



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 87 OF 2020

REPUBLIC.....APPLICANT

VERSUS

THE CHIEF OFFICER ROADS, TRANSPORT, AND

PUBLIC WORKS, NAIROBI CITY COUNTY.....1ST RESPONDENT

NAIROBI CITY COUNTY GOVERNMENT.....2ND RESPONDENT

AND

M/S NOORDIN ENTERPRISES LIMITED.....INTERESTED PARTY

EX PARTE APPLICANT:

IMPRESSIONS ADVERTISING

RULING NO 2

The Application

1. The *ex parte* Applicant, Impressions Advertising, (hereinafter “the *ex parte* Applicant”), filed a Chamber Summons application dated 28th April 2020, seeking leave to commence judicial review proceedings against the Respondents with respect to a decision made in relation to road works on Pokomo Lane. It also seeks an order that the grant of leave operates as a stay of implementation of the decision.

2. This Court in a ruling delivered on 30th April 2020 directed that the said Chamber Summons be argued *inter partes* and that the parties file and serve the application, responses thereto and submissions thereon. When the matter came up for mention to reserve a ruling date on 3rd June 2020, this Court noted that there was no evidence on the court record of service of the said Chamber Summons on the Respondents and Interested Party, neither had the *ex parte* Applicant filed submissions on the said Chamber Summons, as directed by the Court. The Court accordingly dismissed the said Chamber Summons for non-prosecution.

3. The *ex parte* Applicant subsequently filed an application by way of a Notice of Motion dated 11th June 2020 seeking the following orders:

- a) **THAT the application be certified as urgent and service hereof be dispensed with in the first instance.**
- b) **THAT the Court be pleased to review Ruling delivered by this Court in JR MISC APP 87 of 2020 on 3rd of June 2020.**
- c) **THAT the s Ruling delivered by this Court in JR MISC APPL 87 of 2020 on 3rd June 2020 dismissing the *ex parte* application’s Chamber Summons dated 28th April 2020 be set aside.**

4. The grounds for the application are that the *ex parte* Applicant instructed a process server to serve the Respondents and the Interested Party in the manner contemplated in Court’s directions, and that the process server then prepared an affidavit of service and filed together with submissions through the email provided by the Division. That the documents having been filed, assessed and paid for on 15th May 2020, the *ex parte* Applicant was shocked when notified on 5th June 2020 that its application had been dismissed for non-prosecution, yet the submissions and the affidavit of service were sent on the official email provided for the Judicial Review Division.

5. These grounds for the application are expounded in an undated supporting affidavit sworn by Alex Mudanya, the *ex parte* Applicant's advocate, wherein he states that he had annexed an email print out marked as "exhibit AAM1" as proof of filing of the affidavit of service and submissions in accordance with the Court's directions. However, a perusal of the said affidavit shows that there is no such annexure.

6. Since the *ex parte* Applicant was faulting the Court for not considering its pleadings despite its alleged compliance with the directions given by the Court, the *ex parte* Applicant is granted leave to file and serve the Respondents and Interested Party with the Notice of Motion and a supplementary affidavit annexing the copies of email printouts showing compliance with this Court's directions given on 30th April 2020 as regards the electronic filing of his submissions and affidavit of service.

7. Kithi and Company Advocates, the advocates on record for the 1st and 2nd Respondents filed Grounds of Opposition and written submissions dated 27th July 2020, wherein the application was opposed on the grounds that there must be an end to litigation, and there is no evidence that the Applicant complied with the directions issued by this court on 4th June, 2020. The Respondents submitted that an advocate is the agent of the litigant, and where the advocate is guilty of inaction, the litigant will bear the consequences of his advocate's inaction as held in **The Council, Jomo Kenyatta University of Agriculture and Technology vs Joseph Mutuura Mbeera & 3 Others [2015] eKLR**.

8. Further, that an examination of the record shows ordinate and inexcusable delay in complying with the court's directions. Contrary to the allegations by the applicant, they did not comply with the courts directions. It is only after the suit is dismissed that the Applicant comes back with an affidavit of service alleging to have served and complied with the court orders. Reliance was also placed on the decision by the Court of Appeal in **National Bank of Kenya Ltd -v- Ndungu Njau (1997) eKLR**, for the position that there is no apparent error or omission on the part of the Court for it to interfere with its decision.

The Determination

9. The main issue for determination in this application is whether the ruling and orders issued herein on 3rd June 2020 are amenable to setting aside or review. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides 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.”

10. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside 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.”

11. The Respondents relies on compliance of the Court's directions as its main ground for review. However, the *ex parte* Applicant did not file any supplementary affidavit to demonstrate such compliance despite having been directed to do so by this Court, in terms of evidence of service and filing of the submissions in the manner directed by the Court. While the *ex parte* Applicant has in this respect provided evidence of service of the Chamber Summons and submissions on the Respondent and Interested Party, there is no evidence provided that the same were brought to the attention of the Court in terms of their actual filing in the manner directed by the Court.

12. The position therefore still remains that the *ex parte* Applicant has not provided any evidence to show that the affidavit of service and submissions were on the court record at the time of dismissal of this suit. In the premises, the *ex parte* Applicant has not brought any new evidence or shown sufficient ground for this Court to review its orders.

13. I accordingly find that the *ex parte* Applicant's Notice of Motion dated 11th June 2020 is not merited and the said application is hereby dismissed with no order as to costs.

14. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF JANUARY 2021

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS RULING

Pursuant to the Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, Other Court Users and the General Public from Risks Associated with the Global Corona Virus Pandemic dated 17th March 2020 and published 17th April 2020 in Kenya Gazette Notice No. 3137 by the Honourable Chief Justice, this ruling was delivered electronically by transmission to the email addresses of the *ex parte* Applicant's, Respondents' and Interested Party's Advocates on record.

P. NYAMWEYA

JUDGE