**Munye v Mugua & another (Civil Case 8 of 2019)**
**[2024] KEHC 6610 (KLR) (29 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6610 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MURANG'A**

**CIVIL CASE 8 OF 2019**

**CW GITHUA, J**

**MAY 29, 2024**

**BETWEEN**

**PETERSON IRUNGU MUNYE ..... APPLICANT**

**AND**

**BENSON MUGUA ..... 1ST RESPONDENT**

**EQUITY BANK LIMITED ..... 2ND RESPONDENT**

**RULING**

1. The applicant, Peterson Irungu Munye presented a Notice of Motion dated 29th June 2023 seeking review of the orders issued by this court (Hon. Kimondo J) in a ruling delivered on 2nd November, 2021 in which his Notice of Motion dated 29th January, 2019 was dismissed with costs to the respondents.

2. The background to the instant motion as can be ascertained from the court record is that in the application dated 29th January 2019, the applicant sought to have the respondents cited for contempt of court and be compelled to obey an order issued by the lower court in Murang'a Chief Magistrates Court Civil Case No. 1 of 2019. The court order required the respondents to withdraw the applicants name from a Credit Reference Bureau.

3. In dismissing the application, the learned Judge after perusing the court order which was attached to the application made a finding of fact that the respondents were not principal parties to the suit in which the order sought to be enforced was issued; that the order was conditional upon payment of money the applicant was directed by the court to pay the 2nd respondent and that the applicant had failed to furnish evidence to prove compliance with the said condition.

4. Aggrieved by the court's ruling, the applicant presented the instant motion basically contending that in dismissing his application, the learned Judge erred by finding, inter lia, that the respondents were not parties to the suit and that the applicant had not proved compliance with the condition requiring

him to pay some money to the 2nd respondent. He asserted that he had already paid the money ordered by the court to the 2nd respondent as evidenced by a bank statement annexed to the current application.

5. The application was contested through a replying affidavit filed on behalf of both respondents dated 9th October, 2023. In a nutshell, the respondents opposed the motion on grounds that there was inordinate delay in filing of the application which delay had not been explained and that the grounds advanced by the applicant in support of his application fell outside the parameters of review set out by the law. The respondents further contended that the application lacked merit and amounted to an abuse of the court process and ought to be dismissed with costs.

6. The application was heard through oral submissions on 5th March,2024.

   Learned counsel Ms Murila appeared for the applicants while Mr Wanda held brief for Mr Juma for both respondents.

   Briefly, Ms Murila in her submissions relied on Order 45 Rule 1 of the *Civil Procedure Rules*(CPR) and asserted that there was an error on the face of Justice Kimondo's ruling regarding service of subject order on the 2nd Respondent; that the applicant had demonstrated that he had obtained new and important evidence in the form of the bank statement annexed to his supporting affidavit evidencing payment of the money adjudged in favour of the 2nd respondent and evidence of service of the court order on the 2nd Respondent which were not available at the time the application was heard and determined.

7. Mr Wanda on his part re-interated the averments made in the Replying affidavit opposing the motion and emphasized, interlia, that there was no error or mistake apparent on the face of the impugned ruling; that the bank statement relied on by the applicant did not amount to new evidence as it was available at the time the application was heard but the applicant failed to obtain it and also failed to avail evidence of service of the lower court's order on the 2nd respondent.

8. After considering the application and the rival oral submissions made by learned counsel on behalf of the parties, I find that the only issue arising for my determination is whether the applicant has demonstrated that his application meets the threshold of review stipulated in Order 45 Rule 1 of the *Civil Procedure Rules* which states 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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."

9. The court of Appeal in *Assets Recovery Agency v Charity Wangui Gethi & 5 Others* (2020) eKLR pronounced itself on the power of a court to review its own decision and the circumstances in which such power could be exercised when it expressed itself thus;

> "...In an application for review, as envisaged under Order 45 of the *Civil Procedure Rules*, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a 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 made; that there has been a mistake or error apparent on the face of the record or: any "other sufficient reason". The ground "other sufficient reason" has been held to be consonant with the first two grounds: See *Kuria v Shah* [1990] KLR 316. Additionally, the applicant must exhibit that he acted expeditiously."

10. From the foregoing, it is clear that inorder for an applicant to be deserving of orders of review, he or she must establish any of the following circumstances ;

    i. That there was discovery of new and important evidence or matter which after the exercise of due diligence was not within his knowledge or could not be produced at the time the decree was passed or order made;

    ii. That there was an error apparent on the face of the record.

    iii. That there was other sufficient cause or reason for the review; and;

    iv. That the application was filed timeously.

11. In this case, whereas it is common ground that the applicant did not lodge an appeal against the order dismissing his application, it is evident that although his main contention was that the bank statement proving payment of monies to the 2nd respondent and evidence of service of the court order on the 2nd respondent amounted to new evidence in the sense that the documents were not availed to the court when the application was heard, the applicant has failed to demonstrate that the existence of the said documents was not within his knowledge or that the documents could not have been produced by him when the application was heard even after exercising due diligence.

12. I have come to the above conclusion for the following reasons;

    First, the applicant has claimed that he had already paid the monies in question to the 2nd respondent by the time the application was heard. This in effect means that having made the payments, the fact of payment to the 2nd respondent hence compliance with the lower courts conditional order was within his knowledge by the time the application was heard.

    Secondly, he has neither claimed nor demonstrated that he made any effort to obtain the bank statement prior to the hearing of the application but that it was impossible to obtain the same for reasons beyond his control.

13. The above argument also applies to the annexure marked 'B' which is the decree on the face of which the 2nd respondent acknowledged service the lower court's order. The document shows that service was effected on 26th May 2017. The application was heard by way of written submissions and both parties filed their submissions on or before 12th October 2021, about three years later. The applicant has not explained why it was impossible to produce this evidence before the court at the time of filing the application or before the same was heard and determined.

14. Lastly, my perusal of the ruling and material that was placed before the court does not support the applicant's contention that there was a mistake apparent on the face of the ruling. From the applicant's submissions, it is apparent that what the applicant was describing as errors apparent on the face of the court's ruling were in essence alleged misapprehension or misinterpretation by the court of the evidence before it, leading to findings of fact which according to the applicant were erroneous.

15. In my considered view, the alleged erroneous findings can only constitute grounds of appeal to the Court of Appeal and cannot constitute grounds for review of the orders made in the impugned ruling. I hold the view that acceding to the applicant's invitation to review the subject ruling on such grounds would be tantamount to sitting on appeal on a decision made by a court of concurrent jurisdiction which is not permissible in law.

16. Even without considering whether or not the application was filed timeously or without unreasonable delay, I am satisfied that my findings above are sufficient to dispose of the application. From the foregoing findings, I have come to the conclusion that this application lacks merit and must fail.

In the premises, the application is dismissed with costs to the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 29TH DAY OF MAY, 2024.**

**C.W. GITHUA**

**JUDGE**

In the Presence of:

Ms. Murila for the Applicant.

Ms. Mwende for Mr Juma for the Respondent.

Ms. Susan Waiganjo, Court Assistant.