Mwangi & another v First Community Bank Ltd & another (Civil Suit E032 of 2022) [2025] KEHC 598 (KLR) (28 January 2025) (Ruling)

Neutral citation: [2025] KEHC 598 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT E032 OF 2022

HI ONG'UDI, J

JANUARY 28, 2025

BETWEEN

DAVID KARANJA MWANGI ..... 1ST PLAINTIFF

POINT A COMMERCIAL AGENCIES ..... 2ND PLAINTIFF

AND

FIRST COMMUNITY BANK LTD ..... 1ST DEFENDANT

REGENT AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. By the Notice of Motion dated 2nd October 2024 the applicants pray for the following orders;

   i. Spent.

   ii Spent.

   iii That pending the hearing and determination of the main suit, an order of injunction be and is hereby issued restraining the defendants/respondents, whether by themselves, their employees, servants and/or agents, assigns, and/or any person acting on their behalf or instructions, from advertising for sale, offering for sale, selling, alienating, taking possession of, leasing, transferring, charging, or otherwise interfering with land parcel number Kiambogo/Kiambogo Block 2/14605 (Mwariki).

   iv That this honourable Court be pleased to review and set aside its orders issued on 24th September 2024, dismissing the interim orders of injunction previously granted 10th November 2022, for want of prosecution.

   v. Spent.

   vi. That the costs of the application be provided for.

2. The said application is based on the grounds thereof and the affidavit of the 1st plaintiff/applicant sworn on even date. He deponed that he is the registered owner of land parcel number Kiambogo/ Kiambogo Block 2/14605 (Mwariki), which is his matrimonial home. Further, that on 10th November 2022, this court issued interim orders of injunction restraining the defendants/respondents from advertising for sale, offering for sale, selling, or in any way interfering with the said property.

3. He further deponed that on 24th September 2024, the interim injunction was dismissed for want of prosecution and he was unaware of the dismissal until he received a notice indicating that his property was scheduled for auction on 31st October 2024. That his previous advocates failed to attend court sessions or communicate to him the implications of failure to prosecute. He added that the impending sale threatened his home and the stability and welfare of his family.

4. That if the auction was to proceed, he would suffer irreparable harm that could not be compensated by any monetary damages. He urged the court to review the dismissal orders, reinstate the interim injunction and stay the auction of his matrimonial home pending the hearing and determination the main suit.

5. The 1st defendant/respondent in response filed a replying affidavit sworn on 17th October 2024 by its legal manager. She averred that the present application was misconceived, lacking in merit and otherwise an abuse of the court process. Further, that on 24th September 2024, neither the plaintiffs/ applicants' nor their advocates were present in Court despite being served with the notice. That it was evident that the plaintiffs/applicants had been given the opportunity to ventilate their case but they had abused the opportunity. Thus, they ought not to be granted another chance.

6. She further averred that to date, the plaintiffs/applicants had not filed their written submissions to their impugned application. Thus, in the foregoing, it was evident that they were not keen to prosecute the said application and one could only assume that their lack of interest was because of the interim orders from this honourable court. Lastly, she averred that if the court was inclined to exercise its discretion in favour of the plaintiffs/applicants, then they should be directed to offset at least 50% of their outstanding debt or in the alternative, they be directed to deposit the entire outstanding loan to court.

7. In response to the replying affidavit the plaintiffs/applicants filed a further affidavit dated 22nd October 2024 in which they raised issues on the current value of their other properties in Naivasha. They annexed copies of valuation reports by Adomag Valuers, copy of official search and Certificate of Lease for Naivasha/ Municipality Block 5/642 and 5/643 together with a sketch map.

8. The application was disposed of by way of written submissions

Plaintiffs/applicants' submissions

9. These are dated 7th October, 2024 and were filed by Bomett Kiprotich & Company advocates. Counsel identified only one issue for determination which is whether or not the applicants had satisfied the grounds for review.

10. Counsel submitted in the affirmative and cited section 80 of the *Civil Procedure Act* and Order 45 rules 1 and 2 of the Civil Procedure Rules on review. He further submitted that reviewing the dismissal order and reinstating the interim injunctive orders would correct procedural wrongs, ensure the applicants' right to be heard, and uphold the principles of justice and fairness. He urged the court to exercise its discretion in reviewing the dismissal and restoring the status quo to prevent an unjust and illegal sale.

11. The court's attention was drawn to: Margaret Kamori Karua & another v Migwi Kiringi (Miscellaneous Succession 37 of 2012 Miscellaneous Succession Cause 37 of 2012) [2018] KEHC 6885 (KLR) (19 April 2018) (Ruling) where the court held;

> " Similarly, in N *Nassir Abdi v. Ali Wario & 2 others (2013) eKLR EP No.6 of 2013* G.V. Odunga J., observed: - "A decision whether or not to vary, set aside or review earlier orders was an exercise of judicial discretion and the court could only exercise such discretion if so to do would serve useful purpose..."
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> Other decisions were also referred to.

Defendants/respondents' submissions

12. These are dated 5th November, 2024 and were filed by Mukiri Global Advocates LLP. Counsel identified two issues for determination.

13. The first issue is whether the court should exercise its discretion to review and set aside its orders issued on 22nd September 2024. She equally cited section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules, 2010, and submitted that the applicants' submissions did not disclose any errors apparent on the face of the record or discovery of any new evidence that was not within their own knowledge.

14. She placed reliance on the case of Muyodi v Industrial and Commercial Development Corporation & Another [2006] I EA 243, where the Court of Appeal described an error apparent on the face of the record to be as follows; -

> " ....In Nyamogo & Nyamogo -v Kogo (2001) EA 174 where the Court held that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 long drawn process of reasoning or on points where there may 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us." (Emphasis mine)

15. Counsel further submitted that the plaintiffs/applicants had not shown that there existed any other sufficient cause to warrant the review and setting aside of the orders issued by this court. Further that the commercial relationship and agreement between the parties to charge the properties clearly contemplated the loss of the suit property upon default and therefore the plaintiffs/applicants could not rely on the aspect of the property being matrimonial property to stop the auction indefinitely.

16. She relied on the decision in Maltex Commercial Supplies Limited & Another v. Euro Bank Limited (In Liquidation) HCCC Number 82 of 2006 in which the court observed that:

> " ... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured."

17. She submitted that the plaintiffs/applicants could not blame their former advocates for failing to file submissions and attend court but had to show tangible steps taken by them in following up on their matter. Further, that they had not produced any proof to show that they were not indolent in following up on the matter.

18. She referred to the decision in Duale Mary Ann Gurre v Amina Mohamed Mahamood & Another [2014] eKLR, where Hon. Justice Mutungi held as follows: -

> " An advocate is the agent of the party who instructs him and such instructing client as the principal continues to have the obligation and the duty to ensure that the agent is executing the instructions given. In the case of litigation, the suit belongs to the client and the client has an obligation to do follow up with his advocate to ensure the advocate is carrying out the instructions as given. The litigation does not belong to the Advocate but to the client. If the Advocate commits a negligent act the client has an independent cause of action against the Advocate."

19. She further submitted that this was not a proper case for the court to exercise its discretion to set aside an order dismissing the application since the plaintiffs/applicants have failed to aid the court in meeting its overriding objective. She prayed for the dismissal of the application.

20. The second issue is on who should bear the costs. On this she argued that the defendants/respondents are entitled to the costs based on the principle that "costs follow the event." She relied on the decision in Jasbir Singh Rai & 3 Others V Tarlochan Singh Rai & 4 Others [2014] eKLR, wherein the Supreme Court discussed the issue of costs. The said court stated that as a general rule, costs follow the event and the court must give reasons whenever costs do not follow the event.

Analysis and determination

21. I have considered the application, the affidavits and the submissions by both parties. I opine that the main issue for determination is whether this court should review and set aside its orders issued on 24th September 2024, dismissing the application dated 2nd November, 2022 for want of prosecution.

22. It is common ground that the High Court has the power of review, which must be exercised within the framework of Section 80 *Civil Procedure Act* and Order 45 Rule 1. 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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

23. Further, Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as follows: -

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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

24. The above provisions circumscribe the jurisdiction of the court in an application for review. The conditions in Order 45 of the Civil Procedure Rules 2010 have to be satisfied although within a much wider approach expressed in the constitutional desire in Article 159 of *the Constitution* and the overriding objective in sections 1A and 1B *Civil Procedure Act* to serve substantive justice.

25. The plaintiffs/applicants' application is premised on the provisions of sections 1A, 1B, 3A and 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules. This implies that they have satisfied the standard as stated in Kithoi v Kioko (1982) KLR 177, page 181, by the Court of Appeal that;

> "…….the Civil Procedure Rules Order XLIV demands inter alia, that an application for review must be based in the discovery of new and important evidence which was not within the applicant's 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 on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, falling which the application will not be granted." (Emphasis added)

26. In the instant application, it is not in dispute that there is no discovery of any new and important matter or evidence. There is equally no mistake or error apparent on the face of the record, in the constitutional desire that courts should take a much broader approach in applying legal thresholds. The only point on which the instant application can be decided is whether there is any other sufficient reason presented before the court to warrant the court to vary the orders herein.

27. It is the 1st plaintiff/applicant's case that his previous advocates failed to attend court sessions or communicate to him the implications of failure to prosecute the application. Further, that he was unaware of the dismissal until he received a notice indicating that his property was scheduled for auction on 31st October 2024.

28. On its part the 1st defendant/respondent contends that the plaintiffs/applicants were not keen in prosecuting their application and one could only assume that their lack of interest was because of the interim orders they were enjoying. Further, that they had been served severally and given the opportunity to ventilate their case but they had abused the opportunity. Thus, they ought not to be granted another chance.

29. There is no doubt that the plaintiffs/applicants failed to prosecute their application despite the several orders/ directions issued and served on them. They blame their previous advocates for failing to attend court sessions or communicate to them the implications of failure to prosecute the said application.

30. In Mwangi vs. Mwangi [1999] 2 EA 234, it was held that:

> " The burden lies on a party who seeks the exercise of a Court's discretion in his favour to place some material before the Court upon which material the discretion is to be exercised. To simply say "it is the mistake of my counsel", is really no answer...Pure and simple inaction by counsel or a refusal by him to act, cannot amount to a mistake which ought not to be visited on a client. Simple inaction by a lawyer coupled with client's careless attitude may be enough to say: "I am not going to exercise my discretion"

31. That was the position adopted in Maneno Mengi Ltd and Others vs. Nyamachumber and another [2004] 1 EA 116 where the court held that it is now settled that an advocate's lack of diligence and inaction is no ground for circumventing the clear provisions of the Rules. This court shares the same sentiments.

32. However, this court is not powerless in granting relief when the ends of justice and equity so demand, since the powers vested in the court are of a wide scope and ambit. The Supreme Court of India in Raj Bahadur Ras Raja vs Seth Hiralal AIR [1962] AC 527 held as follows:-

> " The inherent power has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it. Lord Cairns in Roger Vs Comptoir D' Escompts De Paris stated as follows:
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> "One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

33. From the above cited authorities, it is clear that discretion vested in the court is dependent upon various circumstances, which the court has to consider. It can be exercised on an application filed by a party. It could also be exercised in order to stall the dilatory tactics adopted in the process of hearing a suit, so as to do real and substantial justice to the parties to the suit.

34. Having considered all the facts of this case, I find that this is a proper case for this court to exercise its discretion in favour of the applicants to give them a chance to be heard. Accordingly, I hereby set aside the orders issued on 24th September 2024.

35. Prayer two (2) in the application seeks for an order of injunction pending the hearing and determination of the main suit.

36. The conditions for the grant of an interlocutory injunction are now well settled as stated in Giella v Cassman Brown and co ltd 1973 E.A 360, Mrao v First American Bank of Kenya Ltd and 2 others 2003 klr 125, and American Cynamid co v Ethicon Ltd 1975 1All E.R. The principles are:

    a. An applicant must show a prima facie case with a probability of success.

    b. In an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages.

    c. And if in doubt in any of the above conditions the court will decide then on a balance of convenience.

37. The plaintiffs/applicants' case is founded on a loan facility advanced by the 1st defendant/respondent to them. It is contended by the plaintiffs/applicants that the 2nd plaintiff/applicant faithfully and without failure repaid the said loan and thus has been performing its obligations as per the charge instrument. It is however claimed, that the 1st defendant/respondent without any justification instructed the 2nd defendant/respondent to advertise and dispose of the suit property which is his matrimonial home in order to recover loan arrears.

38. In John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR, the court held as follows;

> " ....Any property which is properly and lawfully given as security for loan becomes a commodity for sale. And so, any ground based on those arguments does not in itself prove of prima facie case of possibility of suffering irreparable damage. See the case of C.A Civil Appeal No. 114 of 2009 Nyanza Fish Processors Limited Vs Barclays Bank of Kenya Limited where the court held that;
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> "The applicant itself has offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The Respondent is a bank and there is no gainsaying that it will be able to satisfy the loss"

39. I have carefully considered the plaint and in my humble view, it raises triable issues that can only be determined by way of evidence. The 1st plaintiff/applicant argued that the suit property is a matrimonial property and if the same is auctioned there was a likelihood that he would suffer irreparable harm which would not be adequately compensated for by damages.

40. The court in John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR held as follows;

> " Any property which is properly and lawfully given as security for loan becomes a commodity for sale. And so, any ground based on those arguments does not in itself prove of prima facie case of possibility of suffering irreparable damage. See the case of C.A Civil Appeal No. 114 of 2009 Nyanza Fish Processors Limited Vs Barclays Bank of Kenya Limited where the court held that;
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> "The applicant itself has offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the applicant to damages. The Respondent is a bank and there is no gainsaying that it will be able to satisfy the loss"

41. Looking at the applicants' application, they have merely stated in the grounds on the face of the application and in the submissions without any proof that they repaid the loan advanced by the 1st defendant/respondent. Therefore, this court has no reason to doubt the 1st defendants/respondent's averment that it is owed money by the plaintiffs/applicants and they have not taken any steps to clear the outstanding loan amounting to kshs. 47,176,290/=. However, I am of the view that both sides have raised important issues which deserve a remedy.

42. Additionally, the circumstances of this case and equality of parties require the court to fashion a remedy which carries the lowest risk of injustice so that none of the parties is disadvantaged. I have further noted that there is no defence filed by the defendants.

43. The upshot is that the application succeeds in terms of prayers (iii) and (iv) and the following orders shall issue:

    i. The orders issued on 24th September, 2024 are hereby set aside.

    ii. An injunction shall issue in terms of prayer (iii) of the notice of motion dated 2nd October, 2024 on one condition which is that the plaintiff/applicant shall pay the 1st defendant the sum of Ksh 10,000,000/= within 60 days from today's date. Any default will lead to automatic termination of the injunction.

    iii. The defendants to file and serve their defence/defences to the main suit within 14 days.

    iv. After the filing of the defence/defences, parties will have 30 days to file and exchange any documents and witness statements.

    v. Mention on 8th April, 2025 for pre-trial conferencing.

    vi. Costs shall be in the cause.

Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 28TH DAY OF JANUARY, 2025 IN OPEN COURT AT NAKURU

H. I. ONG'UDI

JUDGE