



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & KANTAL. J.J.A.)

CIVIL APPEAL NO. 253 OF 2016

BETWEEN

JASON ONDABU T/A

ONDABU & COMPANY ADVOCATES.....1ST APPELLANT

KULLSAM KASSAM.....2ND APPELLANT

ZACHARIA BARAZA T/A

SIUMA TRADERS.....3RD APPELLANT

AND

SHOP ONE HUNDRED LIMITED.....RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at

Nairobi (L. Njuguna, J.) dated 15th September, 2016 in Nairobi H.C.C. Appeal No. 398 of 2012)

JUDGMENT OF THE COURT

1. This appeal arises from a ruling delivered by the High Court (*L. Njuguna, J.*) on 15th of September 2016. In that ruling, the court dismissed an application dated 5th February 2013 made by the 1st appellant, Jason Ondabu t/a Ondabu & Company Advocates, in which the principal prayers were for the review, setting aside and or variation of orders given on 20th December 2012 in which the appellant was found guilty of contempt of court and punished.

2. The background is that the 1st appellant's client, Kullsam Kassam, the 2nd appellant, filed suit before the Magistrates' court at Nairobi seeking a declaration that the occupation of premises known as NCM house Nairobi by the respondent, Shop One Hundred Limited, was unlawful and constituted trespass. The 2nd appellant sought an order of eviction against the respondent as well as damages for trespass.

3. Satisfied that the continued occupation of the premises by the respondent was unlawful and constituted trespass, the Magistrates' court issued orders on 24th July 2012 for eviction of the respondent. By the same order, the court authorized Siuma Traders, the 3rd appellant, to evict the respondent. The OCS Central Police Station was ordered to provide security during the eviction.

4. The respondent was aggrieved by the orders given by the Magistrates' court. It lodged an appeal before the High Court. Pending the hearing and determination of that appeal, the respondent applied for stay of execution of the eviction orders.

On 6th August 2012, the High Court (*W. Korir, J.*) gave directions in the presence of counsel for the parties as to the filing of written submissions with regard to the application for a stay of execution. At the same time, the High Court ordered that "*the status quo be maintained*" until 4th October 2012 when the hearing of the application was scheduled for highlighting of the written submissions.

5. On 10th August 2012, when the order of status quo given on 6th August 2012 was still in force, the respondent was forcibly evicted from

the premises.

6. The respondent sought and obtained leave of the High Court to apply for orders of contempt against the appellants for disobeying the status quo orders given on 6th August 2012. That was followed by the respondent's application dated 3rd September 2012 seeking orders for a finding that the appellants "*are in contempt of court for disobeying the order issued...on 6th August 2012*"; that the appellants be fined Kshs.10,000,000.00 each; that their property be attached; and that they be committed or detained in prison for a term of 6 months. That application was heard and allowed by the court (**Angawa, J.**) in a ruling given on 20th December 2012 with the result that the appellants were found in contempt of court and punishment meted out as prayed.

7. Dissatisfied with the ruling of 20th December 2012, the 1st appellant presented the review application dated 5th February 2013 to which we have already referred, which culminated in the impugned ruling delivered on 15th September 2016. In dismissing the application for review, the Judge expressed:

"In my view, it has not been shown that the Hon. Judge made some mistake or there was an error apparent on the face of the record and no sufficient reason was given for review of the orders made on 20 December 2012."

8. Although Kullsam Kassam and Zacharia Baraza t/a Siuma Traders are named in the record of appeal as the 2nd and 3rd appellants respectively, based on the notice of appeal and the memorandum of appeal, the appeal is essentially by the 1st appellant alone. During the hearing of the appeal, learned counsel for the 1st appellant, **Mr. George Onsombi**, appearing with **Mr. Nyagah** relied entirely on written submissions in which the eight grounds of appeal in the memorandum of appeal were condensed into two. It was submitted that in dismissing the application, the Judge failed to appreciate the provisions of the Civil Procedure Act and Rules, 2010 that govern applications on review, setting aside and variation of orders; and that although the Judge correctly stated the law, she failed to properly apply it to the circumstances of the case.

9. It was submitted that the finding of contempt against the 1st appellant was based on the false premise that the 1st appellant extracted the eviction order and instructed the auctioneer, the 3rd appellant, to carry out the eviction when in fact he had not done so; that had the Judge considered the material placed before her in that regard, she would have appreciated that there was an error on the face of the record and would have allowed the review; that she would have seen that the 1st appellant neither extracted the eviction order, nor did he instruct the 3rd appellant to execute it; and that no evidence whatsoever was produced to link the 1st appellant to the violation or contempt of the orders issued on 6th August 2012.

10. In support of his application for review, the 1st appellant produced a letter dated 24th July 2012 by which his client, the 2nd appellant, applied for the eviction order from the Magistrates' court as well as the court receipt issued to the 2nd appellant in that regard. According to counsel, the production of that evidence at the review stage was on account of discovery of new and important matter which was not within the knowledge of the 1st appellant at the time the contempt application was heard; that the Judge therefore erred in concluding that the 1st appellant should have produced that material during the hearing of the contempt proceedings and erred in finding that the 1st appellant was thereby seeking to introduce new evidence.

11. Counsel cited ***John Macharia Gichigi vs. Commissioner of Police [2017] eKLR; Parliamentary Service Commission vs. Martin Nyaga Wambora & another [2018] eKLR*** and ***Woburn Estate Limited vs. Margaret Bashforth [2016] eKLR*** in support of the appeal, urging that this is a proper case for this Court to interfere with exercise of discretion by the lower court which failed to take into account matters that it should have in arriving at its decision.

12. It was submitted further that the Judge also fell into error in basing her decision on extraneous matters. According to counsel, the Judge "*appears to give credence to issues relating to the authenticity*" of the annexures to the 1st appellant's affidavit in support of the review application, namely the letter from the 2nd appellant applying for the eviction order from the Magistrates' court and the accompanying court receipt, when the authenticity of those documents was not an issue for consideration. Reference was made to the decision in the case of ***Sheikh t/a Hasa Hauliers vs. Highway Carriers Ltd [1988] eKLR*** to support the proposition that consideration of extraneous matters by the Judge vitiated the ruling and the Judge therefore exercised her judicial discretion wrongly.

13. **Mr. Njoka**, learned counsel for the respondent, also relied entirely on written submissions in which it was urged that the learned Judge cannot be faulted for her appreciation of what amounts to new and important matter for purposes of an application for review. On the strength of the case of ***Rose Kaiza vs. Angelo Mpanju Kaiza [2009] eKLR***, it was submitted that an application for review is not an opportunity for an applicant who has seen weakness in its case to produce evidence not submitted earlier.

14. In the present case, it was submitted, the letter dated 24th July 2012 purportedly written by the 1st appellant's client to the Magistrates' Court requesting for the eviction order as well as the court receipt dated 24th November 2012, both of which the 1st appellant relied upon as discovered new evidence and on the basis of which he sought review, were already in existence when the contempt application was heard before **Angawa J.**; that there was no reason given why the 1st appellant did not, or could not, have produced that evidence at the time. Accordingly, it was urged, the learned Judge properly exercised her judicial discretion in concluding that the 1st appellant had not demonstrated that there was discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the relevant time with the exercise of due diligence.

15. As regard the complaint that the judge based her decision on extraneous matters not placed before her, it was submitted that it was the 1st

appellant who submitted the documents in question, namely the letter dated 24th July 2012 and the court receipt, before the Judge; that those documents were not part of the evidence before **Angawa J.** when the contempt application was heard but were only produced during the review application; and that it was therefore incumbent upon the Judge to interrogate them in the context of the application for review.

16. We have considered the appeal and submissions. The 1st appellant's application on the basis of which the impugned ruling was delivered was an application for review hinged on Section 80 of the Civil Procedure Act. That section provides that any person who considers himself aggrieved by a decree or order from which an appeal is allowed by the Act but from which no appeal has been preferred or by a decree or order from which no appeal is allowed by the 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 as it thinks fit.

17. An application for review, therefore, involves exercise of judicial discretion. The circumstances in which this Court, as an appellate court, can interfere with the exercise of judicial discretion are limited. In the often-cited case of **Mbogo & another vs. Shah [1968] 1 EA 93** it was held that:

“...this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. Therefore, the only issue for determination in this appeal, is whether the learned Judge properly exercised her discretion in rejecting the 1st appellant's application for review. As the learned Judge stated in the impugned ruling, the grounds on which an application for review may be entertained as set out in Order 45 of the Civil Procedure Rules include “*discovery of new and important matter or evidence which, after the exercise of due diligence, was not within*” the knowledge of the applicant “*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*”.

19. The principal basis upon which the 1st appellant sought review, was that there was “*an error apparent on the face of the record*” in the ruling of the court of 20th December 2012; that in citing the 1st appellant for contempt, **Angawa J.** proceeded on the basis of a mistake of fact, namely, that it was the 1st appellant who extracted the eviction order on the basis of which the respondent was ejected from the suit property and that it was the 1st appellant who instructed the court bailiff, the 3rd appellant, to execute the eviction; that the correct factual position was that it was the 1st appellant's client, the 2nd appellant, and not the 1st appellant, who extracted that eviction order and instructed the 3rd appellant to execute it when there was in force an order for status quo to be maintained. It was averred that the 1st appellant “*never extracted the lower court order on 8th August 2012 which is the substratum of the...court's ruling of 20th December 2012 but the same was done by Kullsam Kassam*”.

20. In support of the application for review, the 1st appellant exhibited to his affidavit, two critical documents. The first document was a copy of a handwritten letter dated 24th July 2012 addressed to the Chief Magistrates' court by the 2nd appellant requesting to be supplied “*with a certified copy of the order issued herein.*” The second document was a copy of a court receipt date 24th November 2012 in the name of the 2nd appellant for an amount of Kshs.300.00. According to the 1st appellant, those two documents established beyond question that he was not at all involved in extracting the eviction order from the Magistrates' Court nor did he instruct the auctioneer, the 3rd appellant, to execute the eviction order.

21. In rejecting the application, quite apart from observing that the handwritten letter dated 24th July 2012 had no court stamp and the discrepancy in dates between that letter and the accompanying receipt, the learned Judge expressed, correctly in our view, that the 1st appellant had not demonstrated why those documents were not produced during the hearing of the application for contempt. In that regard, the Judge stated:

“The letters annexed to his affidavit in support of the application herein were not exhibited to the court when the Hon. Judge heard the application for contempt of court and no explanation has been given why they could not be produced at that material time.”

22. We respectfully agree. As this Court stated in the case of **Rose Kaiza vs. Angelo Mpanju Kaiza (above)** to which we were referred, an application for review is not an opportunity for a party to plug holes in its case by procuring fresh evidence to strengthen its otherwise weak case. In that case, the Court quoted an earlier decision in **D.J. Lowe & Company Ltd-vs-Bangue Indosuez Civil Appl. Nai. 217/9 (UR)** where the Court expressed that:

“Where such a review application is based on the fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.”

23. Clearly, by the time **Angawa J.** heard the application for contempt, there is no good reason given why the two documents could not be produced, if indeed they were in existence. It has not been shown that in rejecting the application, the learned Judge misdirected herself in some matter or took into account matters that she should not have, or that she failed to take into account matters that she should have or that her decision is plainly wrong.

24. In the words of Madan, JA. in **United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd (1985) EA 898:**

"The court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

25. There is accordingly no merit in the 1st appellant's complaint that the learned Judge failed to appreciate the provisions of the law on review or that the Judge failed to consider material evidence in reaching her decision.

26. There is also no merit in the complaint that the Judge based her decision on extraneous matters that were not placed before her. If we understand the 1st appellant correctly, the Judge should, for example, have accepted that the handwritten letter by the 2nd appellant bespeaking the eviction order was filed as it purported notwithstanding the absence of a court stamp. Needless mention, a court stamp on the letter would have given credibility to it. It was a relevant consideration in relation to the question why that letter was not produced during the hearing of the contempt application only to surface at the stage of the application for review, and even then without explanation why it could not have been produced at the appropriate stage of the proceedings. And so was the question of the dates of that letter vis a vis the date on the accompanying court receipt.

27. All in all, we find no merit in this appeal. It is dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Nairobi this 4th day of December, 2020.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR