



Juma & another (On Behalf of the Estate of Juma Muchemi) v Grace Wambui Odongo t/a Classic Guest House (Commercial Case 45 of 2018) [2024] KEHC 302 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEHC 302 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE 45 OF 2018
MS SHARIFF, J
JANUARY 25, 2024**

BETWEEN

MARY JUMA 1ST PLAINTIFF

JOYCE MUCHEMI 2ND PLAINTIFF

ON BEHALF OF THE ESTATE OF JUMA MUCHEMI

AND

GRACE WAMBUI ODONGO T/A CLASSIC GUEST HOUSE DEFENDANT

RULING

a. The Application

1. The notice of motion before court is the one dated April 13, 2023 by the Defendant/Applicant seeking the following prayers;
 - i) Spent
 - ii) Spent
 - iii) That this honourable court be pleased to review its orders of the March 1, 2023 and allow the Defendant to put in a title deed as security instead of providing a bank guarantee as ordered by the court.
 - iv) That costs of this application be provided for.
2. The application is grounded on the following facts;
 - i) That this court granted a conditional order of stay to wit she was supposed to pay rent arrears of Kshs.830,844/= and provide a bank guarantee for Kshs.2,000,000/=.



- ii) That she has complied with the 1st limb but is now willing to provide land as security for the Kshs.2,000,000/= instead of a bank guarantee.
 - iii) That there is need to grant the orders to forestall imminent execution.
3. In further support of the application is a supporting affidavit sworn by Grace Wambui Odongo the Applicant. She depones that she is unable to raise the Kshs.2,000,000/= bank guarantee due to financial constraints occasioned by the death of her husband. She further depones that she has conferred with a family friend one Mr. Patrick Otieno who has agreed to offer his land as security for the Kshs.2,000,000/=.

b. Applicant's Case

4. In buttressing her application, the Applicant filed a further affidavit sworn by Patrick Jeremy Otieno and submissions. In the further affidavit Patrick Jeremy Otieno deponed that he was a family friend of the Applicant and the owner of plot no. Kisumu/Manyatta 'A'/3843. He attached a copy of a Valuation Report and a Search Certificate. He averred that he had accepted to offer the parcel of land valued at Kshs.7,700,000/= as security for the Kshs.2,000,000/= condition issued by the court.
5. In her submissions dated May 17, 2023 the Applicant identified the only issue for determination as whether she should be allowed to put in the title deed in place of a bank guarantee. In urging this contention, the Applicant submitted that she was unable to raise the Kshs.2,000,000/= due to financial constraints after being widowed. She beseeched this court to allow her to use the property as security in the interest of justice as espoused by the overriding objectives stipulated in sections 1A and 1B of the [*Civil Procedure Act*](#).

c. Respondent's Case

6. In opposition to the application, the Respondent filed grounds of opposition, replying affidavit and written submissions. In the grounds of opposition and the replying affidavit the common thread was that the application offended the provisions of rule 45 of the [*Civil Procedure Rules*](#). It was the Respondent's contention that there was neither discovery of new or important matters nor a mistake or error apparent in the record to warrant review. Additionally, the Respondent averred that it would be prudent for the Applicant to seek a loan using the title deed and deposit the amount in court as realization of the money from the land would not be easy in case the appeal fails.
7. In their submissions dated July 11, 2023 the Respondents refuted the Applicant's claim that it would cost upwards of Kshs.250,000/= to perfect the charge, stating that as per the [*Remuneration Order, 2014*](#) it would only cost Kshs.40,000/= to secure up to Kshs.2,500,000/=.
8. The Respondent urged this court to dismiss the application on the basis that there were no sufficient grounds for review as stipulated by Order 45 Rule 3 of the [*Civil Procedure Rules*](#). They equally urged this court to be guided by the case of [*Onesmus Mburu Njuguna vs Samson Kitire Kuna*](#) [2007] in which the court declined to accept a title deed as security in place of money, stating that a money decree can only be secured by money.
9. The respondent urged this court to dismiss the application with costs.



d. Analysis and Determination

10. After careful analysis of the application, affidavits and submissions I am of the opinion that the only issue for determination is whether this court should review its ruling of the 1st of March 2023 and allow the Applicant to put in the title in place of the personal guarantee.
11. Section 80 of the *Civil Procedure Act* provides that: -
Any person who considers himself aggrieved-
 - a) By a decree or order in which an appeal 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.
12. The provisions of Order 45 Rule 1 provide for the review of a decree or order as follows: -
 1. (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 from whom 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 the judgment to the court which passed the decree or made the order without unreasonable delay.
13. There are three limbs which are discernible from part (b) above
 1. Discovery of new and important matter or evidence.
 2. Mistake or error apparent on the face of the record.
 3. Any other sufficient reason.
14. In the present application, the Appellant has not demonstrated that there has been discovery of new and important matter or evidence, or that there is an error apparent on the face of the record. Review can also be allowed for any other sufficient reason. The question that arises therefore is whether the reason advanced by the Applicant is sufficient.
15. A careful scrutiny of the record shows that on the 1st of March 2023 I granted stay on condition that the Applicant pays the Respondent Kshs.830,844/= and secures a bank guarantee of Kshs.2,000,000/= within 60 days failure to which execution would ensue.
16. The reason advanced by the Applicant is that she doesn't have the money to secure the bank guarantee. In as much as this court sympathizes with the Applicant given the harsh economic times, I cannot allow the application as presented for various reasons. Firstly, the decree herein is a money decree hence a title



deed especially belonging to a third party would pose challenges of realization. In the case of *Ph Ogolla-Onyango v Daniel Gitbegi* [2020] eKLR the court while faced with similar situation had this to say;

“In the instant case, the judgment is of a money decree; the title document is not sufficient security. It would be deposited in court and the Respondent has no access or knowledge of it. The same if allowed would be deposited with Deputy Registrar and the Respondent would have no access and security to it. It is not sufficient security even if the appeal is heard and determined, the title document cannot be transferred to any party, sold or disposed of.”

17. Additionally, in the case of *Jeniffer Wachuka Njebu v Gititu Coffee Growers Co-operative Society* [2019] eKLR the court weighed in on the issue in the following manner.

“The Applicant’s offer of a third party’s title is not a tangible security for the performance of the monetary part of the decree. The title proffered is owned by a third party and is in my view, difficult to realize as security. I agree with the Respondents that it is not suitable for purposes of securing performance of the monetary part of the decree.”

18. I am inclined to agree with the above sentiments that a money decree can only be appropriately secured by money. In view of the foregoing the Applicant has not met the threshold for review of the orders of the 1st of March 2023.
19. The upshot is that the application dated lacks merit and is accordingly dismissed with costs to the Respondent.

DELIVERED, DATED, SIGNED AT KISUMU THIS 25TH DAY OF JANUARY 2024.

MWANAISHA. S. SHARIFF

JUDGE

