



PP Flora Limited & another v Development Bank of Kenya Limited (Environment & Land Case 13 of 2018) [2023] KEELC 223 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 13 OF 2018
FM NJOROGE, J
JANUARY 26, 2023**

BETWEEN

PP FLORA LIMITED 1ST PLAINTIFF

PRAKASH CHANDER RAM 2ND PLAINTIFF

AND

DEVELOPMENT BANK OF KENYA LIMITED DEFENDANT

RULING

1. This ruling is in respect of the plaintiffs notice of motion application dated July 19, 2022. The application is said to be brought under order 45 rule 1 of the Civil Procedure Rules and seeks the following orders;
 - a. ...spent
 - b. ...spent
 - c. ...spent
 - d. This honorable court be pleased to correct paragraph 3 of the ruling delivered herein on June 30, 2022 to indicate that the plaintiffs filed a response to the defendant's application dated January 28, 2022.
 - e. This honorable court be pleased to review and set aside or vary the order of costs in the ruling delivered on June 30, 2022, and substitute therefore an order that each party shall bear its own costs of the defendant's application and the suit.
 - f. The costs of this application be provided for.
2. The application was supported by the affidavit of Prakash Chander Ram sworn on July 25, 2022. The grounds on the face of the application and supporting affidavit are that this suit together with an



injunction application were filed to stop the defendant from selling by auction the plaintiffs properties; that these properties were charged to the defendants as security for a credit facility; that the suit and the application was filed on the basis that the defendant had not issued proper notices as required by law; that the court on November 27, 2018 granted interim orders stopping the sale and directed the defendant to stage a new sale if the same is done in accordance with the law; that the defendant subsequently issued notices and sold the suit property and the suit was therefore overtaken by events; that by an application dated January 28, 2022 and filed on February 8, 2022 the defendant sought for the dismissal of the suit; that the matter was mentioned on 5/05/2022 and the court gave directions on the hearing of the application which he was informed by his advocates on record; that he was unwell and indisposed and therefore unable to give instructions to his advocates to file a response on behalf of the plaintiffs; that upon his recovery, he instructed his advocates on record on June 27, 2022 to file a response to the application; that his replying affidavit was filed and served upon the Defendant on the June 28, 2022 and a physical copy delivered to court for filing; that by a letter dated June 28, 2022 to the court and copied to the defendant, his advocates on record explained the circumstances which led to the delay in filing of the replying affidavit; that the ruling delivered on June 30, 2022 allowed the defendant's application dated January 28, 2022 with costs; that at the time of delivery of the ruling, the plaintiffs had filed a response to the ruling albeit out of time and it is therefore not true that the plaintiffs had not filed a response to the application; that the court proceeded to dismiss the suit with costs to the defendant without considering his replying affidavit which contained material that he believes would have led the court to reach a different conclusion; that this includes the fact that the defendant had subsequently exercised the power of sale which was not disclosed in the defendant's application; that these circumstances merit the review of the ruling and order made on June 30, 2022; that paragraph 3 of the ruling should be corrected to indicate that a replying affidavit was filed; that the award of costs should be set aside and substituted with an order that each party bears its own costs; that there was no basis for awarding costs against the plaintiffs as the court had already found merit in the plaintiffs case vide the ruling of November 27, 2018 where the court stopped the planned auction by the defendant; that the suit was overtaken by events and that it is in the interest of justice that the ruling and order of June 30, 2022 be reviewed as prayed for in the application.

3. In response to the application the defendant filed a replying affidavit sworn on August 24, 2022 and filed on September 20, 2022 by his counsel on record. He deposed that although the application is framed as one for review, upon perusal of the grounds and the matters raised in the affidavit, it shows that it is an appeal contesting the merit of the decision made by this court on June 30, 2022; that the order dismissing the suit is a negative order incapable of stay of execution as prayed for by the plaintiffs; that no costs have been presented for taxation and execution is not possible; that the plaintiffs are aggrieved that costs were awarded to the defendant; that the plaintiff had instituted the present suit vide the Plaint dated January 22, 2018 together with the application dated the same date whose ruling was delivered on November 27, 2018; that on January 28, 2022 four years after the suit was instituted and the interlocutory orders granted, the defendant lodged an application for dismissal of the main suit for want of prosecution and had it served upon the advocates for the plaintiff on March 2, 2022; that the plaintiff had not filed a reply by 5/05/2022 when the honorable court gave directions; that at paragraph 7 of the supporting affidavit, the 2nd plaintiff on July 19, 2022 admitted that he was informed of the said directions; that in a blatant disregard of the court directions and timelines, the plaintiffs failed to file and serve a response until on June 28, 2022 the eve of the ruling date being June 30, 2022; that the 2nd plaintiff's replying affidavit does not give a valid explanation for failure to prosecute the suit; that the plaintiffs have not offered any explanation for their failure to timeously file the replying affidavit; that the replying affidavit sworn on 2/06/2022 confirms that the plaintiffs had no intention to prosecute the main suit; that the plaintiffs have not satisfied the conditions for stay of execution,



review or setting aside the order or ruling and that it will not be in the interest of justice to revive the suit only for the purpose of exempting the plaintiffs from accrued costs.

4. The plaintiffs filed a further affidavit sworn by Prakash Chander Ram on October 21, 2022. He deposed that their application only seeks a review of the ruling of the honorable court delivered on June 30, 2022 and that it is not an appeal; that he is advised by his advocates on record that it is not true that orders made in the ruling of June 30, 2022 are negative orders as alleged by the defendant; that the orders are capable of being executed and enforced; that the defendant was awarded costs without considering the plaintiffs replying affidavit; that the plaintiffs are apprehensive that the defendant will file a bill of costs for taxation; that in support of his application he provided information and evidence on the circumstances that led to the delay in swearing the affidavit in response to the defendant's application dated January 28, 2022; that he is elderly and has had various health medical problems in the last few years; that his movements and operations were hindered and extremely limited and that had the court considered the replying affidavit that was filed before the ruling was delivered it would have reached the conclusion that there was no basis to award costs to the defendant.
5. The plaintiffs filed their submissions dated October 26, 2022 on the same date while the defendant filed its submissions dated November 17, 2022 on November 21, 2022.
6. The plaintiffs in their submissions relied on Section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules* and submitted that they have sufficiently demonstrated that the application for review is premised on the ground that there was a mistake on the face of the record to the extent that the court indicated in its ruling that the plaintiffs had not filed a replying affidavit.
7. They relied on the cases of *Zablon Mokuva vs Solomon M. Choti & 3 Others* [2016] eKLR, *Muyodi vs Industrial and Commercial Development Corporation & Another* [2006] 1 EA 243 among other cases and submitted that the mistake is self-evident and does not require any long drawn argument. The plaintiffs concluded their submissions by seeking that their application dated 25/07/2022 should be allowed as prayed.
8. The defendant in its submissions identified the following issues for determination; whether this court should exercise its discretion to allow an application premised on false depositions, whether this court should sit on review over issues meant for appeal, whether the application meets the threshold for review and stay and whether this court should review its judgment solely to exempt the plaintiffs from paying costs.
9. On the first issue, the defendant submitted that the 2nd plaintiff lied in his supporting affidavit and that the medical reports produced by the plaintiffs do not justify their inaction. That the sickness if any did not incapacitate the 2nd plaintiff or bar him from swearing the response which he did on June 2, 2022.
10. On the second issue, the defendant voiced an objection and submitted that the plaintiffs' application is an appeal in the guise of an application seeking orders of review and relied on the case of *Ferrotech vs Mwadziwe Ali* [2021] eKLR in support of its arguments.
11. On the third issue, the defendant submitted that the plaintiffs' application falls outside the purview of and does not meet the threshold required under section 80 of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. It relied on the case of *Harrison Okumu vs Perez Okumu* [2021] in support of its arguments.
12. On the fourth issue, it was submitted that no sufficient reason has been advanced to warrant the setting aside of the order for costs. That the plaintiffs ought to have made their response on the issue of costs while the case and the application were pending and that they cannot now raise it through an application for review. That by the time the court retired to consider the application for dismissal, the



plaintiffs had not filed a response. The defendant relied on the case of *Cecilia Karuru Ngayu vs Barclays Bank of Kenya & another* [2016] eKLR and submitted that the court considered relevant issues in determining the issue of costs.

Analysis and Determination

13. After considering the application, the replying affidavit and the submissions, this court finds that the only issue that arises for determination is whether the court should review its orders issued on June 30, 2022.

14. Section 80 of the *Civil Procedure Act* provides as follows:

“ 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.”

15. Order 45 rule 1 of the *Civil Procedure Rules* provides as follows:

(1) 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 judgment to the court which passed the decree or made the order without unreasonable delay.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

16. The court in the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR held as follows:

“Section 80 gives the power of review and order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) 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; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”



17. The plaintiffs in this matter seek that the court do review its orders made on June 30, 2022 to indicate that the plaintiffs filed a response to the defendant's application dated January 28, 2022 and to set aside the order of costs and substitute the same with an order that each party bears its own costs.
18. The defendant opposed the plaintiffs' application and stated that the grounds upon which the plaintiffs were seeking for orders of review were issues that could only be raised on appeal as they are challenging the merits of the court's decision delivered on June 30, 2022.
19. The defendant had filed the application dated January 28, 2022 seeking for the dismissal of the suit for want of prosecution. The application came up for hearing on May 5, 2022 where the court gave directions as follows:

“Mr Kashindi is granted 14 days to respond to the application dated January 28, 2022. The applicant shall have leave to respond only to new issues raised by the response within 7 days of service of the reply by the respondents. The application shall be disposed of by way of written submissions. The applicant shall file and serve submissions within 7 days of the service of the replying affidavit of the respondents. The respondent shall respond to the submissions within 7 days of service of the applicants submissions. Ruling shall be delivered on June 30, 2022.”
20. The plaintiffs were granted fourteen days to file a replying affidavit to the defendant's application. The plaintiffs admit that they did not file their replying affidavit within the fourteen days granted by the court. The plaintiffs ought to have filed their replying affidavit by May 19, 2022 but instead they filed their response to the application on June 28, 2022, two days before delivery of the ruling. The 2nd plaintiff has now alleged that he was unwell and that is why he was unable to file a response to the application within time. No evidence of such illness was availed.
21. The plaintiffs also seek that the court do review its orders on costs which were granted to the defendant in the ruling delivered on June 30, 2022. This is on the basis that the defendant had already sold the suit property and the suit was therefore overtaken by events. The defendant opposed the review and stated that it being a successful litigant, it was entitled to costs.
22. As was held in the case of *Republic v Public Procurement Administrative Review Board & 2 others* (supra), the court can only review its orders upon discovery of new and important evidence which after the exercise of due diligence could not be adduced at the time the order was issued or on account of a mistake or error apparent on the face of the record.
23. I think this is the first time ever that I have been asked to review an order on the basis of inexplicable, unadulterated sloth on the part of an applicant who ensconced himself into blissful somnolence almost throughout the timeline provided for the filing of defence to an application that had potential to deliver a fatal blow to his already moribund suit; I however do not think that this court should stain the record of the well-known jurisprudence on review on the basis of the grounds relied on at present as that would amount to condonation of unmitigated lethargy. If there was a good reason for not filing the replying affidavit in time a request to the court through the Deputy Registrar for a mention before the Judge, or an application under certificate of urgency should have drawn this court's attention to it before the impugned orders were issued.
24. I have also perused the proposed replying affidavit filed two days to the ruling - and which I doubt came into the court file until after the ruling, hence the observation of “no reply filed” in the ruling - and I have found no ground upon which the defence of the applicant to the dismissal application could have been anchored; merely stating - in the replying affidavit filed to counter a dismissal application - that



the suit properties had been sold was not sufficient to fend off claims of lackadaisical conduct on the part of the applicants; an explanation for non-prosecution of the suit was still outstanding. It would remain a fact that the suit had lain unprosecuted for a period exceeding the statutory limit required to warrant dismissal under order 17 rule (2)(1); whether sold or not, there remained a suit that had to be disposed of, and the primary duty was incumbent upon the applicant to move the court either for prosecution, withdrawal or recording of a consent with their adversary none of which actions were undertaken; neither would I think that the issue of whether costs should have been awarded to the defendant should have occasioned an application for review as under section 27 of the Civil Procedure Act, costs ordinarily follow the event; the applicants' suit having been dismissed - and that in the absence of any plea at the hearing of the application that gave rise to the impugned orders for court's graceful exercise of discretion to order that they be spared from costs - nothing else was to be expected save the condemnation of the applicants to costs.

25. It is my view that in this matter, the reasons given by the plaintiffs in seeking for orders of review do not fall under the grounds upon which orders of review can be granted under order 45 rule 1 as there has been no discovery of new evidence nor is there an error apparent on the face of the record or other sufficient cause ejusdem generis. The upshot of the foregoing is that the application for review dated July 19, 2022 is devoid of an iota of merit and I hereby dismiss it with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 26TH DAY OF JANUARY, 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

