



REPUBLIC OF KENYA



KENYA LAW
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**Wachira v Golden Tea Traders Ltd & 4 others (Environment & Land
Case 16 of 2015) [2023] KEELC 13 (KLR) (9 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 13 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 16 OF 2015**

**MAO ODENY, J
JANUARY 9, 2023**

BETWEEN

SALOME WAMBUI WACHIRA PLAINTIFF

AND

GOLDEN TEA TRADERS LIMITED 1ST DEFENDANT

NIC BANK LIMITED 2ND DEFENDANT

JOSEPH SHIUNDU LUTTA 3RD DEFENDANT

LILY K. MUSINGA 4TH DEFENDANT

LAND REGISTRAR KILIFI 5TH DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated December 9, 2021 by the 2nd defendant seeking the following orders;-
 - a. Spent
 - b. Spent
 - c. The honourable court be pleased to set aside the holding in order number (d) of judgment delivered on February 28, 2020 holding that the 2nd respondent NIC Bank Limited is jointly and severally liable for the damages for loss of user.
 - d. The court be pleased to vacate the award to the plaintiff against the 2nd respondent NIC Bank Limited in the sum of Kshs 1,000,000 per year effective September 23, 2014 until payment in full.
 - e. Costs.



2nd Defendant's Submissions

2. The application is supported by the sworn affidavit of Jackson Kingori the Legal Counsel of the 2nd defendant who deponed that the honourable court delivered a judgment on February 28, 2020 in the absence of the 2nd defendant and on October 23, 2020, the plaintiff obtained an extract of the decree of the court.
3. Counsel gave a brief background to the case and stated that the plaintiff decree holder vide a notice of proclamation dated December 7, 2021 threatened to execute for a sum of Kshs 6,000,000/- together with costs and interests totaling Kshs 7,000,300 /-against the applicant.
4. It was counsel's submission that the award of mesne profits against the bank which was only a financier was by error and therefore there is sufficient reason to review and set aside the award against the bank for the following reasons; -
 - a. There is undisputed evidence by all the parties that the only interest by the applicant was that of a financier under the legal charge document dated September 23, 2014 against all that parcel of land known as Kilifi/Kijipwa/132 for the sum of Kshs 4,200,000 advanced to the defendant.
 - b. Save for registering its interest over the title, it was common ground that the bank did not by any of its actions or omissions take possession of the suit property or otherwise prevent the plaintiff from accessing its property.
 - c. In any event, the court made a finding that even the original title presented to the bank and upon which the encumbrance was registered was a fake title and not the original title belonging to the plaintiff.
 - d. Accordingly, there was no any act of omission on the part of the applicant bank that would cause the plaintiff any injury or loss.
 - e. In any event, the permanent injunction issued restraining the bank, its servants, employees and/or agents from exercising any right/interest/benefit conferred by the charge document dated September 23, 2014 against all that parcel of land known as Kilifi/Kijipwa/132 left the bank extremely exposed though not at fault and despite advancing the 1st defendant the sum of Kshs 4,200,000 now unsecured.
 - f. Additionally, it is a matter of public notoriety that financiers in charges or mortgages only secure their interest on paper (title) not physically.
5. It was counsel's further submission that it will be extremely difficult or impossible for the applicant to be restituted to its original position as a secured financier in the event its legal rights under the charge are extinguished and payment of mesne profits made to the plaintiff.
6. Counsel also stated that on December 21, 2020, the 2nd defendant applied for an extension of time to lodge a notice of appeal against the judgment which application also sought for stay of execution pending the hearing of the intended appeal.
7. In a ruling delivered on November 18, 2021, Olola J dismissed both applications for extension of time and stay of execution and counsel submitted that the 2nd defendant has applied to the Court of Appeal to extend time to lodge the notice of appeal in Malindi Court of Appeal Civil Application No E066 of 2021 and currently seeks a stay of execution pending appeal.



Plaintiff's Submissions

8. The plaintiff/respondent filed a replying affidavit whereby she deponed that the applicant filed a similar application for stay of execution which was heard and dismissed vide a ruling dated November 18, 2021.
9. The plaintiff further deponed that the issues raised in the current application are *res judicata* as they are similar to the one that was dismissed. Further that there is no application for extension of time before the Court of Appeal; no notice of appeal filed in the ELC; hence the application is merely a delaying tactic and an abuse of the court process.
10. It was the plaintiff's case that she is not opposed to stay of warrants of attachment dated December 2, 2021 pending the ascertainment of costs to be included in the fresh warrants of attachment but is opposed to stay of execution of the judgment.

Analysis and Determination

11. The issues for determination is whether the court can review the judgment and set aside the order that the 2nd respondent NIC Bank Limited is jointly and severally liable for the damages for loss of user and whether the court can vacate the award to the plaintiff against the 2nd respondent NIC Bank Limited in the sum of Kshs 1,000,000 per year effective September 23, 2014 until payment in full.
12. I have considered the grounds of the application, counsel's submission and the response by the plaintiff/respondent and find that this is essentially an application for review of the judgment.
13. It is on record and admitted by both parties that the applicant filed an application for extension of time to file an appeal out of time and stay of execution which were heard, determined and dismissed on November 18, 2021.
14. Counsel for the applicant has also submitted that upon dismissal the applicant exercised its right and filed an application in the court of appeal to extend time to lodge the notice of appeal in Malindi Court of Appeal Civil Application No E066 of 2021.
15. Order 45, rule 1(b) is clear that for the court to review its decision, certain requirements should be met. It 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.
 - c. 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. Section 80 of the [Civil Procedure Act](#), cap 21 laws of Kenya states 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.
- c. 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.”

17. It should be noted that the court has unfettered discretion under section 80 of the [Civil Procedure Act](#), to make such order as it thinks fit on sufficient reason being given for review of its decision, but the same should be exercised judiciously.
18. In the case of [Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya](#) (2019) eKLR where the court held that the power of review is available only when there is an error apparent on the face of the record and not reappraisal of the entire evidence or how the judge applied or interpreted the law which would amount to exercise of appellate jurisdiction. This is not acceptable as the right avenue would be through an appeal process.
19. The applicant started by making an application for extension of time to appeal which was declined together with stay of execution. The applicant further stated that there is a pending application for extension of time in the Court of Appeal.
20. In the case of *Abasi Belinda v Frederick Kangwamu & another* (1963) EA 557, it was held that 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.
21. The issues raised by the applicant point towards a view that the judge did not appreciate that the applicant was a mere financier and therefore not liable to pay the awards for loss of user in the judgment. This in my view does not amount to an error on the face of the record and if the applicant felt aggrieved then he should pursue the issue of extension of time within which to lodge a notice of appeal as counsel has rightly stated that the applicant has done so and is pending for determination.
22. Further the grounds that the application is hinged upon are that the judge erred in awarding mesne profits to be paid jointly and severally to the plaintiff; that the bank did not by any of its actions or omissions take possession of the suit property or otherwise prevent the plaintiff from accessing its property and finally that there was no any act of omission on the part of the applicant bank that would cause the plaintiff any injury or loss.
23. The above grounds sound as part of grounds in a memorandum of appeal and not an application for review. This is to blame the court for erring on facts and law according to the applicant.



24. A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established as was held in the Court of Appeal case of *National Bank of Kenya Limited v Ndungu Njau* (Civil Appeal No 211 of 1996)
25. On the issue by the respondent that she has no objection to the stay of warrants of attachment and sale dated December 2, 2021 pending the ascertainment of costs to be included in the fresh warrants, the respondent is aware the court cannot regularize an anomaly hence she cannot have her cake and eat it.
26. Consequently, I find that the 2nd defendant's application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 9TH DAY OF JANUARY, 2023.

M.A. ODENY JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

