



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISC APPLICATION NO. E055 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

BETWEEN

REV. SIMON NDUNGU MUNGAI.....1ST APPLICANT

PASTOR VINCENT MUNGAI NDUNGU TRADING AS OVERCOMERS

CHRISTIAN MISSIONS & LIVELINK COMMUNICATIONS....2ND APPLICANT

VERSUS

COUNTY GOVERNMENT OF KIAMBU.....1ST RESPONDENT

COUNTY FINANCE OFFICER

KIAMBU COUNTY GOVERNMENT.....2ND RESPONDENT

COUNTY SECRETARY

KIAMBU COUNTY GOVERNMENT.....3RD RESPONDENT

RULING NO. 3

1. On 20th January 2021, this Court delivered a ruling in which this suit was dismissed for want of prosecution, after non-compliance with this Court's directions and orders issued on 2nd November 2020. The *ex parte* Applicants have now filed a Notice of Motion application dated 2nd February 2021, seeking the following orders:

- a. The application be certified urgent and the same be heard ex-parte in the first instance.**
- b. The Court be pleased to review and/ or vary, set aside its order dated 20/1/2021, together with all consequential orders.**
- c. The court reinstates the application dated 12th October 2012 and issue directions on the same.**
- d. There was an apparent mistake and error on the face of the record in that the proceedings by the applicants have been dismissed on account of non-prosecution and yet the Applicants had no knowledge or any notification that the court had granted leave and issued directions on the 2nd November 2020 concerning the disposition of the instant suit.**
- e. Such further and/or other orders be made as the court may deem fit and expedient.**

2. The said application is supported by an affidavit sworn on 2nd February 2021 by Vincent Mungai Ndungu, the 2nd *ex parte* Applicant. The main ground for the application is that the *ex parte* Applicants' Advocate did not receive any electronic email communication of the court's directions and orders issued on 2nd November 2020 through their email address.

The Determination

3. 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.”

4. 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.”

5. I have perused the Court record herein and note that there is no evidence of transmission to the parties of the directions issued by this Court on 2nd November 2020, which were issued electronically by email due to the COVID-19 pandemic restrictions. There is therefore sufficient reason, and it is in the interests of justice that the ruling and orders granted herein on 20th January 2021 are set aside, as they were predicated on the service of the said directions on the *ex parte* Applicants.

6. In light of the foregoing observations and findings, the *ex parte* Applicants’ Notice of Motion dated 2nd February 2021 is found to be merited to the extent of the following orders:

I. The *ex parte* Applicants’ Notice of Motion application dated 2nd February 2021 is certified urgent and admitted to hearing *ex parte* in the first instance.

II. The ruling and orders issued herein on 20th January 2021 are hereby set aside, and the suit herein and Chambers Summons application dated 12th October 2020 are hereby reinstated for hearing.

III. There shall be no order as to the costs of the *ex parte* Applicants’ Notice of Motion application dated 2nd February 2021.

IV. The *ex parte* Applicants are granted leave to apply for an order of Mandamus directed to the County Finance Officer Kiambu County Government and County Secretary Kiambu County Government to compel them to honor the decree dated 31st January 2011 in Nairobi HCCC No 67 of 2008 by paying the decretal amount and interests as per Certificate of order dated 27th July 2020 amounting to Ksh 4,460,292.

V. The costs of the Chamber Summons dated 12th October 2020 shall be in the cause.

VI. The *ex parte* Applicants shall file the substantive Notice of Motion, and shall serve the Respondent with (i) the Chamber Summons application dated 12th October 2020, (ii) the substantive Notice of Motion and submissions thereon, (iii) a copy of this ruling, and (iii) a mention notice, within twenty-one (21) days from today’s date.

VII. Upon being served with the said pleadings and documents, the Respondents shall be required to file its response to, and submissions on the substantive Notice of Motion within twenty-one (21) days from the date of service.

VIII. This matter shall be mentioned on 26th April 2021 to confirm compliance and for further directions.

IX. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the *ex parte* Applicants’ substantive Notice of Motion on the basis of the electronic copies of the pleadings and the written submissions filed by the parties.

X. All the parties shall file their pleadings and submissions electronically, by filing them with the Judiciary e-filing system, and send copies by electronic mail to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com and asunachristine51@gmail.com.

XI. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to

asunachristine51@gmail.com.

XII. The parties shall also be required to file their respective affidavits evidencing service in the Judiciary's e-filing system.

XIII. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 26th April 2021.

XIV. The Deputy Registrar of the Judicial Review Division shall send a copy of this ruling to the *ex parte* Applicants by electronic mail by close of business on Thursday, 18th February 2021.

XV. Parties shall be at liberty to apply.

7. Orders accordingly.

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

P. NYAMWEYA

JUDGE