Case Number:	Civil Suit 12 of 2014
Date Delivered:	09 Dec 2016
Case Class:	Civil
Court:	High Court at Nyeri
Case Action:	Ruling
Judge:	Jairus Ngaah
Citation:	Eco Bank Ltd v David Njoroge Njogu & another [2016] eKLR
Advocates:	none mentioned
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nyeri
Docket Number:	-
History Docket Number:	-
Case Outcome:	Applicant's application dated 18th February, 2016 dismissed with costs to the Respondent
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 12 OF 2014

ECO BANK LTD…………………….......PLAINTIFF/RESPONDENT

VERSUS

DAVID NJOROGE NJOGU……………………………DEFENDANT

ANN WANJIRU NJOGU……….....……. DEFENDANT/ APPLICANT

RULING

The applicant filed a notice of motion dated 18th February, 2016 seeking stay of execution of a default judgement entered against the defendants and the appurtenant execution proceedings thereto; she also sought for the order of this court to review and set aside its order made on 10th July, 2015, dismissing the applicants' application to set aside that judgement and an unconditional leave to file a defence to the suit out of which this judgment arose. Just like in the previous dismissed application, the applicant also sought for a similar order in the current application for leave to enter appearance and file a defence and a counter-claim to the suit. The motion is predicated upon **Section 3A** and **Section 80** of the **Civil Procedure Act, Order 45 Rules 1, 2 and 3(2), Order 50 Rule 1 and Order 51 of the Civil Procedure Rules.** It is also stated to be based on the following grounds:

"

1. That it is in the interest of justice and fairness that the applicant be allowed to properly enter appearance and file her defence and counterclaim out of time.

2. That the applicant instructed her previous advocate to enter appearance and file a defence on her behalf but her previous advocate prepared a shoddy defence that was a sham and a mere denial of the allegations raised in the plaint and which exhibited no triable issues.

3. That her previous advocate exhibited gross negligence and misapprehension of the law when he made an application before this honourable court and failed to properly present her case by presenting proper arguments in support of her application.

4. The applicant has suffered great loss and continues to suffer great loss and distress of the pendency of this matter as the respondent/plaintiff herein has oppressively pursued by arrest and usurious recovery proceedings against her in complete disregard of her fundamental rights.

5. That the applicant has now instructed counsel to prepare a draft defence and counterclaim which she has annexed to the affidavit supporting this application and which honestly exhibit true triable issues and by which she implores this honourable court to set aside the judgement in default entered in favour of the plaintiff and allow the matter to proceed to be heard on its merits.

6. This application ought to be grounded in the interest of equity, justice and fair administration of the law."

In the affidavit sworn in support of the motion, the applicant contended that the judgement entered against them in default was irregular because they were condemned unheard. She impugned the ruling delivered by this court on 10th of July 2015 on the grounds that it focused on *"technicalities and ancillary issues"* rather than on the substance of the application that was before the court. She also swore that the judgement against them and the ruling of this court had manifest errors and therefore amenable to review.

The applicant also deposed that the plaintiff had disposed of her parcel of land referred to as **Title No. Karatina Municipality/Block 1/374** at a low value of Kshs 8,000,000/= yet the same parcel of land was sold a year later for the sum of Kshs 26,000,000/=.

She admitted entering appearance and filing defence out of time but contended that she ought to have been given chance to defend herself; it was her entitlement, so she swore, to have the judgement set aside because her defence raised triable issues.

The respondent opposed the motion and a replying affidavit was filed on its behalf in that regard; it was sworn by the respondent's counsel on 3rd March, 2016. According to the respondent, the applicant filed a notice of appeal against the same ruling that she is seeking to have reviewed. However, she did not follow it up and file the memorandum of appeal. According to the respondent's counsel, it is out of order for the appellant to seek review of a ruling she is appealing against.

Counsel also deposed that in any event the order sought to be reviewed was not annexed to the affidavit in support of the application for review.

Both counsel filed fairly lengthy submissions in support of and in opposition to the motion; they also cited several court decisions to anchor the rival positions they have taken on this motion. On the part of the applicant, her counsel largely revisited the argument on the merits of the applicant's defence and why she should have been given the opportunity to have it on record in spite of the fact that she was caught out by time. He argued that the defence raised triable issues and the applicant should not have been condemned unheard.

As far as I can see, counsel for the applicant questioned the ruling of this court mainly on grounds of law. For instance, the learned counsel submitted;

"the said ruling contained manifest errors as it did not at any point gives (sic) its attention to the substance matter of the suit. This are triable issues raised in the applicant/2nd Defendant's defence."

He followed this submission with several decisions according to which interlocutory judgements had been set aside because the defences raised triable issues. Counsel proceeded to submit on what he thought are triable issues raised in his client's defence.

In a nutshell, the submissions by counsel for the applicant were either raised, or should have been raised at the hearing of the application which was dismissed on 10thJuly, 2015. I understand counsel to have regurgitated the applicant's earlier application which as noted, was seeking more or less the same orders that the current application is seeking.

The plausibility of the learned counsel's submissions can only be determined in the context of **Order 45** of the **Civil Procedure Rules** which is the primary rule under which the motion has been encapsulated; this rule provides 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 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.

According to this rule the conditions or the grounds upon which an application for review may be made are:-

a) A discovery of a new and important matter of evidence, which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the material time; or

b) there is a mistake or error apparent on the face of the record; or

c) for any other sufficient reason.

Any of the three grounds is sufficient for an application for review by an applicant who considers himself aggrieved by a decree or order; however, the application must be made without undue delay regardless of which of the three grounds it is based upon.

The grounds expressed on the face of the applicant's motion do not elicit any of those prescribed by **order 45** of the rules; in particular, there is nothing in those grounds that suggests a discovery of a new and important matter of evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by her at the material time. It is also not alleged in those grounds that there is a mistake or error apparent on the face of record; neither can I find any other ground that can properly be described as a sufficient reason for review.

It is only in the affidavit and in the submissions by the learned counsel for the applicant that it has been claimed that the impugned ruling overly dwelt on the technicalities rather than on the substance of the application that was dismissed.

I would not regard this as an error apparent on the face of record because it apparently has more to do with a difference in opinion on a point of law rather than a manifest mistake. What I understand the applicant's counsel to say is that based on his understanding of the law I should have approached the applicant's application differently and perhaps focused more on the merits of the applicant's defence than give attention to the period within which it ought to have been filed.

With due respect to the learned counsel for the applicant, a difference of opinion on the interpretation of the law or legal principle cannot be a ground for review; I think that where a party aggrieved by an order or a decree is of the conviction that the order or the decree was based on a misapprehension of the law, the correct course would be to appeal against that decree or order rather than file a review application which, in my humble view, puts the judge or the magistrate who made it in a somewhat awkward position of explaining or defending the order or the decree.

In **Abasi Balinda versus Fredrick Kangwamu & Another (1963) E.A 558** a court was asked to review its order on costs on the ground that the court is said to have taken an erroneous view of the evidence and of the law relating to the question of whether a returning officer was a necessary party to an election petition. The court (Bennet, J.) appreciated that **section 83** of the Uganda Civil Procedure Ordinance (equivalent to **section 80** of our **Civil Procedure Act**) conferred upon the court jurisdiction to review its own decisions in certain circumstances and **order 42** (which is equivalent to **order 45** of our **Civil Procedure Rules**) prescribed the conditions subject to which and the manner in which the jurisdiction should be exercised. In interpreting that jurisdiction and in the process dismissing the applicant's application, the court cited with approval a passage from **Commentaries on the Code of Civil Procedure by Chitaley & Rao (4th Edition), Vol. 3 page 3227,** where the learned authors explained the distinction between a review and an appeal and had this to say;

"a point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal"

Again, our own Court of Appeal explained this much better in **National Bank of Kenya Ltd versus Njau (1995-1998) 2EA 249 (CAK)**; at page 253 of the judgment, the Court said: -

"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. <u>It will not be a sufficient ground for review that another judge could have taken a different view of the matter.</u> <u>Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review</u>." (Underlining mine)

I need not say anything more on this because I think the foregoing pronouncements are self-explanatory. However, even assuming that I was wrong in interpretation of the law as the learned counsel for the applicant has suggested, his argument appears to me to be self-defeatist. It is self-defeatist because when one considers the grounds upon which the motion itself is based, it is not difficult to see the applicant's previous counsel on record was the target of her vitriol.

Of particular interest is the allegation that the previous counsel ***"prepared a shoddy defence that was a sham and a mere denial of the allegations raised in the plaint and which exhibited no triable issues".*** As if that is not enough, the applicant has gone further to state that **"*her previous advocate exhibited gross negligence and misapprehension of the law when he made an application before this honourable court and failed to properly present case by presenting proper arguments in support of her application."***

In the same grounds, counsel has acknowledged that the defence was not filed within time.

If, in the learned counsel's own assessment, the applicant's defence was shoddy, a sham and a mere denial deficient of any triable issues, can he, in the same breath, fault this honourable court for overlooking the applicant's defence and dismissing the application on mere technicalities" I reckon not. If the applicant's previous counsel exhibited gross negligence and misapprehension of the law in the prosecution of the applicant's application, as counsel has submitted, then this honourable court has nothing to do with the predicament the applicant finds herself in. Suffice it to say, the applicant cannot be heard to admit on the one hand, that she did not file a defence in time, and even the draft that was presented to court for its consideration was nothing more than a sham and, on the other hand, blame the

court for not considering the merits of the same defence. She cannot also be heard to complain that her previous advocate filed an incompetent application and exhibited gross negligence and misapprehension of the law in its prosecution and at the same time fault this court for not allowing it.

One other thing; though the impugned ruling was delivered on 10th of July 2015 it was not until 19th February, 2016, almost eight months later, that the application for review was filed. No attempt whatsoever was made by the applicant to explain the delay in the filing of this application. It must be noted that under **order 45** of the rules, apart from demonstrating that any or all of the grounds of an application for review exist, the application must be made without unreasonable delay. I am of the humble view that a delay of eight months is, in the absence of any explanation, unreasonable and for this reason, I doubt the applicant would merit the order for review even if she was to succeed on any of the prescribed grounds for such an application.

Finally, I have noted from the respondent's replying affidavit that the applicant deliberately suppressed some facts material to her application. It is clear from that affidavit, and the applicant has not disputed it, that a few days after this court delivered the impugned ruling the applicant filed a notice of appeal to the Court of Appeal against the ruling.

When the respondent raised this issue, the applicant's counsel basically argued that a notice of appeal does not amount to an appeal and therefore the applicant cannot be deemed to have been appealing against the ruling and at the same time seeking for its review.

There is no doubt that the notice of appeal was filed under rule 74 of the Court of Appeal rules; I take it that once such a notice has been filed the jurisdiction of the Court of Appeal over the matter in issue is thereby activated and by the same token, the jurisdiction of the High Court on the same subject is deactivated. The two courts cannot exercise their respective jurisdictions over the same matter simultaneously; one must give way to the other if not for anything else, for good order.

The answer to the applicant's counsel's argument that a notice of appeal is not appeal, is found in the definition of "appeal" in **rule 2** of the Court of Appeal rules. That rule provides that "***appeal in relation to appeals to the court, includes an intended appeal.***" A notice of appeal would fit the description of an intended appeal because **rule 74** of the rules under which it is filed says "***any person who desires to appeal to the court shall give notice in writing.***" The Court of Appeal has itself held in **Equity Bank Ltd versus West Link MBO Limited (2013) eKLR** that once a notice of appeal is filed an appeal is deemed to be in existence since rule 2 of the Court of Appeal Rules defines an appeal as including an intended appeal.

If this is the true position in law and, I have no reason to doubt that it is, it means that the applicant's application for review was a nonstarter from the very beginning and perhaps this explains why the applicant did not disclose in her application that she had filed a notice of appeal in respect of the same ruling that she is seeking to have reviewed**. Order 45 rule 1(1) (a)** of the **Civil Procedure Rules** is clear that it is only a person who is aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred that may apply for an application for review. The applicant's application flies in the face of this rule and to that extent it is simply an abuse of the due process of the court.

Finally, I have noted also that the applicant did not attach the order she is seeking to have reviewed to the affidavit in support of the application. It has been consistently held in our courts, since the decision of the **Court of Appeal of Eastern Africa in Gulamhussein Mulla Jivanji & Another versus Ebrahim Mulla Jivanji (1929-1930) XIIKLR 41**, that it is the duty of a party who wishes to appeal against or apply

for a review of a decree or order to move the court to draw up and issue the formal decree or order. I know not of any decision that has deviated from this position of law and if there is any, then it has not been shown to me. Suffice it to say, that failure to include the order or decree to the motion for review is fatal.

For all I have said, I am inclined to hold that the applicant's application dated 18th February, 2016 is misconceived, incompetent and, in any event, deficient of any merit; I hereby dismiss it with costs to the respondent.

Signed, dated and delivered in open court this 9th day of December, 2016

Ngaah Jairus

JUDGE

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