



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. APPLICATION NO. 114 OF 2020**

**IN THE MATTER OF: ADVOCATE/CLIENT BILL OF COSTS**

**COOTOW & ASSOCIATES.....ADVOCATES/RESPONDENTS**

**VERSUS**

**MBARUK AYUB ALI MBARUK.....APPLICANT/CLIENT**

**RULING**

1. The application before the Court is the Notice of Motion dated **7<sup>th</sup> January, 2021** and filed on the **13<sup>th</sup> January, 2021**. It is expressed to be brought under Section **1A, 1B, 3A, 63(e), 80 and 100** of the Civil Procedure Act Cap 21 Laws of Kenya, **Order 12 Rule 7, 45 (1) (b) and Order 51 of the Civil Procedure Rules, Article 50 and 159 (2) (a) (b) and (d) of the Constitution of Kenya**, inherent jurisdiction of the Court and any other enabling provisions of the Law.
2. The application is seeking for the following orders: -
  1. *Spent;*
  2. *Spent;*
  3. *THAT this Honourable Court be pleased to reinstate the Applicant's Application dated 3<sup>rd</sup> September, 2020*
  4. *THAT the costs of this Application be provided for.*
3. The grounds on which the application is based are on its face and further on the Supporting Affidavit sworn by **Moses Waweru** on the **7<sup>th</sup> January, 2021**, the Applicant's Counsel. The gist of the Applicant's case is that the Applicant filed an application dated the **3<sup>rd</sup> September, 2020** seeking stay of proceedings of the Advocate/Respondent's Bill of Costs. That the said application was listed for hearing on various occasions but the same never proceeded.
4. It has been deponed that on the **9<sup>th</sup> November, 2020** the Application dated **3<sup>rd</sup> September, 2020** was listed for hearing before Hon. Lady Justice Njoki Mwangi but the same did not proceed as the court was not sitting.
5. The Applicant/Client has stated that they served the Advocate/Respondent with a hearing notice for the **23<sup>rd</sup> November, 2020** but the matter was not cause-listed on the cause list and their attempts to trace the physical file bore no fruits. That the file was only located after the Ruling had been delivered on the **2<sup>nd</sup> December, 2020**.
6. According to the Applicant/Client, they were not served with a Ruling Notice to enable them arrest its delivery and thus seek to have the Application reinstated for purposes of hearing.
7. It has been averred that the non-attendance of Counsel for hearing of the Applicant on **23<sup>rd</sup> November, 2020** was due to the fact that the matter was not cause-listed and the file herein could not be traced as it was in chambers awaiting delivery of Ruling.
8. The Applicant/Client has stated that this Honourable Court is vested with the power to review its judgment and orders thereof in light of the provisions under **Order 12 Rule 7 of the Civil Procedure Rules**. Further, it has been added that this Court has a duty to treat parties before it equally and thus this Court should grant the Applicant an opportunity to prosecute their Application dated **3<sup>rd</sup> September, 2020**.

9. It is the Applicant's averment that this Application was made within reasonable time. He has urged this court to be guided by the provisions under **Article 50 and 159 (2) of the Constitution of Kenya** and be persuaded to reinstate the Application dated **3<sup>rd</sup> September, 2020**. Further, he avers that the Advocate/ Respondent will not suffer any prejudice if this Application is granted.
10. The application is opposed. The Advocate/Respondent filed a Replying Affidavit sworn by **Augustus Khisa Wafula**, Advocate on the **25<sup>th</sup> March, 2021**. He has deponed that the Application dated the **7<sup>th</sup> January, 2021** does not envisage any ground for review as envisaged under **Section 80 of the Civil Procedure Act**.
11. He affirmed that the Applicant's application dated **3<sup>rd</sup> September, 2020** was listed for hearing on the **9<sup>th</sup> November, 2020** before Hon. Lady Justice Njoki Mwangi, but the Applicants informed her that the matter was erroneously listed before her. The same was adjourned and the Applicant's took a hearing date for the **23<sup>rd</sup> November, 2020** which they served upon the Advocate/ Respondent.
12. According to the Advocate/Respondent both parties were aware that the matter was not to be heard before Hon. Lady Justice Njoki Mwangi.
13. It is also averred that on the **23<sup>rd</sup> November, 2020** the Advocate/Respondent attended court for the scheduled hearing of the Applicant/Client's Application, but the Applicant/Client was not present due to his indolence.
14. The Respondent/Advocate have averred that the Applicant/Client have not detailed nor provided proof of the efforts they made to inquire about the file and the claim that a matter not listed on the cause list is not a sufficient reason for Counsel or a litigant to attend court.
15. It has been deponed that the decision as delivered by Court is on the merits of the Application and the only available remedy for the Applicant/Client is to lodge an Appeal and not file an application for review.
16. Further, the Advocate/Respondent has stated that the failure by the Applicant and or his Counsel to attend court on the **23<sup>rd</sup> November, 2020** was by design as the Applicant/Client filed another application dated **30<sup>th</sup> November, 2020** before the Environment and Land Court seeking to stop the taxations such as the application dated **3<sup>rd</sup> September, 2020** sought.
17. The Advocate/Respondent is convinced the Applicant/Client is forum shopping to see which court will grant them orders and thus the Application dated **7<sup>th</sup> January, 2021** is an abuse of the court process and should be dismissed.
18. The Application was canvassed by way of written submissions. The Applicant/Client filed submissions on the **19<sup>th</sup> April, 2021** whilst the Advocate/Respondent filed theirs on the **28<sup>th</sup> April, 2021**. Both parties opted to rely on the said submissions in their entirety.
19. Parties relied on their written submissions.

#### **The Applicant's submissions**

20. The Applicant submitted that this Court is vested with the power to review its judgment and orders in light of the provisions of **Order 45 Rule 1 of the Civil Procedure Rules**. Therefore, this court can reinstate the application dated **3<sup>rd</sup> September, 2020** as provided under **Order 12 Rule 7 of the Civil Procedure Rules**.
21. It was also submitted that the principles for setting aside an *ex parte* judgment such as the orders made on the **2<sup>nd</sup> December, 2020** are well elaborated in the case of **Shah v Mbogo & Another [1967] EA 116**.
22. Further, submissions are that the non-attendance on the **23<sup>rd</sup> November, 2020** was not deliberate as the same was occasioned by the Applicant in court by fact that the matter had not been cause-listed as evidenced in the cause list as produced as annexure marked "MN 3". The Applicant has thus urged the court to set aside the orders issued on **2<sup>nd</sup> December, 2020**.

#### **The Respondent's Submissions**

23. The Respondent/Advocates submitted that the Applicant/Client has not complied with the requirements of **Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules** to warrant a review of the court's decision.
24. The Respondent/Advocate went on to state that failure to attend court is not sufficient reason to warrant a party seek orders of review. The only available remedy for the Applicant/Client to appeal to the Court of Appeal and not seek review from this court.
25. According to the Advocate/Respondent, the Applicant/Client was aware that the application dated **3<sup>rd</sup> September, 2020** was to be heard before this Court and not Hon. Lady Justice Njoki Mwangi's court
26. That it is in face the Applicant/Client who fixed the date for hearing of the application dated **3<sup>rd</sup> September, 2020** and served the same upon the Advocate/Respondent. It is therefore strange that they then missed to attend court on **23<sup>rd</sup> November, 2020** evident they were not interested in prosecuting the said application.
27. The Advocate/Respondent submitted that in its decision the court considered the evidence that has been adduced by both the Applicant

and the Respondent in their respective pleadings and delivered a Ruling on the **2<sup>nd</sup> December, 2020**, dismissing the application dated **3<sup>rd</sup> September, 2020**. It was submitted that the Application dated **3<sup>rd</sup> September, 2020** was heard on its merits and the lack of submissions by the Applicant/Client is immaturity. Reliance was placed on the case **Kenya Coach Industries Limited v Stanley Musembi & another [2021] eKLR**.

28. It was finally submitted by the Respondent/Advocate that the Applicant/Client instead of attending court on the **23<sup>rd</sup> November, 2020** for the hearing of their application dated **3<sup>rd</sup> September, 2020**, proceeded to file **Misc. App No. 20 of 2020** dated **30<sup>th</sup> November** between the parties herein in which it was seeking similar orders before the Environment and Land Court. This action, according to the Respondent/Advocate is a blatant abuse and a mockery of the court process, only intended to embarrass and abuse precious judicial time and resources.

29. For the above reasons, Advocate/Respondent urged this Court to dismiss the application dated **7<sup>th</sup> January, 2021** with costs.

#### **Analysis and determination**

30. Having considered all the pleadings and written submissions as filed by the parties, the only issue that arises for determination is *whether this court can review its decision delivered on 2<sup>nd</sup> December, 2020 and reinstate the Applicant's Application dated 3<sup>rd</sup> September, 2020*.

31. The right to apply for review is provided for in **Section 80 of the Civil Procedure Act** and elaborated by **Order 45 of the Civil Procedure Rules** as follows: -

**Section 80** of the **Civil Procedure Act** provides:-

*[Order 45, rule 1.] Application for review of decree or order.*

*“1. (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.*

32. From these provisions, clearly there are three limbs which are to be considered when determining an application for review of decree or order. They are *discovery of new and important matter or evidence, mistake or error apparent on the face of the record and any other sufficient reason*.

33. In this case the Applicant/Client has not shown any new and important matter of evidence that has been discussed and neither has he pointed out a mistake, apparent on the face of the record. The Applicant/Client's application is therefore one to be considered under any other sufficient reason.

34. The sufficient reason as provided by the Applicant/Client is that a decision delivered on **2<sup>nd</sup> December, 2020** was entered on a non-attendance of a hearing on the **23<sup>rd</sup> November, 2020** by the Applicant/Client.

35. The reason advanced for the non-attendance is that the matter had not been cause-listed on that day.. The Applicant/Client states that the application dated **3<sup>rd</sup> September, 2020** was slated for hearing before Hon. Lady Justice Njoki Mwangi and the same was not cause-listed on the **23<sup>rd</sup> November, 2020** and that they are shocked that this same matter proceeded before this Court and a Ruling delivered on the **2<sup>nd</sup> December, 2020**.

36. I have looked at the court proceedings and found that the application dated **3<sup>rd</sup> September, 2020** was first slated for mention on the **9<sup>th</sup> November, 2020**, on which date the same was before this court. In attendance was **Mr. Gathu**, Counsel for the Applicant/Client but there was an appearance for the Advocate/Respondent. In the absence of the Advocate/Respondent this Court gave directions that they be served with a hearing notice that the matter had been slated for hearing on the **23<sup>rd</sup> November, 2020**.

37. On the **23<sup>rd</sup> November, 2020**, despite knowledge that this matter was before this court, the Applicant/Client did not appear for the slated hearing. The Court then proceeded to hear the Advocate/Respondent and delivered its Ruling on the **2<sup>nd</sup> December, 2020**.

38. The argument by the Applicant/Client is that the matter herein was a matter that had been before Hon. Lady Justice Njoki Mwangi does not hold water as Counsel for the Applicant/Client appeared before this court on the **9<sup>th</sup> November, 2020** and was present when court fixed the hearing of the application dated **3<sup>rd</sup> September, 2020** for the **23<sup>rd</sup> November, 2020**. The Counsel for the Applicant/Client then served a hearing notice upon the Advocate/ Respondent but did not attend court on the **23<sup>rd</sup> November, 2020**.

39. Further, the Applicant/Client cannot place an expectation on the Advocate/Respondent to serve them with a Ruling Notice when they were well aware that the matter was to be before the court for hearing on the **23<sup>rd</sup> November, 2020**. Therefore it was upon the Applicant/Client, as a desirous litigant to peruse the court file and find out what had transpired in court so as to take appropriate action.

40. I therefore find that the lack of attendance of the hearing on **23<sup>rd</sup> November, 2020** for the reason that the matter herein has not been listed in the day's cause list is not a sufficient reason for this Court to review its Ruling delivered on **2<sup>nd</sup> December, 2020**.

41. A further reading of the Court's Ruling delivered on 2<sup>nd</sup> December 2020, clearly shows that this Court considered all the pleadings as had been filed by both parties and considered all the evidence as was produced before it. In my view, the only remedy available to the Applicant/Client at this juncture is an Appeal if they are not convinced and are aggrieved by the decision of the Court.

42. I am in agreement with the submissions by the Advocate/ Respondent that this court did consider all the Affidavits and that the oral submissions by Applicant/Client could not have taken the place of evidence that was before the court. See the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR** where the Court of Appeal stated that submissions cannot take the place of evidence and that submissions are only a marketing language for parties.

43. This court is perturbed by the Applicant/Client's behavior where they appear before a court, take directions and fail to abide by those said directions for reasons only known to them. What this court will not take lightly is the attempt by the Applicant/Client to mislead this Court to believe that an injustice occurred while it is through their own indolence that they were not heard on the **23<sup>rd</sup> November, 2020**. The actions by the Applicant/Client amount to an abuse of the court process.

44. The upshot is that I find no merit in the Applicant/Client's application dated **7<sup>th</sup> January, 2021** and the same is dismissed with costs to the Advocate/Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22<sup>ND</sup> DAY OF JUNE, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the Presence of:

M/S Wamboi counsel holding brief for Mr. Waweru for Applicant

Mr. Weloba for Respondent

Court Assistant - Bancy