



REPUBLIC OF KENYA



KENYA LAW
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**Nyaga v Nyaga & another (Civil Appeal 28 of 2022)
[2024] KEHC 4797 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 28 OF 2022
LM NJUGUNA, J
MAY 8, 2024**

BETWEEN

NJAGI TIRAS NYAGA APPLICANT

AND

JANE WANJIRA TIRAS NYAGA 1ST RESPONDENT

ROSE RUGURU TIRAS 2ND RESPONDENT

RULING

1. For determination is a notice of motion dated 11th August 2023 through which the applicant seeks the following orders:
 - a. That this honourable court be pleased to review and/or set aside the orders issued by this honourable court on 12th July 2023 upon such terms as are just;
 - b. That the appeal be reinstated for final determination; and
 - c. That the costs of this application do abide the outcome of the appeal.
2. It was the applicant's case that following the ruling of this court delivered on 12th July 2023, the application for reinstatement of the appeal was allowed on condition that the applicant pays the respondents Kshs.5,000/= within 10 days failing which the orders would be vacated. That it is only fair and just that the orders dismissing the suit for non-compliance be reviewed and/or set aside and the appeal be reinstated. In the supporting affidavit sworn by the applicant's advocate, he stated that the ruling issuing the condition was read in his absence since he was unable to login to the virtual court session.
3. That by the time he learned of the condition set, he tried to look for the respondents' phone numbers in vain. That on 18th July 2023, he was not aware of the condition and the file was marked as closed before he could meet the condition set on 12th July 2023. That he only managed to pay the money



ordered by the court to the respondents on 01st August 2023 via M-pesa and he produced an M-pesa SMS showing that Kshs.5,000/= was paid to the 2nd respondent. He stated that the failure to comply with the court's order was not intentional and should be excused.

4. The respondents filed their joint replying affidavit stating that the applicant is bringing an application of this kind for the 3rd time and the appeal has been dismissed twice before. That the applicant is not keen on prosecuting this appeal since the last time, the appeal was reinstated on condition that the applicant pays the respondents Kshs.5,000/= within 10 days failing which the orders for reinstatement would be vacated.
5. They further stated that when the applicant failed to meet the condition as set by this court, the file was marked as closed through an order issued on 27th July 2023. They stated that the reasons for the applicant's failure to attend court is not genuine since he was in the court premises when the matter was called and he admits as much. That litigation must come to an end at some point and they urged the court to dismiss the application since it is an abuse of the court process.
6. The court directed parties to file their written submissions but only the respondents complied.
7. It was the respondents' submission that an application for reinstatement of the appeal was filed and determined through the ruling delivered on 12th July 2023 after the appeal was dismissed for non-attendance. That the court reinstated the appeal conditionally but the applicant failed to meet the condition set. That the applicant cannot feign lack of knowledge of the condition set by the court through the said ruling since it was not the work of the court clerk to inform him of the orders given by the court. They stated that the appeal has already been in the court system for a long time and they urged the court to let the matter rest and litigation to end.
8. From the foregoing, the issue for determination is whether or not the ruling of this court issued on 12th July 2023 should be reviewed.
9. Review is provided for under Section 80 of the [Civil Procedure Act](#) 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.”

Similarly, Order 45 Rule 1 of the Civil Procedure Rules provides:

- (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.

10. There are only 3 factors for the court to consider before reviewing its findings, these are:
- a. That there has been 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
 - b. That there has been some mistake or error apparent on the face of the record; or
 - c. Any other sufficient reason.
11. The facts herein are that the applicant lodged an appeal against the decision of Hon. J.W. Gichimu in Runyenjes SPM's Succession Cause No. 10 of 2015. When the appeal was scheduled for hearing, the applicant failed to appear yet the court noted that he was well aware of the hearing date. The appeal was dismissed for non-appearance. Being dissatisfied with the ruling, the applicant moved the court seeking reinstatement of the appeal and the court rendered itself on 12th July 2023. The court stated thus, verbatim:
- “Accordingly, I hereby set aside the orders given by this court on 24 November 2022 and do order reinstatement of the appeal to be heard on its merit. The Respondents shall have the costs of this Application assessed at Kshs 5,000/= to be paid within ten (10) days from the date of this ruling failing which the orders made herein shall stand vacated.”
12. Through the supporting affidavit to the application, the applicant's advocate deposed that he sought for the respondent's contacts for sometime and only got them when the order reinstating the appeal had already lapsed. That, regardless, he paid the amount of Kshs.5,000/= to the respondents on 09th August 2023 and 2 days later, he filed the application herein. The parameters for considering whether or not to review the findings of this court are stated hereinabove. From the facts before this court at this point in time, the applicant has not demonstrated that he has found new evidence or an error apparent on the face of the ruling delivered on 12th July 2023 by this court. There are also no sufficient reasons why the review should be considered.
13. The orders of the court were automatically vacated within the 10 days provided in the ruling. The condition set by the court was the court's way of dispensing justice to the respondents while ensuring that the applicant prioritizes prosecuting this appeal. As it were, the applicant did not meet the condition and so the orders were automatically vacated. Orders of the court are meant to be obeyed otherwise the disobeying parties are to be held in contempt. In the case of *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi [2018]* eKLR it was held:
- “Court orders are not meant for cosmetic purposes. They are serious decisions that are meant to be and ought to be complied with strictly.”
14. For the applicant who was present in court and who has access to the court file to say that he was not clear on the orders issued by the court, it means that the appeal is not a priority to him to the detriment of the rights of the respondents. The court serves justice to the applicant and the respondents alike, hence the orders given, lest the court becomes a place of child's play. It is trite that courts cannot and



should not make orders in vain as was the sentiment in the case of B. V. Attorney General [2004] 1 KLR 431 where it was held thus:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

15. That being said, in light of section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules, I am not persuaded that the order for review should be granted. It is evident that the applicant is aggrieved with the order itself and, in my view, the issue can be taken up on appeal and not review.
16. Therefore, having considered the pleadings and arguments made herein, I have applied the relevant laws to find that the application lacks merit and the same is hereby dismissed with costs to the respondents.
17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 08TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

.....for the Appellant/Applicant

.....for the Respondents

