



**Kencom Sacco Society Limited v Ndeda t/a Nick Ndeda & Associates Advocates (Civil Case 130 of 2018) [2024] KEHC 13507 (KLR) (Civ) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13507 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL CASE 130 OF 2018  
AN ONGERI, J  
OCTOBER 29, 2024**

**BETWEEN**

**KENCOM SACCO SOCIETY LIMITED ..... PLAINTIFF**

**AND**

**NICK NDEDA T/A NICK NDEDA & ASSOCIATES  
ADVOCATES ..... DEFENDANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 6/3/2024 seeking the following orders
  - i. That this application be certified as urgent and service be dispensed with at the first instance.
  - ii. That leave be granted to the firm of Conrad Laws Advocates LLP to come on record for Nick Ndeda T/a Nick Ndeda & Associates Advocates
  - iii. That this Honourable Court be pleased to grant orders staying execution of the Judgment delivered by Hon. Justice A. N. Ongeru on 18<sup>th</sup> August 2023 pending hearing and determination of this application.
  - iv. That this Honourable Court be pleased to review and/or set aside the Judgment delivered by Hon. Justice A. N. Ongeru on 18<sup>th</sup> August 2023.
  - v. That the costs of this application be provided for.
2. It is based on the following grounds;



- i. That the Applicant herein has been served with warrants of attachment dated 8<sup>th</sup> February, 2024 issued to Mutrix Auctioneers to recover the sum of 58,819(USD) being the decretal sum, costs and interests.
  - ii. That the Applicant has, since the conclusion of the court matter been able to obtain proof of existence of crucial documents which disclose critical information deliberately withheld by counsel for the Plaintiff during the suit and which, had the Court had the benefit of, would have rendered a different finding.
  - iii. That Applicant had instructed his previous Advocates to commence these proceedings and its only until recently that the Applicant learnt that the said Advocate had abandoned the file and travelled outside this Jurisdiction to pursue further studies without informing him.
  - iv. That for any other sufficient reason and in the interests of justice, the said Judgment and/ or order ought to be reviewed and/or varied to the extent that the Judgement herein be set aside.
  - v. That unless this court issues the orders sought as a matter of urgency, the Applicant will be greatly prejudiced hence the urgency of this Application.
3. It is supported by the affidavit of Nick Ndenda in which he deposed that judgement herein was delivered on 18/8/2023. Being aggrieved by the judgement he instructed his advocate in record Mr. Onyango of Wawira Gachoki Advocates to file the instant application and to consider options related to an appeal.
  4. He was however served with warrants of attachment dated 8/2/2024 issued to Mutrix Auctioneers to recover the sum of 58,819 (USD) being the decretal sum, costs and interest. It was at this point that he discovered that his advocate had gone out of the country for studies without informing him.
  5. Since the conclusion of the matter, he managed to obtain crucial documents which disclose critical information deliberately withheld by counsel for the plaintiff during the suit and which had the court had the benefit of would have rendered a different finding. Thus, in the interest of justice the said judgement ought to be reviewed and/or varied.
  6. The respondent filed a replying affidavit by Godfrey Makuyu Otenyo dated 3/5/2024 opposing the application. In it he deponed that since 1/9/2023 the applicant has not taken any steps to file his record of appeal or apply for review. The applicant waited until he was served with the warrants of attachment for him to make this application for review.
  7. He stated that it is not true that the applicant was not aware of this matter as the Notice of Appeal is signed and filed by the applicant and the signature is the same in the submissions that were filled on 2/6/2023. He indicated that the application herein for review is designed to delay the respondent from enjoying the fruits of its judgment. The respondent's claim against the applicant was based on a clear professional undertaking whose terms were clearly spelt out. The applicant failed to observe the clear terms which fact is captured in the documents which he has produced and hence the application for review lacks merit.
  8. The parties filed written submissions as follows; the applicant submitted that he has obtained crucial documents which disclose critical information deliberately withheld by counsel for the respondent during the suit. The applicant further indicated that he did not file a notice of appeal as alleged by the respondent.



9. The applicant contended that the respondent acted contrary to the standards of professional practice and ethical conduct as the material non-disclosure on the part of the respondent led to the erroneous judgement.
10. That the respondent got into a loan agreement with Messrs. InfraCapital Limited and was required to pay a processing fee before the financier would execute the term sheet. It is the advocate for the respondent who issued an undertaking guaranteeing the payment of the processing fees in order to facilitate the execution of the term sheet. At no time did the applicant issue an undertaking therefore this suit should be struck out.
11. The applicant submitted that he has established that the respondents advocate deliberately misled the court and that the evidence produced prove that the respondent advocate issued the undertaking. The applicant was under an obligation to his clients and the respondent, to immediately dispatch the funds to the financier which he did.
12. The respondent alternatively submitted that its case is on enforcement of a professional undertaking. The applicant argued that he did not give the professional undertaking while the respondent's argument is that he is still bound by clear terms of the professional undertaking that was given to him by the respondent's advocates.
13. The respondent submitted that the applicant failed to comply with the terms of the professional undertaking. The very essence of a professional undertaking is that it binds the donor and done who are advocates and who should adhere to the professional undertaking with standards of ethics that are higher than that of the market place.
14. The respondent argued that there is nothing new about the emails that the applicant has always had access and control of and this cannot be said to be discovery of new evidence and urged the court to dismiss the application herein with costs to the respondent.
15. The issues for determination are as follows;
  - i. Whether the firm of Conrad Law Advocate, LLp should be granted leave to come on record.
  - ii. Whether this court should review its order dated 18/8/2023.
16. On the issue of leave to come on record, it is not disputed that the previous advocates travelled out of the country. Leave is granted.
17. On the issue of review, the law governing the same is Order 45 which states as follows;
  - “(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.



(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review”

18. The applicant in this case alleges that crucial evidence has been unearthed which merits review of the judgment.
19. That the said documents had been printed and shared when the firm of Nick Ndeda & Associates was relocating its ISP and were lost in storage archives and could not have been produced earlier despite every effort made by the applicant.
20. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made.
21. In the circumstances of this case, I am persuaded that there is good reason to grant the review orders sought by the defendant.
22. The applicant stated that he discharged his obligations and the position was communicated to the plaintiff and further that the crucial documents which disclose critical information were deliberately withheld by counsel for the respondent during the suit.
23. The application dated 6/3/2024 is allowed and the judgment of this court dated 18/8/2023 is set aside.
24. The OS to start denovo before any other court in the Civil Division since this court is on transfer.
25. However, the defendant applicant to pay the costs of this application assessed at Ksh.20,000 before the OS is heard denovo.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

.....for the Plaintiff

.....for the Defendant

