



Ongwae v Director of Public Prosecutions & 2 others; Kiptoo & 5 others (Interested Parties) (Constitutional Petition E237 of 2020)
[2023] KEHC 3662 (KLR) (Constitutional and Human Rights) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3662 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E237 OF 2020

M THANDE, J

APRIL 28, 2023

BETWEEN

CHARLES OGEGA ONGWAE PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS 1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, MILIMANI 2ND RESPONDENT

KENYA BUREAU OF STANDARDS 3RD RESPONDENT

AND

ERIC CHESIRE KIPTOO INTERESTED PARTY

PETER KINYANJUI NDUNGU INTERESTED PARTY

POLE MWANGENI INTERESTED PARTY

MARTIN MUSWANYA NYAKIAMO INTERESTED PARTY

BENSON ODUOR NGESA INTERESTED PARTY

STEPHEN BOAZ OLOO INTERESTED PARTY

RULING

1. In the Application before me dated 20.7.22, the Petitioner seeks orders that:

1. Spent.



2. This Application be placed before the honourable Justice A. Mrima for him to review the order granting costs to the Respondents.
 3. Pending the hearing and determination of this Application there be a stay of taxation of the respondents bill of costs.
 4. The costs be in the cause.
2. The Application is premised on the grounds that a bill of costs claiming the sum of Kshs. 4,075,570/= from the Petitioner, was filed by the firm of Amadi & Amadi Advocates which was not properly on record for the 3rd Respondent. The Petitioner averred that there were express instructions from the office of the Attorney General that all state corporations shall be represented by counsel from the State Law Office. A copy of the circular dated 3.11.2020 was exhibited. It is the Petitioner's case in view of the directive from the Attorney General, the Court awarded costs to a law firm that was not properly on record. He contended that in as much as costs are discretionary, in public interest litigation, parties should bear their own costs. He thus argued that his petition was filed in the interest of the public as it touched on the abuse of power by the 1st Respondent and sought orders against the 3rd Respondent. There is therefore reason for the Court to review its orders regarding the award of costs. He stated that he stands to suffer substantial loss if the orders sought are not granted expeditiously.
 3. The Application is opposed by the 3rd Respondent vide a replying affidavit sworn on 13.1.23 by Brian Kimanyano, the Legal Manager. It was deposed that the Attorney General did issue the directive in question that ministries, departments and agencies should engage in house counsel. Additionally, that approval must be sought where an agency wished to engage external legal counsel. The exhibited circulars show that the directive emanated from the President. It was further averred that on 20.7.2020, the Law Society of Kenya moved to Court by way of judicial review in HCJR/E10 of 2020, challenging the directive by the President. By an order of even date, Mativo, J. (as he then was), issued orders staying the directive pending the hearing and determination of the substantive application. The said order has never been appealed against, reviewed, varied or set aside. Further that at no point throughout the trial, did the Petitioner seek orders to withdraw the suit against the 3rd Respondent. It would be a miscarriage of justice for this Court to deny the 3rd Respondent its duly appointed advocates who represented them and participated in the suit. According to the 3rd Respondent, the Application is intended to delay the matter and to deny the 3rd Respondent's advocates, their fees. The Application should thus be dismissed with costs.
 5. In a supplementary affidavit sworn on 18.1.23, the Petitioner averred that as former managing director of the 3rd Respondent, he is aware that whenever instructing external counsel, the 3rd Respondent obtains the consent in writing of the Attorney General. Further that the terms of engagement including the agreed fees are captured in the letter of instructions. Given that such a letter was not exhibited, he is unable to ascertain whether the appointment of the advocates was procedural. He further averred that Brian Kimanyano is not the head of legal services of the 3rd Respondent. As such, he has no authority to swear affidavits on behalf of the 3rd Respondent. The Petitioner further contends that participation of the said advocates in the proceedings was minimal. There cannot therefore be any justification in awarding them costs. The Petitioner further averred that a circular issued prior to the one of 3.11.2020 required state corporations to seek consent of the Attorney General before engaging external counsel. The ruling of Justice Mativo, J. did not relate to the circular of 3.11.2020. The Petitioner thus urged the Court to find that the firm of Amadi & Amadi could not be awarded costs.
 6. In a rejoinder, Brian Kimanyano swore a further affidavit on 9.2.23. He averred that the circular dated 1.3.18 referred to by the Petitioner was quashed by Nyamweya, J. on 4.6.19 in JR Misc Appl



364 of 2018, *R v Attorney General; Law Society of Kenya (Interested Party) Ex-parte Francis Andrew Moriasi* [2019] eKLR. The 3rd Respondent has recognized the decisions of this Court and has complied with the same. It is the 3rd Respondent's contention that, had the Petitioner succeeded in his petition, he would have vigorously pursued the Respondent for costs without raising the issue of legal representation.

7. On 16.1.23, the matter was allocated to me for hearing effectively dispensing with the prayer that the Application be placed before Mrima, J.
8. The jurisdiction of this Court to review its orders, is provided in Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*. Section 80 allows an aggrieved litigant to apply for review of an order or decree and empowers the Court to make such order as it deems fit 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.

9. Order 45 Rule 1 (1) stipulates the grounds upon which an order may be reviewed:

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. The question before the Court is whether the Petitioner has met the test set out in Order 45 Rule 1(1) for review of orders. The scope of review of an order is limited to 3 grounds. First there must be discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time the decree was passed or the order made. Second, there is some mistake or error apparent on the face of the record. Third, any other sufficient reason. There is also a requirement that an application for review be made without unreasonable delay.
11. In the present case, the Petitioner submitted that the law firm of Amadi & Amadi Advocates is not properly on record for the 3rd Respondent as there is an express directive from the Attorney General that all state corporations shall only be represented by counsel from the State Law Office. As such, the Court awarded costs to a firm not properly on record. Further that in as much as costs are discretionary, public interest litigation like the one herein, parties ought to bear their own costs.



12. For the 3rd Respondent, it was submitted that costs follow the event. Further that orders were issued in JR Misc Application 364 of 2018 quashing the circular dated 1.3.18 and HCJR No. E010 of 2020 staying the implementation of the impugned decision and resolutions barring ministries and state departments from engaging external counsel. It was thus contended that there was no requirement that state corporations shall only be represented by counsel from the State Law Office.
13. In *Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi* [2019] eKLR, the exparte applicant challenged Guidelines D, H and L of the circular of 1.3.18 titled Guidelines on Provision of Legal Services by the Office of Attorney General & Department of Justice. In her judgment, Nyamweya, J. (as she then was) issued an order of certiorari quashing the offensive Guidelines in the circular and an order of prohibition restraining and prohibiting the Hon. Attorney General from implementing and enforcing the impugned guidelines. And in HCJR/E10 of 2020, the applicant therein challenged the National Development and Communication Cabinet Committee dated 8.7.2020. In his ruling of 20.7.2020, Mativo, J. (as he then was) stayed the implementation and execution of the impugned decision.
14. For an applicant seeking review of Court orders to succeed, such party must demonstrate the existence of the grounds set out in Order 45 Rule 1(1) of the Civil Procedure Rules. The Petitioner has not said that there is discovery of new and important matters or evidence, which after due diligence, was not within his knowledge or could not be produced at the time the order was made. Indeed, as he has stated, he is well versed with the operations of the 3rd Respondent, having served as its managing director for 4 years prior to his being charged in Court on 22.6.18. What he now claims ought to have been within his knowledge and raised in Court at, or prior to the commencement of the hearing. The Petitioner has also not stated that there is a mistake or error apparent on the face of the record. Having failed the first 2 tests, has the Applicant satisfied the general ground of any other sufficient reason? The Petitioner's case is anchored on 2 circulars by the Hon. Attorney General requiring that state corporations shall only be represented by counsel from the State Law Office. It has been demonstrated that there are 2 Court decisions staying and setting aside the requirement. Accordingly, the general ground has not been satisfied.
15. There is no evidence that any of these 2 decisions cited have been appealed against, reviewed and set aside. In light of this, I do find that the Application which is anchored on the 2 circulars which have been quashed or stayed and is not tenable.
16. Additionally, the said firm represented the 3rd Respondent in the proceedings herein up to the conclusion of the same. Indeed the Petitioner has stated that the role of the firm was insignificant and therefore ought not have been awarded costs. Judgment herein was delivered on 24.3.22 with the Court dismissing the petition which had been consolidated with others, and further directing the Petitioner and other petitioners to bear the costs. The firm of Amadi and Amadi Advocates filed the 3rd Respondent's party to party bill of costs dated 19.5.22. It was not until 20.7.22 that the Petitioner filed the present Application challenging the representation of the 3rd Respondent by the said firm. From June 2020 when the said firm was instructed, the Petitioner who was familiar with the workings of the 3rd Respondent did not raise any objection to the said firm representing the 3rd Respondent.
17. It is quite clear to the Court that the Petitioner is unhappy with the amount in fees he may be required to pay the 3rd Respondent's advocates. Had he been aggrieved by the decision awarding costs to the Respondents, he should have appealed against the same. The present application is therefore in my view, an afterthought and a feeble attempt on the part of the Petitioner to appeal against the decision of 24.3.22 which ought to have been done by 24.4.22. It is a well-established maxim that equity aids the vigilant and not the indolent.



18. It is well settled that the purpose of the provisions for review of court orders is not to afford a party an opportunity to appeal. In the case of *Kenya Bureau of Standards v Geo Chem Middle East* [2021] eKLR, the Supreme Court stated:

It is clear to us that the application before us is a disguised appeal which seeks to reopen Matters already determined with finality by this Court. In *Fredrick Otieno Outa* [supra], we emphasized the principle that an application for review, was not intended to give a party an opportunity to appeal, or relitigate its case. Where such a review is sought, an applicant must lay a basis, to the satisfaction of the Court, that the application for review satisfies the set criteria.

16. The Petitioner contends that this Court erred in awarding costs in the petition which was in his view filed in the public interest. While this may be a good ground for appeal it cannot sustain an application for review. In so stating I am guided by the holding in *Pancras T. Swai v Kenya Breweries Limited* [2014] eKLR where the Court of Appeal stated:

It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are *factus (sic) officio* and have no appellate jurisdiction. The power to review decisions on appeal is vested in appellate courts.

16. The issue of costs was settled by the Court in its judgment of 24.3.22. It is quite apparent that the Application is a disguised appeal which seeks to reopen a matter already determined with finality by this Court. The Petitioner is in effect asking the Court to relook at the issue and make a finding that the award of costs was wrong. To do so, would be tantamount to the Court sitting on appeal of its own decision, an undertaking over which this Court is devoid of jurisdiction.

16. In view of the foregoing, this Court finds that the Application dated 20.7.22 lacks merit, does not meet the set criteria for review and the same is hereby dismissed with costs to the 3rd Respondent.

DATED AND DELIVERED IN NAIROBI THIS 28TH DAY OF APRIL 2023

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner.

.....for the Respondent.

.....for the Interested Party.

.....Court Assistant.

