



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS APPLICATION NO. 5 OF 2019

MAURIZIO TURATO.....APPLICANT

VERSUS

PEPE TERESARESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ameli Inyangu Advocates for the Appellant

Oyomba Advocate for the Respondent

RULING

Before me is an application dated **14.3.2019** seeking an order to review and or vary it's order number 3 given by **Hon. Justice W. Korir** dated 29.1.2019.

That in the same determination, the court be pleased to substitute its order number 3 with an order dispensing with the requirement to deposit in court the sum of Kshs.9,000,000/= and in its grant allow the applicant to deposit title documents of contemporaneous value in court.

The costs of this application be provided for.

The affidavit in support of the application has been deponed to and signed by the applicant himself **Maurizio Turato**.

On behalf of the applicant Learned Counsel **Ameli Inyangu** in his written submissions filed on 25.3.2019 restricted himself to the competency of the applicant pursuant to order 44 Rules 1 of the Civil Procedure Rules and 580 of the Civil Procedure Act. It was the Learned Counsel contention that though he took over the proceeding post Judgement of pretrial court he did not require leave of the court under Order 9 Rule 5 of the Civil Procedure Rules to take over proceedings from the previous advocate on record. Counsel further objected to the one of submissions implicating that one **Fred Adhoc** is unqualified and unlicensed to practice Law or represent any person before a court of Law. In this regard Counsel annexed a copy of practicing certificates as FOA 2 – as sufficient evidence of his status as a legal professional to offer such services to clients.

Further Learned Counsel submitted that the respondent has failed to see to it that the supporting affidavit and annexure 2 and 3 as filed are in breach of provisions in place within the provisions of the Civil Procedure Act. He submitted that a court confronted with a situation like the one being raised by the respondent has to bear in mind its constitutional obligation under Article 159 (2) (D) and Section 1A and B of the Civil Procedure Act or overdoing objective in order to render substantive justice. To emphasize this substantive question of Law. Learned Counsel cited the principles in the cases of **Stephen Boro Gitiha v Finance Building Society & 3 Others Civil Appeal Nairobi 263 of 2009**, **Abdallah Mohamud v Muhammad Kahiye 2015 eKLR**, **Nicholas Kiptoo Arap Korir Salat v IEBC 2013 eKLR** on the thrust of the application itself Learned Counsel submitted that special circumstances obtain to the facts of this case depending exercise of discretion to review the order to deposit quantum of Kshs. 9,000,000/= as security for the performance of the decree. According to Learned Counsel the special circumstances which warrant review is that the applicant is unable to raise the sum of question so ordered by the court. That the appeal has high chances of success and the applicant would be prejudiced if his right of appeal is to be extriquitted for reason of failure to raise the security as ordered by the court. Enjoining the said provisions Section 80 and Order 44 Rule 1 of the Act and Civil Procedure Rules, Learned Counsel placed reliance on the following cases: **Pancras T. Swai v Kenya Breweries Ltd 2014 eKLR**, **Sarden Mohamed v Charan Singh Nand Sung 1959 EA 793**, **Shanzu Investments Ltd v Commissioner For Lands CANO 100 OF 1993**, **Wangechi Kimata & Another v Charan Singh CAPPEAL No. 80 of 1985**, **Patrick Mwangi Mureithi v Robert Muthara Njoka 2017 eKLR**, **Nuh Nassir Abai v Ali Wario & Others 2013 eKLR**.

Learned Counsel propounded the position that at an opportune time if the order is reviewed the applicant would be in a position to settle the decree in the event it fails to succeed on appeal.

He therefore pleaded to the court to allow the application for review as sufficient reasons to grant, a variation of the order on security.

The respondent's case is grounded in the replying affidavit sworn on 19.3.2019. It is useful to lay down the deponent arguments in the affidavit:

- 1. That the legal counsel Oloo & Chatur Advocates filed a notice of motion dated 29.1.2019 which is subject matter of the notice of motion filed by the firm of Ameli Inyangu & partners dated 14.3.2019.**
- 2. That in the firm of Ameli Inyangu filing the latest notice of motion be and so without a notice of change from the previous Advocates.**

That in the foregoing and in default of the mandatory provisions under Order 9 Rule 5 of the Civil Procedure Rules it renders the application falsely defective. That the applicant has not shown any error on the face of the record or discovery of new matter or sufficient reason in this motion to prove circumstances to justify review of the orders of the court issued on 29.1.2019.

On the other hand, the respondent has a valid Judgment where he was awarded for damages that has not been able to reinforce it due to the stay of execution orders issued by the court. He contended that the respondent continues to be prejudiced without any justifiable cause from the applicant. Further the respondent stated that Advocate **Adhoch Fredick Ouma** professional standing as a paid up member licensed to offer legal services is in doubt given the content of annexure PF 1 from the Law Society of Kenya. The respondent further deponed that the applicant counsel has not brought any evidence to support the orders of him seeking leave to come on record or notifying the previous advocate of the changes on legal representation pursuant to order 9 Rule 9 of the Civil Procedure Rules. The applicant counsel is therefore prosecuting the notice of motion against the statutory provisions on change of advocate post Judgment proceedings. Learned counsel also stated that it is very important for the court to differentiate between an original affidavit and photocopy filed by the applicant in flagrant by act of the rules of evidence Section 35 (1) (2) of the Act. Learned counsel proceeded that the photocopy is sworn or approved by the court. There is also no indication that the photocopy validity of the affidavit was the exceptions provided for under Section 78 (A) of the Evidence Act. According to learned counsel the photocopy supporting affidavit offended mandatory provisions of Section 64, 65, 66 67 and 68 of the Evidence Act. Learned counsel further contended that competence of further affidavit by **Mr. Fred Adhoch** failed to disclose source of information and belief which he has not done.

Thereof no evidence of error and discovery of a new matter to persuade this court to exercise discretion to set aside the order.

For the purposes of whether there is a competent notice of motion, learned counsel cited the following authorities: **Stephen Mwangi Kimote v Muraba Sacco Society ELC 219 of 2017** Learned counsel contention was that it was improper for the applicant to seek review and vary the orders by **Hon. W. Korir** without being himself under Section 80 of the Civil Procedure Act.

The law and determination

Having considered the notice of motion, and affirmed that evidence by the respective parties to the claim and submissions on the issues raised by the applicant all in all I back the following approach:

- 1. Whether as earlier ordered the application for review of security for costs ought to be granted by this court.**
- 2. Whether the application as filed is competent by virtue of alleged breach of Order 9 Rule 5, 9 and 12 of the Civil Procedure Rules.**
- 3. Who bears the costs of this application.**

Issue No. 1 (Background)

The High Court being presided over by **W. Korir Judge** on 29.1.2019 did fully appreciate the undisputed evidence on the notice of motion filed the same day under certificate of urgency by the applicant as against the respondent. The applicant was heard and an assessment of the matter, the judge issued interim orders of stay of execution followed with a condition to deposit the decretal sum of 9 million within 45 days from the due date of 29.1.2019. That the applicant was required to do was to deposit the amount within the stipulated period and also have the notice of motion heard inter partes. That the notice of motion was never to be heard but a completely new motion dated 14th March 2019 was filed seeking review and revocation of the orders issued on 29th January 2019. The grounds adduced by the applicant is that initial application was grounded under Order 42 Rule (6) of the Civil Procedure Rules. The general principle as stipulated under this order is that an appeal or memorandum of appeal shall not operate as a stay of execution to deprive a successful litigant the fruits of his Judgment arising out of a valid court decree.

The court however in considering the facts of the case can exercise discretion to offer equitable remedy as spelt out if the following conditions are met:

- (1). The application has been filed without undue delay.**
- (2). The applicant has demonstrated in any way that he will suffer substantial loss.**

(3). That he must satisfy the criteria of providing security for the performance of the decree.

On such application being decided on 29.1.2019, the Judge stayed execution of the Judgment subject to the applicant providing security of 9 Million within 45 days being the decretal amount in Civil Case No. 192 of 2017. The applicant deposit security for due performance of the decree.

The test of whether to grant stay or not is governed by Rule 6 where the court is clothed with wide discretion based on fulfilment of conditions precedent set therein. In doing so, the court has to balance the competing rights between the parties but at the end of it determine which is just and equitable remedy in the interest of justice.

In this application there is no sufficient reasons why the applicant did not pursue the original application. As directed by the court in terms of Order 4 issued on 30.1.2019. The issue before this court does not sound like dealing with stay of execution or enlargement of time to comply with the order of the court issued on 29.1.2019. The motivation by applicant is to have the condition on deposit of the amount of Kshs.9,000,000/= varied and substituted with collateral security. I think after applicant realized that he has defaulted and he had no avenue but to start all again to apply for new orders. In response to his averments and submissions, can we say he has a case under Section 80 and Order 45 Rule 1 of the Civil Procedure Rules? By the provisions of Order 45 Rule 1 it is clear that a party who is aggrieved with an order or decree of the cash can only succeed in having the order reviewed if the following conditions are met.

“First, by presenting evidence of discovery of new and important matter of 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 order made or on account of some mistake or error approach on the face of the record or for any other sufficient reason.”

“Secondly, the impugned decree or order is a subject of an appeal but prefers to challenge it by way of a review.”

From the record, dealing with the issue on stay of execution under Order 42 Rule 6 there was no real contest about it, neither is there is a doubt in the application of Rule 6 that the court’s discretion remains unfettered. The application as made under Order 42 Rule 6 also empowers the court to invoke inherent powers to make such orders as may be necessary for the ends of justice, or for any sufficient cause.

The test to be applied on inherent powers of the court was considered in **Hallsbury’s Laws of England 4th Edition Volume 37** at paragraph 14 which shares as follows:

“The jurisdiction of the court which is comprised within the term inherent is that which enables it to fulfill itself, property and effectively as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural Law, both civil and criminal, and not part of substantive Law; it is exercisable by summary process without primary trial. It may be involved not only in relation to the parties in pending proceedings, but in relation to any one whether a party or not, and in relation to matters not raised in litigation between the parties. It must be dislanguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process of the court. In sum, it may be said that the inherent jurisdiction of the court is a virtue and viable doctrine and has been defined as being the reserve or Fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so. In particular to ensure the observance of the one process of Laws, to prevent improper vexation to do justice between the parties and to secure a fair trial between them.”

In my view the above principles provide a useful guide when I consider the decision of the court made on 29.1.2019 under Rule 6. The nature of the action brought to the court was the question of preferring an appeal from the Judgement of the Chief Magistrate Court. So far as the applicant’s prayers were concerned under Order 42 Rule 6 stay of execution and security for due performance of the decree was a condition precedent in the exercise of discretion by the court.

Looking at the matter from the applicant’s side there was nothing else later to hear in the future under the terms of Rule 6. I do not think that there was prejudice or hardship suffered by the respondent which can not be adequately compensated by costs at the end of it all when the proposed appeal was to be heard and determined. The judge in so acting and exercise of jurisdiction did so by virtue of a written Law and in the performance of his constitutional duty. The question raised by the applicant in his notice of motion of 14.3.2019 is in effect challenging the jurisdiction as laid down in Order 42 Rule 6 granting the order for security for due performance of the decree. In relation to the orders there was no necessity for the court to hear the application for stay of execution. It was fact accompli on 29.1.2019.

The present application as already initiated for an order of review is untenable for absence of error, mistake, discovery of new and matter of evidence or any other sufficient reason.

In the case of **Edison Kanyabweru v Pastori Tumwebaze SCCA 6/2006** the Supreme Court of Uganda giving effect to the grounds for review under their Order 46 Rule 1 (2) of the Civil Procedure Rule which has similar provisions with our own Order 45 Rule (1) of the Civil Procedure Rule had this to say

“error on application on the face of the record has been defined as an evidence error which does not require any extraneous matter to show it’s incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on record. This may be one of fact but it is not limited to matter of fact and includes also error of Law.”

It has also been held that for a litigant to be entitled to the remedy it seeks under review, the existence of exceptional circumstances which may have resulted in a prejudice or in furtherance of an injustice may be a consideration. The mere fact that a party finds it burdensome to

comply with the order is no guarantee to invoke Order 45 Rule 1 of the Civil Procedure Rule.

I accede to the principle laid down in the locus classicus case of **Mechanical Lloyd Assembly Plant v Nantly 1987 – 88 2 GLR 598** by the Supreme Court of Ghana where it was held as follows intenalia:

“The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances. It is not an appellate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed indeed in the exceptional situation where a fundamental and basic error must have occasioned a gross miscarriage of justice.”

In **Muyodi v Industrial and Commercial Development Corporation & Another 2006 EA 243** the Court of Appeal dealt with the Rules made under Order 45 of the Civil Procedure Rules for purposes of providing interpretation guidance as held in the following passage:

“The court adopting the decision in Nyamogo & Nyamogo v Kogo 2001 EA 174 stated thus:

“That an error on the face of the record cannot be define precisely or exhaustively, there being an element of indefiniteness inherent in it’s very nature and it must be left to be determined judicially on the facts of the case. There is real destruction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial part of Law, are in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no guaranteed for a review although it may be for an appeal.”

In my view to invoke the application for a review remedy under Section 80 of the Act and Order 45 Rule1 there must be a distinct genies or category which can satisfy the threshold to constitute variation, setting aside or substitution of the initial order in the interest of justice.

In the opinion of this court, the applicant motion and affidavit evidence does not fall under Order 45 Rule and protection of the Law within the provisions stated in the order.

This leads the court to consider the provisions of this application under Order 9 Rule (5), (9) and (12) of the Civil Procedure Rules. For purposes of this application, I restate the rules as follows:

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former advocate shall, subject to Rule 12 and 13 be considered the advocate of the party and the final conclusion of the cause or matter including any review or appeal.”

The contest in this application is to whether the secured Law Firm of **Ameli Inyangu & Partners** in commencing an action on behalf of the applicant against the respondent did so pursuant to the provisions of Order 9 Rule 5 of the Civil Procedure Rules. **Mr. Oyomba** in an argument has submitted that by the due date of 29.1.2019 the Firm of **Oloo & Chatur Advocates** was on record for the applicant. The action instituted against the respondent had already resulted in a final Judgment of the court in **CMCC 192 OF 2017**. It is also submitted that the Firm of **Ameli Inyangu & Co. Advocates** before deciding to enter appearance and file pleadings they were under a duty to proceed in accordance with the nature of the duty of tenancy over representation as presented in Order 9 Rule 5.

It is curious to note that the applicant counsel did not seem to appreciate the gravity and protection of Law afforded by the Rules on Legal representation.

In the application under review I derive help from the principles in the following cases **PETER LUDASIA MAKHOHA V THERISIA HUDSON HCC NO. 18 OF 2015 BUSIA ELC** where the judge held thus:

“My understanding of this rule is that where an appeal has been filed it is a continuation of the cause or matter filed in the lower court and the advocate on record in the lower court is deemed to be the advocate for the parties until conclusion of the appeal, unless a notice of change of advocates has been filed and leave has been granted for change of advocate under Order 3 Rule 9A of the Civil Procedure Rules.”

The observations made by **Mr. Oyomba** as submitted showed that although the Firm of **Oloo & Chatur Advocates** continued to exist and did represent the applicant up to including 29.1.2019 their retention was never suspended or terminated by the applicant/ proposed appellant. **Mr. Oyomba** submitted that it was only through proper notice of change of advocates with the previous advocate can the Firm of **Ameli Inyangu** institute Legal proceedings on behalf of the appellant.

It should be recognized that when an advocate is appointed as an agent of litigant to represent him or her in court is a matter arising out of the instruments authorizing his or her appointment as such. Where authority is to be given to render professional legal services post Judgement and there was an advocate on record it is necessary that in giving the specific instructions for the purpose of taking over proceedings. Section Order 9 Rule 5 be complied with by the new counsel. It seems to me that the respondent counsel has a suitable and arguable grievance against the applicant counsel over the validity of his appointment which remains uncontroverted. It is evidence from the procedural history of the proceedings that there is credible omission underlying the coming on record of **Ameli, Inyangu & Co. Advocate** to represent the applicant. In substance, the object to be gained in regard to the scope of Order 9 of the Civil Procedure Rules on change of advocates is in tandem with the provisions of Article 10 of the constitution on national values and principles of governance. Why do I say so,

litigation and administration of justice are insulated with the values and principles i.e. equality, equity, human rights, inclusivity, integrity, transparency and accountability. Some of the key functions of the procedure rules is to entrench transparency, integrity and accountability in the due process of the Law. The higher the quality of the process, the higher the efficacy and efficient quality outcomes of justice deliverables. There is no good reason why the notice of change of advocate and leave to represent the applicant post Judgment was not sought and properly granted by the court or by consent of both counsels.

In light of the above considerations, I agree with the submissions made on behalf of the respondent. According to the facts pleaded in the notice of motion of 14.3.2019 the claim made under clause 3 and 4 on the relief sought have not been shown to be available to the applicant. For all I know the applicant has failed the test under Section 80 of the Civil procedure Act, Order 45 Rule 5 of the Civil Procedure Rules. Certainly nothing can be stated to the contrary by this court based on the provisions of the Rules.

Further, the applicant's case is in contravention of Order 9 Rule 5 of the Rules on notice of change of an advocate post Judgement proceedings.

In these circumstances, the notice of motion is lost with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF FEBRUARY 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Atee for the applicant