

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HCC E112/2009

IN THE MATTER OF THE ARBITRATION ACT, CAP 49 LAWS OF
KENYA
AND
IN THE MATTER OF A DISPUTE BETWEEN

DR. SAMUEL THENYA MAINA APPLICANT

AND

BRIAN MARTIN FRANCIS 1ST RESPONDENT

ESTATE OF HIRAM NGARUIYA 2ND RESPONDENT

ISAAC NJOROGI GITHO 3RD RESPONDENT

JAMES NJUGUNA GITHO 4TH RESPONDENT

KRISCO HOLDINGS LIMITED 5TH RESPONDENT

MUIBORO ENTERPRISES LIMITED 6TH RESPONDENT

KCB BANK KENYA LIMITED 7TH RESPONDENT

BILHA W. MWANGI & KEMBOY, JULUIS KIPKOSKEI t/a

KEMBOY LAW ADVOCATES LLP 8TH RESPONDENT

NJERI BENSON NGUGI 9TH RESPONDENT/APPLICANT

IGERIA ARTHUR KONYE 10TH RESPONDENT/APPLICANT

NJOROGI DAVID NGUMBU t/a

IGERIA & NGUGI ADVOCATES ... 11TH RESPONDENT/APPLICANT

R U L I N G

1. Before Court are two Motions on Notice dated 4/8/2022 and 8/8/2022, respectively filed by the 9th, 10th and 11th respondents.
2. The prayers sought in the application dated 8/8/2022 are spent and therefore, the Court will only consider the application dated 4/8/2022.
3. The said Motion was brought *inter alia* under **Article 50 and 159 of the Constitution, Order 22 Rule 22, Order 45 Rule 1(a), 3 of the Civil Procedure Rules**. In it, the applicants sought the review and/or variation of the orders issued on 13/7/2022 in order to allow the 9th-11th respondent to deposit an alternative security, being Land Reference **no.1/1396 (Original no.1/1395/1)** to be held by the Court as security for the accumulated interest totalling a sum of **Kshs.53,270,698/-** pending the determination of the arbitral proceedings.
4. Alternatively, the applicants prayed for the orders issued on 13/7/2022 to be reviewed and/or varied to direct the 9th-11th respondent to deposit a bank guarantee of **Kshs.53,270,698/-** issued by the 7th respondent as an alternative security pending

the determination of the arbitration and an order to have this court set a 60 day timeline in which the said bank guarantee would be deposited with the advocates for the plaintiff and the advocates for the 1st-6th respondent.

5. The grounds upon which the Motion was predicated included that; the 7th, 9th, 10th and 11th respondent's application dated 27/6/2022 was compromised in terms that the interest awarded in the judgment delivered on 5/2/2021 in **Civil Suit No. 21 of 2020** be deposited in the joint interest earning account of the advocates for the plaintiff and the 1st-6th respondent pending arbitration.
6. That the applicants had filed the said application without sufficient material facts and were under the mistaken belief that the plaintiff possessed the requisite funds to pay the accumulated interest of **Kshs.53,270,698/-**.
7. That upon obtaining the orders issued on 13/7/2022, the applicants requested the plaintiff through the 7th respondent, his bankers, to remit the said interest sum to the joint account in accordance with the orders. However, the 7th respondent informed them that it did not possess sufficient security in

favour of the plaintiff to secure the said sum of **Kshs.53,270,698/-** as he had fully drawn down his facility with the bank.

8. It was averred that the plaintiff was willing to provide an additional security to be deposited with the Court as an alternative security for the said sum pending the determination of the arbitration, the security being **Land Reference no.1/1396 (Original no.1/1395/1)**. In the alternative, a bank guarantee for the said sum could be deposited with the advocates for the plaintiff and for the 1st-6th respondent.
9. That unless the orders sought are granted, the 11th respondent is likely to suffer loss and damages once the 1st-6th and 8th respondents commence and proceed with the execution of the interest thereof.
10. In opposition, the 1st-6th respondent filed a replying affidavit sworn on 26/9/2022 by the 3rd respondent. He averred that the application was *res judicata* as the applicants had filed similar applications, one dated 1/9/2021 in **HCCC 21/2020** and another one dated 27/6/2022 in this suit which was compromised by the parties.

11. That the Court lacks jurisdiction to interfere with the judgment of the Court in **HCC No.21/2020** in the manner sought by the applicants. That the applicants as judgment debtors in **HCC No.21/2020** cannot hide under any other party. That compliance with the judgment cannot be effected in any other manner as suggested by the applicants.
12. It was contended that the applicants were dragging the 1st-6th respondent into the related suit where they are not parties in order to escape the judgment of Court which is yet to be reviewed or appealed against. That the application is not envisioned under **section 7 of the Arbitration** Act and the court was being invited to entertain issues beyond its jurisdiction outside the scope of the said provision.
13. The 8th respondent also opposed the application vide a replying affidavit sworn on 2/9/2022 by **Bilha Mwangi**. She contended that the subject amount arises out of a dishonoured Professional Undertaking issued by the applicants who are judgment debtors in **HCC No.21/2020**. That the judgment should be honoured and not exchanged by security documents.

That this was attempt to review the judgment of a Court of concurrent jurisdiction which is contrary to the law.

14. That the subject amount was not the subject of these proceedings and not an issue for determination in this suit. That the applicants were seeking authority to disregard orders of a court of equal jurisdiction.
15. The 8th respondent pleaded that the application was an abuse of the court process and should be struck out or dismissed with costs.
16. The grounds for a review are set out under **Order 45 of the Civil Procedure Rules** which states: -

“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 judgement to the court which passed the decree or made the order without unreasonable delay.”

17. It is clear therefore that a review will only be granted if there is a discovery of new and important matter of evidence, if there is a mistake or error apparent on the face of the record or for any other sufficient reason. The application however, must be made without unreasonable delay.

18. In the present case, the grounds for the review sought are that, when the applicants filed the application dated 27/6/2022 and compromised the same, they were not aware that the plaintiff did not possess the requisite funds to pay the

accumulated interest of **Kshs.53,270,698/-**. That the constituted new and important information that would warrant a review.

19. On 13/7/2022, the following orders were recorded by the consent of the parties: -

“a) The Application dated 27/6/2022 is hereby compromised in terms of prayer 4 to the extent of pending Arbitration.

b) The deposit be made/effected within 7 days of today.

c) Execution to issue.”

20. The consent was entered into pursuant to a judgment and decree made in **HCC 21 of 2020**.

21. In **Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR**, it was held: -

“I have no difficulty upholding the learned Judge’s holding that as a judge of the High Court he had no jurisdiction to enquire into or review

the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of the Constitution in these terms.

‘The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.’

22. I have considered the contestations herein. The order I am being asked to vary was by the consent of the parties themselves. It however, relates to a judgment made by another

Court of concurrent jurisdiction. What was before this Court was specifically the preservation of **Kshs.102,378,022/93**. That was granted. The issue now being raised extends to the interest on that amount whose jurisdiction lies with the Court that entered the subject judgment.

23. In this regard, I agree with the 1st to 6th respondent that granting the orders sought would be to interfere with the jurisdiction exercised by another Court. The application is for dismissal on that ground alone.

24. However, in the event I am wrong on that, the application will still fail on merit. Although brought timeously, the applicants did not demonstrate that the application falls within the 4 corners of **Order 45 of the Civil Procedure Rules**.

25. The claim that the impugned consent was entered without sufficient material facts cannot lie. The 7th respondent was in operation. The plaintiff was still around. The applicants should have been a little bit vigilant and they could have ascertained the inability of the plaintiff to raise the interest sought. Indeed, **Order 45** states of '*evidence that could not be procured after diligence*'. There is nothing to show that the plaintiff's inability

to secure the interest amount just occurred after the consent was entered.

26. In any event, a consent order cannot be easily set aside. In **Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR**, the Court of Appeal held that a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties.
27. In the present case, I am of the opinion that the applicants did not demonstrate any illegality or fraud or circumstances that would warrant interfering with the said consent.
28. The upshot is that the application lacks merit and is dismissed with costs.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 19th day of May, 2023.

A. MABEYA, FCIArb

JUDGE