOLUTIONS LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal against the Ruling of the High Court of Kenya at Makueni (H.  
Ong’undi, J) dated 4th July, 2019 in High Court Civil Case No 5 of 2018)*

**JUDGMENT**

Background

1. This appeal arises from the Ruling of Hon. Justice H. Ong’undi delivered on 4<sup>th</sup> July 2019 in Makueni High Court Case No. 5 of 2018 in which the 1<sup>st</sup> Respondent, Boniface Kivindyo Mutisya, had sued Consolidated Bank Limited (the Appellant herein), Alfred Kavila Kivindyo (2<sup>nd</sup> Respondent herein) and Alma Solutions Limited (the 3<sup>rd</sup> Respondent herein) seeking –
  - (a) an order of permanent injunction restraining the Appellant, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents (the defendants in that suit), their servants or agents from disposing of, selling or otherwise interfering with Land Parcel Numbers Mbooni/Iiani/107 and Mbooni/Iiani/884;
  - (b) a declaration that the charge registered on the two parcels of land in favour of the Appellant is illegal and a nullity;
  - (c) an order discharging the charges registered on the parcels of land aforesaid; and



- (d) costs of the suit and interest at court rates.
2. The appellant filed its defence and counterclaim against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents seeking –
- (a) KShs. 2,024,098.39 together with interest thereon at the Appellant’s commercial rates as at 21<sup>st</sup> December 2016 until payment in full;
- (b) auctioneers’ costs with interest at court rates from 16<sup>th</sup> November 2016 until payment in full; and
- (c) costs of the suit on a full indemnity basis.
3. The 1<sup>st</sup> Respondent denied the Appellant’s counterclaim. He filed a reply to defence and defence to the Appellant’s counterclaim to which the Appellant replied. It would appear from the record of appeal that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein did not defend the Appellant’s counterclaim.
4. The suit proceeded to hearing at the conclusion of which the High Court delivered its judgment on 12<sup>th</sup> November 2018. In his judgment, the Hon. Justice C. Kariuki gave judgment for the Appellant on the counterclaim with costs against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein. The court further directed that the 1<sup>st</sup> Respondent’s suit succeeds to the extent that LR No. Mbooni/Iiani/107 be returned to him by reason of the fact that, the court found, that parcel of land had not been charged to the Appellant. As regards LR No. Mbooni/Iiani/884, the court dismissed the 1<sup>st</sup> Respondent’s suit with costs to the Appellant. A decree was issued accordingly.
5. Aggrieved by the decision of the High Court, the Appellant filed a Notice of Motion dated 15<sup>th</sup> May 2019 seeking inter alia –
- (a) stay of execution of the decree pending hearing and determination of its Motion;
- (b) review of the judgment;
- (c) a finding that LR No. Mbooni/Iiani/107 was charged to the Appellant together with LR No. Mbooni/Iiani/884;
- (d) in the alternative, the court do reopen the suit limited to taking evidence of the existence and of a charge over LR No. Mbooni/Iiani/107; and
- (e) costs of the application.
6. The 1<sup>st</sup> Respondent opposed the application and filed his Grounds of Opposition on 28<sup>th</sup> May 2018 whereupon the Hon. Justice H. Ong’undi proceeded to hear the Motion and delivered a Ruling on 4<sup>th</sup> July 2019 thereby dismissing the Appellant’s Notice of Motion with costs to the Respondents.
7. Dissatisfied by the Ruling, the Appellant filed its Notice of Appeal on 11<sup>th</sup> July 2019 and, thereafter, its record of appeal on 21<sup>st</sup> August 2019. Hence this appeal.
8. In addition to this appeal, the Appellant proceeded to institute another appeal on 10<sup>th</sup> February 2020 against the judgment of the High Court delivered on 12<sup>th</sup> November 2018, being Civil Appeal No. 43 of 2020.

#### The Parties

9. The Appellant is a body corporate duly registered under the *Companies Act*, Cap.486 (now repealed). The company carries on business as a bank. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents are father and son respectively



while the 3<sup>rd</sup> Respondent is a company duly registered under the *Companies Act*, Cap. 486 (now repealed), and of which the 2<sup>nd</sup> Respondent was at all material times a director.

10. The 1<sup>st</sup> Respondent was at all material times the registered proprietor of Land Reference Numbers Mbooni/Iiani/107 and 884 claimed to have been charged to the Appellant for a sum of KShs.2,000,000 advanced to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, and allegedly guaranteed by the 1<sup>st</sup> Respondent on security of the charge on his two parcels of land aforesaid.

#### Dispute, Ruling and Judgment of the High Court

11. From the record before us, the 1<sup>st</sup> Respondent claims that his son, the 2<sup>nd</sup> Respondent had persuaded him to give the original title documents relating to his (the 1<sup>st</sup> Respondent's) two properties for safe custody with a bank of his choice. Instead of placing the documents in safe custody, the 2<sup>nd</sup> Respondent allegedly charged them with the Appellant as security for a sum of KShs. 2,000,000 advanced to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Of the alleged fraud, we find nothing to fault the trial court's finding that the 1<sup>st</sup> respondent understood the legal implications of his signatures on the charge and guarantee documents. Moreover, the 1<sup>st</sup> respondent did not deny executing the charge and guarantee documents and indemnity. His allegation that he did not understand the import of those contracts are, in our considered view, a mere afterthought. He was duly represented by learned counsel, Mr. J. K. N. Kamunyori, in the transactions leading to the charge. If indeed any fraud had been perpetrated, nothing would have been easier than to lodge a claim in fraud against all concerned. No such claim or complaint was raised, and we need not say more.
12. It was not until the Appellant moved to enforce the security to recover the mortgage debt pursuant to its Statutory Notice issued on 12<sup>th</sup> April 2016 and the Notification of Sale dated 1<sup>st</sup> September 2016 that a dispute arose between the 1<sup>st</sup> Respondent, the Appellant and the 2<sup>nd</sup> Respondent as to whether the two properties had in fact been lawfully charged to the bank.
13. To resist the realisation of the security by the Appellant, the 1<sup>st</sup> Respondent filed suit in Makueni HCC No. 5 of 2018 which culminated in the judgment of 12<sup>th</sup> November 2018 and the Ruling of 4<sup>th</sup> July 2019, the latter being the subject of this appeal.

#### Appeal and Submissions of Counsel

14. The Appellant's Motion for review of the judgment of the Hon. Justice C. Kariuki was made under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Orders 21 Rule 6, 45 Rules 1, 2, and 5, and 51 Rules 1 and 8 of the *Civil Procedure Rules*, 2010 and on 13 grounds as listed on the face of its Motion in paragraphs (a) to (m) (both inclusive). Out of the 13 grounds, we consider the relevant ones to be that –
  - (d) there was an innocent omission in the production of the charged documents and no evidence in support thereof was submitted to the court by the bank; and
  - (e) there was an error apparent on the face of the record, or sufficient reason to exercise its jurisdiction to review.
15. The other grounds are, in our considered view, matters of evidence or explanations relating to the events leading to the dispute, the Motion and Ruling from which this appeal is preferred. As we have already observed, the appeal from the judgment of the High Court delivered on 12<sup>th</sup> November 2018 shall be dealt with separately in light of the fact that it is the subject of appeal to this Court in Civil Appeal No. 43 of 2020.
16. Having considered the findings of the High Court in its Ruling delivered on 4<sup>th</sup> July 2019, the submissions of counsel and the numerous statutory provisions cited before us, we form the view that



this appeal stands or falls on three main grounds stipulated in Order 45 Rule 1(1)(b) of the Civil Procedure Rules, 2010:

- (a) 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;
- (b) on account of some mistake or error apparent on the face of the record; or
- (c) any other sufficient reason.

#### Discovery of New and Important Matter or Evidence

17. The critical ground on which the Appellant's application for Review of the High Court's judgment and decree was made appears in paragraph 6 of Albert Anjichi's supporting affidavit sworn on 15<sup>th</sup> May 2019. According to him, "though the foregoing information [i.e. the alleged registration of charges against LR Nos. Mbooni/Iiani/ 107 and 884 as mentioned in paragraphs 4 and 5 of his affidavit] was available to the bank at the time of filing the suit, but was innocently omitted during the preparation of the pleadings on account of staff of the bank being transferred or resigning from the bank which in turn lead to the documents being left out in the preparation of the bank's defence. On this account the bank's advocates then dealing with the matter inadvertently forgot to follow up the matter."
18. The question is whether this ground availed to the Appellant to justify review of the judgment of the High Court, and whether on account of the explanation given in Mr. Anjichi's supporting affidavit would persuade us to allow the appeal. The short answer is no. The learned judge was correct in dismissing the application for review. A reading of paragraph 6 of Mr. Anjichi's affidavit clearly shows that the information relating to the alleged charge on LR No. Mbooni/Iiani/107 "was available to the bank at the time of filing the suit, but was innocently omitted during the preparation of the pleadings ...". In our considered view, that does not amount to "... discovery of new and important matter or evidence which, after the exercise of due diligence, was not within [the Appellant's] knowledge or could not be produced by [them] at the time when the decree was passed or the order made". Indeed, the application for review purported to introduce evidential documents not on the record of the court that passed the judgment sought to be reviewed.
19. In *Otieno, Ragot and Company Advocates v National Bank of Kenya Limited* [2020] eKLR, this Court observed:

"In the present appeal, the Respondent did not seek leave to adduce additional evidence. It filed an application for review on which it purported to introduce new evidence. No additional evidence could be produced before the learned Judge unless they formed part of the record before the taxing officer ..., the Judge only deals with what was on record before the taxing officer."
20. On discovery of new evidence and important matter which was not within the knowledge of the Appellant, the Court of Appeal in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR held that:

"In Francis Origo and another v Jacob Kumali Mungala C.A. No. 149 of 2001 (unreported), the High Court dismissed an application for review because the applicant did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them ..."
21. The matter before us is not any different. The Appellant had the evidential documents in issue relating to the alleged charge over LR No. Mbooni/Iiani/107 all along. The information was within their reach



and did not require any heightened degree of diligence to search and find. It was merely forgotten. That could not, in our considered view, constitute a ground for review with the intention of producing in evidence that which the Appellant had within its power to adduce as a matter of course.

Was there an Error on the Face of the Record to Justify Review?

22. In his written submissions dated 25<sup>th</sup> September 2020, M/s. Wamae and Allen Advocates invited us to find that there was an error apparent on the face of the record of the superior court, which the learned Judge ought to have considered in her Ruling. According to paragraph 16 of the counsel's submissions:

“... there is an error apparent on the face of the record as there exists evidence adduced by the 1<sup>st</sup> Respondent in his Complaint showing that Land Reference Number Mbooni/Iiani/107 was charged in favour of the Appellant. The certificate of post-registration search conducted over the property indicated that there was a Charge registered in favour of the Appellant to secure the sum of KShs. 2,000,000 on 3<sup>rd</sup> May 2012.”

23. To our mind, the 1<sup>st</sup> Respondent may have alluded, in his Complaint, to a charge over the suit property. However, that would not of itself have conferred on the Appellant the right to introduce the Charge in an application for review. Such evidence may only be introduced on application for leave to do so either before delivery of judgment or on appeal. In any event, that would not be the kind of evidence that was in the Appellant's hands all the time but which, in Mr. Anjichi's words, “the bank's advocates then dealing with the matter inadvertently forgot to follow up ....” In the circumstances, we do not see what error was apparent on the record. The evidence in issue was within the Appellant's knowledge and could have been produced by its officers at the trial, and before the judgment and decree were passed.

Were there other Sufficient Reasons for which the Application for Review Could have been Allowed?

24. We find no other reason for which the Appellant's application for review of the High Court's judgment could have been allowed. Counsel for the Appellant have invited us to consider the decision of the superior court in *Michael Muriuki Ngubuini v East African Building Society Limited [2015] eKLR* in which the court observed that “the expression ‘sufficient reason’ is wide enough to include misconception of fact or law by a court or even by an advocate.” He qualifies his submissions on this score by stating that “this definition only covers misconception of facts of law, but not negligence or conduct of an advocate.”

25. While we agree that an error apparent on the face of the record may be occasioned by an act of counsel or the trial court, such an error does not include negligent conduct on the part of a party or counsel. In any event, the guiding principles that govern the circumstances under which a party may seek to introduce new evidence in civil proceedings have been conclusively dealt with. Forgetfulness or inadvertent omission, as was the case here, cannot constitute “other sufficient reasons” to warrant review as contemplated by Order 45 Rule 1(1) (b).

Obiter: Effect of the Appeal in Civil Appeal No. 43 of 2020

26. It would be remiss of us not to consider what purpose would be served by the appeal before us and the one challenging the judgment of the High Court. We are at a loss as to the Appellant's intention in pursuit of both. Having said that, we are nonetheless obligated to determine the matter before us regardless of the possible outcome, either way, of the other appeal. On the other hand, we appreciate that the grounds on which litigants may seek review of the judgment of a superior court are distinct from which an appeal may lie. As was held by Bennett J in *Abasi Belinda v Frederick Kangwamu and another [1963] EA p.557*, “a point which may be a good ground of appeal may not be a good ground



for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal.”

27. What is clear to us, though, is that one cannot elect to apply for a review of a judgment from which an appeal has been preferred. This Court in *William Karani and 47 others v Wamalwa Kijana and 2 others [1987] eKLR* observed that “there should be only one appeal arising from the judgment irrespective of the number of grounds there may be, but once the main appeal is filed, any appeal arising from refusal to review the judgment is washed away.” The distinction here is that the second appeal in No. 43 of 2020 came after the one before us, which explains our decision to have the two appeals determined separately.
28. In conclusion, we find that the decision of Hon. Justice H. Ong’undi, J was not wrong in dismissing the Appellant’s application for review. For this reason, we find no merit in the appeal. We accordingly dismiss it with costs to the Respondents.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF DECEMBER, 2021**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

*Signed*

DEPUTY REGISTRAR

