



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**  
**MISCELLANEOUS APPLICATION NO 237 OF 2019**  
**IN THE MATTER OF THE ADVOCATES ACT (CAP 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF TAXATION OF COSTS BETWEEN ADVOCATES AND CLIENTS**

**AND**

**ARISING FROM THE HIGH COURT OF KENYA AT MOMBASA, CIVIL SUIT NO. 117 OF 2018, GIRIAMA ANCHING COMPANY LIMITED –VS- DEVELOPMENT BANK OF KENYA LIMITED (FORMERLY NAIROBI HCC NO. 304 OF 2018**

**BETWEEN**

**NYACHOTI & CO. ADVOCATES.....APPLICANT/RESPONDENT**

**VERSUS**

**GIRIAMA RANCHING CO. LTD.....RESPONDENT/APPLICANT**

**RULING**

By Notice of Motion Application dated 25<sup>th</sup> November 2019, Kenga & Co Advocates brought under the provisions of **Order 12 Rule 7, Order 51 Rule 1 and sections 1, 1A, 1B, 3A & 63 (e), of the Civil Procedure Act (cap 21) Laws of Kenya** and all enabling Acts and Provisions of the Law, the Respondent/Applicant sought orders;

- a) That this Court sets aside the dismissal orders of 20<sup>th</sup> November 2019, which the court dismissed the Respondent's/Applicant's Application dated 24<sup>th</sup> September 2019 filed on 27<sup>th</sup> September 2019 for non-attendance or appearance
- b) That this Court reinstates the application dated 24<sup>th</sup> September 2019 for hearing.
- c) That costs of this application be provided for.

The Application was based on grounds;

- a) That the Respondent/Applicant filed an application dated 24<sup>th</sup> September 2019, filed on 27<sup>th</sup> September 2019, challenging the Bills of Costs filed herein on the ground that the suit from which the said Bill is arising was filed without instructions.
- b) That the said application came up for hearing on 20<sup>th</sup> November 2019 but unfortunately the Advocates on record did not appear in Court, leading to its dismissal for non-attendance or appearance in court.
- c) That the Advocate who held brief for the firm of Advocates on record for the Respondent/Applicant correctly informed the said firm of the said hearing date but the said firm mistakenly diarized the matter as coming up for hearing on 21<sup>st</sup> November 2019 instead of 20<sup>th</sup> November 2019.
- d) That this matter involves issues dealing with payment of costs for legal services allegedly offered to the tune of Ksh 450,000,000/- and therefore it would be prejudicial to the Respondent/Applicant if the issue of lack of instructions was not determined before

taxation scheduled 26<sup>th</sup> day of November 2019.

e) That the failure by the advocates on record to appear in court on 20<sup>th</sup> November 2019, was excusable and as such the Respondent/Applicant deserved the orders sought for herein.

### **REPLYING AFFIDAVIT**

The Application is opposed vide a Replying Affidavit 25<sup>th</sup> February 2020, filed on 27<sup>th</sup> February 2020, sworn by Philip Nyachoti, legal representative of the Applicant herein. He averred that the Application was grossly misconceived, gravely misplaced, mischievous, frivolous, scandalous and vexatious and the same constitutes an abuse of the Court process and as such, it should be dismissed with costs.

He stated that the said application was filed in bad faith and as an afterthought in order to frustrate the Applicant. Further, the Respondent has not adduced any sufficient evidence and/or reasons to warrant the review and/or setting aside of the Orders issued by this Court on 20<sup>th</sup> November 2019 dismissing its application dated 24<sup>th</sup> September 2019.

That in any event, the following acts of indolence on the part of the Respondent render the Respondent unworthy of any equitable relief from this Court;

a) The Applicant's Advocate –client Bill of costs dated 18<sup>th</sup> July 2019 was filed in court on 30<sup>th</sup> July 2019 and the same fixed for taxation on 9<sup>th</sup> September 2019, copies of the Applicant's Bill of Costs and Notice of Taxation are marked as **PN-1**.

b) When the matter came up before the Honourable Deputy Registrar on 9<sup>th</sup> September 2019, the parties requested for time to file their respective written submissions and this leave was granted with the Deputy Registrar directing that the matter be mentioned on 22<sup>nd</sup> October 2019 to confirm compliance.

c) On 27<sup>th</sup> September the Respondent filed an application dated 24<sup>th</sup> September 2019 seeking to stay the taxation of the Applicant's Bill of Costs aforesaid and for the said application to be placed before the Honourable Judge to determine whether a retainer existed between the Advocate and client. The said application had not been filed under a Certificate of Urgency and is marked as **PN-2**.

d) On 7<sup>th</sup> November 2019, the Respondent now filed a Certificate of Urgency seeking to have its application dated 24<sup>th</sup> September 2019 aforesaid heard urgently; a copy of the application is marked **PN-3**.

e) By an order issued ex-parte on the same day, this Court directed that the application be served and that further directions be issued on 20<sup>th</sup> November 2019.

f) The Respondent extracted a sealed copy of this Court's order and effected service of the same upon the Applicant on 14<sup>th</sup> November 2019 and as such was fully aware of the said date which could not have been mistakenly diarized as the same appeared in a court Order served by the Respondent. A copy of the Court Order is marked **PN-4**

g) On 20<sup>th</sup> November 2019, the Respondent was not represented in court and in the circumstances, its application dated 24<sup>th</sup> September 2019 was dismissed for want of prosecution. A copy of Court order to that effect is marked **PN-5**

h) On the other hand, following the dismissal of the said Application, the Respondent filed its written submissions to the Applicant's Bill of Costs on 27<sup>th</sup> November 2019 in response to the Applicant's written submissions which had been filed on 5<sup>th</sup> November 2019. A Ruling on the said taxation was scheduled for 2<sup>nd</sup> April 2020. Copies of the written submissions filed by the respective parties are marked as **PN-6**.

That however, the Respondent filed the Application herein dated 25<sup>th</sup> November 2019, seeking to review and/or set aside the dismissal Orders issued on 20<sup>th</sup> November 2019 as an afterthought when pleadings as regards the Applicant's Bill of Costs had already closed with parties having filed their respective written submissions and the Hon. Deputy Registrar having reserved a Ruling in respect of the said Bill of Costs for 2<sup>nd</sup> April 2020. The Orders by the Deputy Registrar regarding the said Ruling have not been set aside and indeed there is no prayer in that regard in the current Application.

That the person who allegedly misdiarized the date of 20<sup>th</sup> November 2019 has not sworn an Affidavit confirming that indeed they did so and in any event, the alleged photocopy of the diary produced by the Respondent and annexed as proof cannot be authenticated in view of the fact that the entry for this matter conveniently appears as the last entry and is thus an indication of the Respondent's application being made in bad faith and as an afterthought.

### **RESPONDENT/APPLICANT'S SUBMISSIONS**

It was the Respondent's submission that the orders of 7<sup>th</sup> November 2019, were extracted and served on the Applicant/Respondent but unfortunately the Advocate on record, Mr. Kenga did not get a copy of the same as he was only informed on phone by the Counsel who held

his brief and/or lodged the said application.

That erroneously, Mr. Kenga, Advocate mis-diarized the matter as coming up for hearing on 21<sup>st</sup> November 2019 instead of 20<sup>th</sup> November 2019 and based on that there was no appearance in court for the Respondent/Applicant on 20<sup>th</sup> November 2019, prompting the dismissal of the main motion of 24<sup>th</sup> September 2019 for non-attendance.

The Respondent submitted that other than the aforementioned extracts, there was also a supplementary affidavit sworn on 17<sup>th</sup> March 2020 by Mr. Kenga, Advocate, accepting the blame that led to the dismissal of the main motion of 24<sup>th</sup> September 2019, on 20<sup>th</sup> November 2019.

In the case HCC (Miscellaneous Application) no 20 of 2016 (Kajiado) James Mwangi Gathara & another vs The officer Commanding Station Loitoktok & Others; and HCC (Miscellaneous Application) No 153 of 2015 (Machakos) Mutua Mwangangi & Another vs James Mutua Mutio; both authorities applied the legal threshold cited the case of Esther Wamaita vs Safaricom, in holding;

*“The discretion is free and the main concern of the Courts is to do justice to the parties before it (see Patel vs E. A Cargo handling services Limited), the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs Mbogo). The nature of the action should be considered, the defence if any should also be considered: and so should the question as to whether the Plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (see Sebei District administration vs Gayali). It also goes without saying that the reason for failure to attend should be considered.”*

In the same Authority they cited the case of Philip & Another vs Augustine Kibede, 1982 -88 KLR 103, where the court held;

*“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I mind the board equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The Court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline.”*

Further in the same authority but citing the case of Muwanga Estates & Another vs N. Part CA 49/2001, it was held as follows;

*“It is how an established principle of the Law that original litigant who is not guilty of dilatory conduct should not be debarred from pursuing his rights in Court because of the negligence of his counsel.”*

#### APPLICANT/RESPONDENT’S SUBMISSIONS

The Applicant in its submission relied on the case of Francis Njoroge vs Stephen Maina Kamore [2018]eKLR, where the court considered the grounds for review under **Order 45, rule 1** as follows

*“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.*

*(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent. He can present to the appellate court the case on which he applies for the review”*

*Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist;*

*a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or*

*b) There was a mistake or error apparent on the face of the record; or*

*c) There were other sufficient reasons; and*

*d) The application must have been made without undue delay.”*

The Applicant submitted that, Mr. Kenga, Advocate who allegedly misdiarized the date of 20<sup>th</sup> November 2019 only swore an Affidavit

stating that he was the one who had misdiarized the date only after the Applicant pointed out the absence of an affidavit by the person who allegedly caused the misdiarization. Further the alleged photocopy of the diary produced by the Respondent and annexed as proof of misdiarization cannot be authenticated in view of the fact that the entry for this matter conveniently appears as the last entry and is thus an indication of the Respondent's Application being made in bad faith and as an afterthought.

### **DETERMINATION**

The Applicant filed the application on 27<sup>th</sup> September 2019 and sought to stay Bill of Costs scheduled for taxation until further orders of the Court.

The Applicant's contention is that the issue of whether a retainer existed between the Firm of Nyachoti & Co and the Client existed or not and for the Court to grant appropriate orders.

On 20<sup>th</sup> November 2019, the Court dismissed the said application of 27<sup>th</sup> September 2019 after the Respondent confirmed that the Applicant was informed of the mention date and failed to appear. In the absence of any appearance or representation in Court or explained circumstances for the Court to consider, the application was dismissed for non-appearance.

The Applicant confirmed that he was served with the Application and verbally notified of the mention date but inadvertently he diarized the 21<sup>st</sup> instead of 20<sup>th</sup> November 2019. He attached copies of his Diary to show the anomaly in diarizing the wrong date. He submitted that the inadvertence is sufficient reason under **Order 45 Rule 1 CPR 2010** to have this Court review its dismissal order and reinstate the application. The review and/or setting aside is discretionary by the Court

The Respondent objected to the application for review of the Court's orders and reinstatement of the application. The Respondent asserted that after the dismissal of the application, the taxation of Bill of Costs proceedings commenced. The Taxing Officer/Deputy Registrar directed Parties to file submissions, which are on record, and the Ruling on taxation of Bill of Costs was scheduled in April 2020. The dismissed application was/is premised on the issue of whether the Respondent was instructed/had a retainer to file suit or not. This issue ought to be determined first before the Judge before taxation of the Bill of Costs is undertaken. The Respondent stated that the dismissed application was filed to forestall the taxation of Bill of Costs.

The issues to be addressed are;

- a) whether there is a reasonable excuse why the Applicant did not attend Court
- b) If the orders are not issued would there be prejudice to the Applicant
- c) In any event what are the appropriate orders to grant.

To the 1<sup>st</sup> issue the Applicant admitted service and notification of mention date of 20<sup>th</sup> November, 2019 but mis-diarized to 21<sup>st</sup> November 2019. Even if that is the case, the Applicant ought to have attended Court or been represented on 21<sup>st</sup> November 2019, the date he diarized to attend Court. No evidence was produced of attendance in Court on the diarized date or any effort thereof to enquire of the matter. Be that as it may, the mis diarizing may have occurred and hence non-attendance. Since the matter was listed on 20<sup>th</sup> November 2019, it could not be listed again on 21<sup>st</sup> November 2019, it may be inconvenient but reasonable explanation for non-attendance on 20<sup>th</sup> November 2019.

Secondly, if the issue of whether there were instructions or not is not first heard and determined, the client will be prejudiced as any Bill of Costs taxed ought to be settled by the Client.

To the 2<sup>nd</sup> Issue, whether there would be prejudice if the order is not granted; the issue in dispute is whether the Respondent was instructed or had a retainer from the client to file Suit or not. It is a contested issue that ought to be heard and determined on its merits first. Thirdly, the actions or omissions of Counsel should not be visited on the Client. Fourthly, each person is entitled to **Article 48 & 50 COK 2010**; access to justice and right to fair hearing under the Constitution. Therefore, applying the overriding principle **Sections 1A 1B & 3A CPA** and the above cited cases, this Court is compelled to tilt its discretion to reinstate the application so as to allow the parties be heard on the pertinent issue that relate to the issue of whether there is a competent Bill of Costs before the Taxing Master/Officer to tax.

It is conceded that the Applicant having been served and informed of the mention date he mis diarized the date failed to attend Court, proffered no reasons and did nothing about it until taxation proceedings commenced and the instant application was filed. For the inadvertence and laxity, which has inconvenienced the Respondent and delayed the disposal of the matter, the Applicant shall pay the Respondent Ksh 20,000/- throwaway costs before setting the reinstated application for hearing and determination.

### **DISPOSAL**

**1. The Court Orders granted on 20<sup>th</sup> November 2019 are hereby vacated, the orders reviewed and the application of 27<sup>th</sup> September 2019 is reinstated.**

**2. The Applicant shall pay to the Respondent forthwith Throwaway Costs of Ksh 20,000/- before setting the reinstated application for hearing.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 28<sup>TH</sup> AUGUST 2020 (VIDEO CONFERENCE)**

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

**MRS CHENGO H/B MR. KENGA FOR THE APPLICANT MR NYAGA H/B MR. NYACHOTI  
FOR APPLICANT/RESPONDENT**

COURT ASSISTANT: TUPET