REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

CORAM: MUMBI NGUGI J

ACEC CIVIL CASE NO. 2 OF 2019

ASSETS RECOVERY AGENCY.....APPLICANT

VERSUS

JAMES THUITA NDERITU.....1ST RESPONDENT

FLAGSTONE MERCHANTS.....2ND RESPONDENT

FIRSTLING SUPPLIES LTD.....3RD RESPONDENT

EXCELLA SUUPLIES LTD.....,4TH RESPONDENT

BETTY MARTHA WAJEWA OMONDI.....5TH RESPONDENT

FLAGSTONE CO. LTD.....6TH RESPONDENT

INTERSCOPE TECH & SERVICES.....7TH RESPONDENT

RULING

1. In the judgment dated 22nd April 2020, this court made an order for the forfeiture of funds held in the respondents' accounts as follows:

a. Kshs 2,981,067 in Account No 0151247643100 held at Standard Chartered Bank Ruaraka Branch; and Kshs 217,598.25 in Account no 0180198054920 held at Equity Bank, Ruaraka Branch in the name of James Thuita Nderitu;

b. Kshs1,088,065.20 in Account No. 0102031937400 held at Standard Chartered Bank Ruaraka Branch; and Kshs 182,463.85 in Account No 0671003217 held at Barclays Bank Ruaraka Branch in the name of Flagstone Merchants Ltd

c. Kshs3,124,964 in Account No 01022010315700 and Kshs 3,160,584.30 in Account No 0102010315701 held at Standard Chartered Bank Ruaraka Branch in the name of Firstling Supplies Ltd

d. Kshs 22,700,580.70 in Account No 0102447666600 held at Standard Chartered Bank Ruaraka Branch in the name of Excella Supplies Ltd

e. Kshs 1,708,290.35 in Account No 0100314850400 held at Standard Chartered Bank Nakuru Branch in the name of Betty Martha Wajewa Omondi

f. Kshs 27,890.70 in Account No 1340266304885 held at Equity Bank Ridgeways Branch in the name of Flagstone Co. Ltd

g. Kshs 434,619.63 in Account No 0180290286272 held at Equity Bank, Ruaraka Branch in the name of Interscope Tech & Services.

2. Following this judgment, the respondents/applicants ***(hereafter 'the applicants')*** filed the present application which is dated 30th April 2020 and is expressed to be brought under the provisions of Article 50 of the Constitution, section 3, 3A 63 (e), and 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules, 2010 and all the enabling provisions of the law. They seek the following orders from the court:

> ***1. (spent).***
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> ***2. THAT pending hearing and determination of the instant Application, this Honourable Court be pleased to issue a stay of execution of the Judgment and Order issued on 24/4/2020 so that the sums of money being the subject matter of this suit remains preserved in the various Respondent's Bank Accounts.***
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> ***3. THAT this Honourable Court be pleased to review and set aside its judgment and order issued on 22/4/2020 against the Respondents that the amounts held in the Respondents accounts as set out in the application dated 12th March 2019 are proceeds of crime and should be forfeited to the state and to pay costs.***
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> ***4. THAT this honourable court be pleased to issue any order that it deems fit.***
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> ***5. THAT costs of this application be in the cause.***

3. The application is based on the grounds set out on the face of the application. The applicants note that the court had in its judgment dated 22nd April 2020 held that the funds held in their respective accounts the subject of the application dated 12th March 2019 are proceeds of crime and should be forfeited to the state. The funds are therefore likely to be forfeited and applied by the state pursuant to the judgment and orders of the court. This would lead to the applicants enduring hardship as it would require parliamentary approval in the next financial year before they can be reimbursed the funds in the likely event that their application succeeds.

4. The applicants state that the orders were given as the court found that the applicant/respondent (Hereafter *'the respondent'*) had established on a balance of probability that the money preserved in the applicants' accounts was proceeds of crime. They cite the judgment of the court at paragraphs 82, 83 and 86 of the judgment in which the court found that the applicants had an evidential burden to show that the funds were legitimate and not proceeds of crime.

5. The applicants contend that there is sufficient reason to justify review and setting aside of the orders of the court. This is on the basis that James Thuita Nderitu, the director and human face behind the 2nd, 3rd, 4th, 6th and 7th applicant companies and the husband of the 5th applicant had provided documentary evidence, particularly those relating to Firstling Supplies Limited including the bank accounts, to their then advocates on record, M/s Gachie & Mwanzia Advocates. He had also instructed the said firm to use the said documents to demonstrate how the sums of monies were transferred from the National Youth Service (NYS) to the various accounts and the explanation behind the movement of money to sister companies.

6. He was surprised, when the judgment of the court was delivered, to learn that the documents he had provided were actually needed and were necessary to defend the suit, contrary to the advice he had been given by his previous advocates on record when he signed the affidavit in opposition to the suit. Upon inquiry by his present Advocates following the judgment, the firm of Gachie, Omwanza & Co Advocates maintained that they did not think it was necessary in the exercise of their professional judgment to include the documentary evidence. This was because, in their view, the suit was premature in the absence of a conviction and it was the state that had the burden of proof.

7. The applicants argue that the failure to present evidence that had been provided is a mistake, error or lapse on the part of the said previous advocates and in the interest of fairness should not be visited upon them as they had acted diligently. It is also their contention that the said failure to present evidence constitutes a sufficient reason for the court to reconsider its hitherto well-reasoned judgment and order.

8. The applicants further argue that there is also discovery of new and important evidence that they could not produce upon exercise of due diligence at the time when the judgment and order of the court were made. They argue that during the investigations that led to the arrest and prosecution of the 1st and 3rd applicants in Milimani Chief Magistrate Anti-Corruption Case No. 8 of 2018, state detectives and DCI officials raided the offices and home of the 1st applicant where documents showing business transactions between NYS and the applicant business entities had always been kept.

9. The 1st applicant had, at the time of this suit, tried to trace some of the documents in support of the applicants' business activities but was unable to obtain them following the raids. However, on or about 20th April 2020, in the process of relocating some of the items from the applicants' business offices situated at Kipro Centre, Westlands, the 1st applicant incidentally came across envelopes which, by chance, had copies of some of the documentary evidence that could have been used in the hearing to show the applicants' business dealings. Such evidence in particular related to invoices, contracts, delivery notes, importation of goods and documents in respect of the business transactions on the part of the 2nd, 3rd, 4th and 7th applicants that could not in any case be availed upon exercise of diligence.

10. Their argument is that this new evidence, together with what had been given to the applicants' previous advocates, provide sufficient basis for the court to review and set aside its decision. They advance several reasons for this argument, which reasons are basically explanations of the various contracts that they contend that they had with the NYS, and the alleged values and payments in respect thereof.

11. The application is supported by an affidavit sworn by the 1st applicant, James Thuita Nderitu. He states that he trades as Flagstone Merchants, the 2nd applicant, and is a director of the 3rd, 4th, 6th and 7th respondents. He is the husband of the 5th applicant, and both are directors of the 4th applicant. Mr. Nderitu sets out the contentions set out in the grounds in support of the application, including the failure by his Advocates then on record to place the evidence which he now seeks to place before the court.

12. He avers that he has been advised by his current advocates that the failure to present evidence constitutes a sufficient reason for the court to reconsider its hitherto well-reasoned judgment and order. He further reiterates the contention in the grounds in support of the application that his documents had been taken in the course of investigations, but that he had found copies of the said documents on or about 20th April 2020 in his office at Kipro Centre, Westlands, while in the process of relocating (documents) from his offices.

13. This evidence relates to invoices, contracts, delivery notes, importation of goods and documents in respect of the business transactions that the applicants had entered into, which could not be placed before the court with the exercise of diligence. He avers that this new evidence, together with what had been given to the applicants' previous advocates, would provide sufficient basis for the court to review and set aside its decision. He replicates the reasons set out in the grounds in support of the application on the basis of which he believes the court should review its decision. He asks the court to review its judgment and set aside the orders that it issued in relation to his properties.

The Response

14. The applicant/respondent (hereafter **'the respondent'**) opposes the application and has filed an affidavit sworn on 18th June 2020 by S/Sgt Fredrick Musyoki, a police officer attached to the applicant as an investigator and part of the team of police officers undertaking investigations relating to offences under the Proceeds of Crime an Anti-Money Laundering Act (POCAMLA).

15. S/Sgt Musyoka deposes that the respondent's Director had, by letter dated 4th May, 2020, written to the Chief Executive Officers of Absa Bank Kenya PLC, Standard Chartered Bank and Equity Bank Limited seeking transfer of the preserved funds held by the respective banks to the respondent in compliance with the judgment dated 22nd April, 2020. The respondent had, on 18th May 2020, obtained its account statement from the Kenya Commercial Bank. The statement indicated that the preserved funds in the applicants' accounts held in Equity Bank Limited and Standard Chartered Bank had been transferred to the respondent's accounts on diverse dates between 11th and 13th May, 2020. The orders sought for the preserved funds to remain in the applicants' accounts pending hearing and determination of the present application could therefore not issue. The temporary orders of stay of execution sought for the preserved funds to remain in the applicants' bank accounts had been overtaken by events prior to the directions and orders of temporary stay issued by the Honourable Court on 13th May, 2020.

16. S/Sgt Musyoki avers that he had noted in his affidavits and further affidavits in support of the application dated 12th March 2019 that the applicants had not discharged the burden of proof that the funds sought to be forfeited were acquired legitimately and that they were involved in complex money laundering schemes. In the written submissions filed on 1st July, 2019 in support of the forfeiture application, the respondent had also submitted that the applicants, in their replying affidavit, had not indicated the nature of business they were carrying out with NYS and had indeed failed to produce any documentary evidence on the large amounts of money they had obtained from the NYS.

17. Further, that during the hearing of the forfeiture application, Mr. Peter Ngumi, Senior State Counsel appearing for the respondent, had pointed out to the court that the applicants had not filed any documentary evidence to support the large receipts of money obtained from the NYS, which had been duly noted by the Court at paragraphs 70, 82, 83, 86 and 89 of its judgment. It was the respondent's deposition therefore that the applicants had at all material times the opportunity to file all documents necessary to defend themselves which avenue they did not pursue.

18. It is also its averment that paragraphs 8, 9, and 16 of the applicants' affidavit in support of the present application are an express admission that the documents in issue were in the applicants' or their Advocates' possession. The documents sought to be introduced cannot therefore be said to be new evidence which could not have been discovered after the exercise of due diligence or which could not be produced at the time when judgment was delivered.

19. According to the respondent, mere discovery of new or important matter or evidence is not sufficient ground for review. Further, that a client-advocate relationship connotes a duty of care and responsibility as between the parties and to the court to be truthful and provide all the necessary facts in possession of a party relevant to the case. It was the respondent's deposition that for material to qualify to be new and important evidence or matter, it must be of such a nature that it could not have been discovered had the applicant exercised due diligence, and that it was not available to the applicant or the court. The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence as is the case in the present matter.

20. The respondent terms the correspondence between the applicants' present and former advocates exhibited in Mr. Nderitu's affidavit as an afterthought in an attempt to procure and strengthen the weak part of the applicants' case by producing evidence to seal the loopholes in the judgment. It also terms the claim that the DCI had carted away the applicants' documents as an afterthought as it was not pleaded in the affidavits in opposition to the forfeiture application.

21. S/Sgt Musyoki avers that the action of presenting the new purported evidence is as a result of having found out the basis of the judgment, going back to the drawing board and fishing out evidence that would bolster the applicants' case. S/Sgt Musyoki notes that the correspondence marked **'JN 4'** in the affidavit in support of the application, which is the letter from Gachie, Mwanzia & Co Advocates is an afterthought as it was issued on 27th April, 2020, as a response to **'JN 3'**, the letter from the applicants' present advocates, which was purportedly written two days later, on 29th April, 2020.

22. It is the respondent's deposition that civil cases are owned by the litigants and not their advocates. Where an advocate fails to prosecute a case to the satisfaction of his client, the client has the option of suing such an advocate for professional negligence but not for review of judgment.

The Applicants' Further Averments

23. In response to the respondent's affidavit, the applicants filed a further affidavit also sworn by James Thuita Nderitu, the 1st applicant. He

avers in this affidavit that the applicants have, in the instant application, presented documents evidencing the nature of business that they undertook with the NYS as well as an explanation for the intra-transfer of money between the applicants. He reiterates that the applicants have supplied evidence to show the nature of the business they undertook, which justified the payments to them.

24. According to Mr. Nderitu, he is the only human face behind the applicants, and this disestablishes the claim of money laundering. He asserts that it cannot be money laundering merely because a company received money from a sister company as this is a common practice in the business world. He maintains that an explanation has been given for the large transfer of money, which was to support sister companies to undertake their businesses and fulfil their contractual obligations. He states that he deeply regrets that the documents that he has now placed before the court were not tendered during the main hearing of the suit, and he asks the court to exercise discretion in favour of the applicants and review its judgment.

The Applicants' Submissions

25. The applicants reiterate that there is sufficient reason to justify review and setting aside of the orders made and there is also discovery of important evidence that they could not produce upon exercise of due diligence at the time of hearing of the case. They further submit that through the affidavits they have sworn in support of their application for review, they have shown the nature of the business they each conducted with the NYS; evidence of importation and delivery of goods; an explanation of the intra transfer of funds among themselves; the taxes assessed and imposed by the Kenya Revenue Authority and their part payment of the said taxes.

26. The applicants submit that the applicable procedure for a matter such as this is Order 45 of the CPC. They rely on the decision in **Official Receiver and Liquidator v Freight Forwarders Kenya Limited [2000] eKLR** in which the court stated with respect to the scope of "sufficient" reasons under Order 45 (1) that the words only mean that the reason must be one that is sufficient to the court to which the application for review is made, and cannot be limited to the discovery of new and important matters or evidence, or a mistake or error apparent on the face of the record.

27. The applicants further submit that to arrive at the correct decision in this matter, the court must consider whether there is sufficient reason, and whether there is new important matter. It is their submission that under the Constitution and section 3 and 3A of the CPC, ordinary considerations of fairness and the need to ensure that justice is served are sufficient reasons for purposes of review. Further, that the rules of procedure notwithstanding, sections 3 and 3A enjoin the court to address injustices.

28. It is their submission further that the fact that the 1st applicant had provided documentary evidence, particularly those relating to Firstling Supplies Limited, including the bank accounts, to the applicants' previous advocates constitute 'sufficient reason' to justify review. The reasons relate to the failure of their previous advocates to place before the court the documentary evidence that was necessary to defend the suit, contrary to the advice the 1st applicant had been given by his previous advocates when he signed the affidavit in opposition to the suit.

29. These reasons also relate to the subsequent inquiry by their present advocates as a result of which the previous advocates maintained that they did not think it was necessary in the exercise of their professional judgment to include the documentary evidence because the suit was premature. They put down the failure to present evidence to a lapse or failure on the part of their previous advocates which should not be visited on them.

30. It is their submission further that assessment of the ground for review is essentially discretionary, with the guiding principle being fairness and justice, considering the nature of the parties before the court and the suit. They contend that this is a suit by a government agency that seeks to confiscate private individuals' property on account that they cannot explain how they earned their money from the government; and that government agencies do not win or lose cases but have the driving objective of ensuring that justice is done. In their view, when the government, which enjoys special status as a party to proceedings, invokes rules of procedure against a substantive claim, the court should adopt a liberal application of law in favour of litigants.

31. The applicants argue that they stand to lose a substantial amount of money partly because their advocate did not produce the documents before the Court. In their view, justice and fairness militate against confiscation of their hard earned monies on account of a mistake or error on the part of their former advocate. They cite the case of **Republic v University Of Nairobi *ex parte* Lazarus Wakoli Kunani & 2 Others [2017] eKLR** which related to an application for enlargement of time to file a substantive motion in judicial review proceedings on the basis that the applicants had been let down by their advocates. The applicants submit that at the centre of the present matter is a blunder and an error of judgment on the part of their former advocates, and they urge the court to consider the parties before it and exercise discretion in their favour.

32. The applicants further rely on the cases of **Belinda Muras & 6 Others vs Amos Wainaina [1978] KLR**; **Phillip Chemwolo & Another** vs**. Augustine Kubede [1982-88] KLR 103 at 1040**; and **Martha Wangari Karua vs. IEBC Nyeri Civil Appeal No.1 of 2017** in support of their contention that they should not suffer because of the failure of their advocates but should have an opportunity to pursue their case on merit.

33. To the respondent's argument that the applicants can pursue their previous advocates, the applicants argue that such a route is untenable. They contend that a suit against their advocates in the present circumstances is unlikely to succeed unless the advocate bypassed a notorious point of law; that the amount of money is colossal and unlikely to be recovered from the advocates, and it would be unfair to impose hardship on the advocates because of a professional judgment.

34. With regard to their argument that there is new evidence, the applicants reiterate the averments of the 1st applicant that their homes and offices were raided and documents seized. They also contend that they discovered in their offices copies of documents in April 2020 which demonstrated the transactions they had with the NYS.

Submissions in Reply

35. The respondent observes, first, that the main ground for review under Order 45 Rule 1 of the CPC is the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within a party's knowledge or could not be produced by him at the time when the decree was passed or the order made. The second main ground is that there is a mistake or error apparent on the face of the record; or for any other sufficient reason. The respondent relies on the Supreme Court of India decision in the case of **Ajit Kumar Rath vs State of Orisa & Others 9 Supreme Court Cases 596 at Page 608** in which the court stated:

> ***"…The power is not absolute and is hedged in by the restrictions indicated in Order 47. The power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for establishing it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule."***

36. It is the respondent's submission that Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. That it excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. In its view, the discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence.

37. The respondent submits that the documents that the applicants seek to introduce cannot be said to be new evidence which could not have been discovered after the exercise of due diligence, nor are they documents which could not be produced at the time when judgment was delivered. It is its submission that the said documents were in the possession of the applicants at all material times incidental to the suit.

38. The respondent cites the case of **Pancras T. Swai v Kenya Breweries Limited [2014]** eKLR in which the Court of Appeal considered the question of discovery of new evidence and important matter which was not within the knowledge of the appellant and stated as follows:

> ***"In Francis Origo & another v. Jacob Kumali Mungala (C.A. Civil Appeal No.149 of 2001 (unreported), the High Court dismissed an application for review because the applicants did not show that they had made discovery of new and important matter or evidence as the witness they intended to call was all along known to them and in any case, the applicants had filed appeal which was struck out before the filing of the application for review."***

39. Reliance is also placed on the case of **Mwihoko Housing Company Limited vs Equity Building Society [2007] 2 KLR 171** in which the court considered the purpose of a review and stated as follows:

> ***"A review could have been granted whenever the Court considered that it was necessary to correct an error or omission on its part. The error or omission must have been self-evident and should not have required an elaborate argument to be established. It would neither have been sufficient ground of review that another Court could have taken a different view of the matter nor could it have been a ground that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or another provision of law could not have been a ground for review. There was no discovery of a new and important matter or evidence which after due diligence was not within the knowledge of the appellant at the time the judgment and decree was passed. There was no error apparent on the face of the record or any other sufficient reason to justify review. In the Court of Appeal decision of Rose Kaiza Vs Angelo Mpanju Kaiza 2009, the Court was categorical that; "An application for review under order 44 Rules 1 of the Civil Procedure Rules must be clear and specific on the basis upon which it is made…"***

40. The respondent notes that in the **Mwihoko** case, the court cited a commentary by Mulla on similar provision of the Indian Civil Procedure Code, 15th Edition at page 2726 that:

> ***"Application on this ground must be treated with great caution and as required by rule 4 (2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

41. The respondent submits that the only reason the applicants seek to present the purported new evidence is because they found out why the court had decided against them. They were going back to the drawing board and fishing out evidence that would bolster their case. The respondent ask the court to dismiss the application as being without merit, relying on the case of **Evan Bwire –v- Andrew Nginda, Civil Appeal No. 103 of 2000, Kisumu, (2000) LLR 8340** in which the court held that:

> ***"An application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case afresh."***

Analysis and Determination

42. I have read and considered the pleadings and submissions of the parties in this matter which I have summarised above. The sole issue for determination is whether this court should review its decision dated 22nd April 2020 as prayed by the applicants.

43. The statutory provisions for review of judgments and orders are set out in Order 45 of the Civil Procedure Code as follows:

> ***1) Any person considering himself aggrieved—***
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> ***(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.***

44. In **Christopher Musyoka Musau v N. P. G. Warren & 8 others [2017] eKLR**, the Court of Appeal held as follows with respect to an application for review:

> ***"This Court has repeatedly held that the jurisdiction and scope of review is not the same as that of an appeal and that the jurisdiction of review can be entertained only if the three conditions stipulated in Order 45 rule 1 are met, that is, where, one, there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or, two on account of some mistake or error apparent on the face of the record, or three, for any other sufficient reason."***

45. The applicants' base their application on the latter of the two conditions set out in order 45(1). They argue that they had evidence to support the source of the money the subject of the application for forfeiture, but that their previous advocates had advised them that it was not necessary to present such evidence before the court. He had, they contend, made the professional judgment that the forfeiture suit was premature, and it was therefore not necessary to present their evidence on the source of funds in their accounts. I note that the said advocate has conceded in writing in the letter dated 27th April 2020 what the applicants now rely on as his lapse or error in judgment. It is this lapse or error in judgment on the part of their previous advocate that the applicants cite as '*sufficient reason*' to justify an order for review of the judgment in this matter.

46. The applicants have relied on **Republic v University of Nairobi *ex parte* Lazarus Wakoli Kunani & 2 others (supra**) in which the court allowed an application for extension of time for filing a substantive motion in an application for judicial review after the applicants' previous lawyers had failed to file the substantive application in time. The court decried the casual and careless approach which the applicants' previous advocates had taken to the matter, which was an important matter impacting on the future of the applicants, university students who had been expelled. But the court noted also that it is not every mistake by an advocate that would be grounds for setting aside orders. It observed as follows:

> ***"…The law is however now that it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the Court. In John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163*** *it was held that:*
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> ***"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent".***
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> *15. In* ***Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002*** ***Kimaru, J*** *expressed himself as follows:*
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> ***"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.***

47. The applicants' argument, as I understand it, is that as the law on asset forfeiture is in its nascent stages, they should be excused for their previous advocate's failure to present evidence before the court, and given a chance to present that evidence and, in a sense, re-litigate the matter afresh. That such failure on the part of their advocate is *'sufficient reason'* for purposes of review because, otherwise, they stand to lose colossal sums of money. This argument, in my view, is not tenable, for two reasons.

48. First, what the applicants are saying is that the review should be allowed so that they can bring in the evidence that their advocate, from his understanding of the law, considered was not necessary and did not therefore present in their pleadings. This, however, in my view, cannot fall within the ambit of *'sufficient reason'* under Order 45(1). If this were to be the case, then no matter would ever come to an end.

All that a party would need to do, following an unfavourable judgment or ruling, is to blame an erroneous position taken in defence of a matter on the erstwhile advocate in order to get an opportunity to re-litigate a matter. I agree in this regard with the position taken in the case of **Ajit Kumar Rath vs State of Orisa & Others** (supra) relied on by the respondent that:

> ***"…A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier.."***

49. In his decision in **Stephen Gathua Kimani -vs- Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR**, Mativo J cited the words of the court in the **Ajit Kumar Rath** case then observed as follows:

> ***""In other words I am not persuaded that the reason offered amounts to "sufficient reason" within the meaning of the rules cited above nor is it an analogous or ejusdem generis to the other reason stipulated in Order 45 rule 1."***

50. The applicants in this case were alleged to have received from the NYS, in an extremely short span, in excess of Kshs 1 billion of public funds. The respondent alleged in its claim against the applicants that in one day, 21st March 2017, the 2nd applicant received in its account a total of Kshs 195,176,275.85- from the court's reckoning, a total of Kshs 235,028,275.85. Between 4th and 13th July 2017, the 3rd applicant received Kshs 795,199,245.65, while the 4th applicant was alleged to have received, on 9th September 2017, Kshs 94,946,120.70. As I observed in the judgment the subject of this application for review, the applicants elected not to address the factual basis of the application, confining themselves to the technical argument that the application is premature. This election, in my view, does not constitute *'sufficient reason'* to justify a court reviewing its decision to admit the evidence that the applicants were at liberty to present, but elected not to.

51.The applicants have placed before this court two letters they aver were exchanged between their previous and their present advocates on the conduct of this matter. In the letter dated 29th April 2020, the firm currently on record writes to the previous firm as follows:

> ***29th April 2020***
>
> ***Gachie Mwanzia & Co Advocates***
>
> ***Dear Mr. Gachie Esq.***
>
> ***RE: ACEC CIVIL SUIT NO 2 OF 2019***
>
> ***ASSET RECOVERY AGENCY V JAMES THUITA NDERITU & OTHERS***
>
> ***We refer to the above matter, wherein we act for firstling Supplies Limited. Our client has informed us that through its director James Nderitu, he had given you all the documents in relation to the claim against it in this matter.***
>
> ***We note from the Judgment of Hon. Justice Mumbi Ngugi that evidence was not tendered. Our client wishes to know why you did not place the evidence given to you before the judge.***
>
> ***We will be grateful if you respond urgently to enable us advise our client accordingly.***
>
> ***Yours faithfully***
>
> ***FOR OKUBASU, MUNENE & KAZUNGU***

52. The reply, surprisingly dated 27th April 2020 and therefore preceding the letter seeking an explanation, is in the following terms:

> ***27th April 2020***
>
> ***OKUBASU, MUNENE & KAZUNGU***
>
> ***OMK LAW OFFICES***
>
> ***RE: ACEC CIVIL SUIT NO 2 OF 2019***
>
> ***ASSET RECOVERY AGENCY V JAMES THUITA NDERITU & OTHERS***
>
> ***We refer to the above matter and to your letter of 24th April 2020.***
>
> ***It is true James Thuita supplied to us the bulky documents that we could have used in this case. This civil suit, was instituted, inter alia, pursuant to section 91 of the Proceeds of Crime and Anti Money Laundering Act, and stated that the reason why the same was to be forfeited was because the money was "PROCEEDS OF CRIME". The crime in question is not related to what our mutual client, Firstlings Supplies Limited is facing before the lower court.***

We felt as we still do that this matter ought to have been brought only after the criminal case. We also felt that the burden of proof lied with the State given the peculiar nature of the framing of the pleadings which we think was wrongful.

This is therefore the reason why we did not include the documents and think that an appeal against the decision will have high chances of success.

Yours faithfully

FOR GACHIE MWANZA & CO

53. The court must observe that the correspondence set out above appears somewhat contrived to suit the purposes of the present application. That notwithstanding, what the correspondence indicates is that the applicants' previous advocate, from his understanding of the law, elected not to present any evidence before this court at the hearing of the forfeiture application. The reasoning for this election advanced by the applicants' advocates on record in support of the present application is that the law on asset forfeiture is still developing, and their previous advocate should be excused for making the wrong call.

54. In my view, however, this is an argument that is of no avail to the applicants. The legislation providing for a civil claim for forfeiture of assets believed to be proceeds of crime, the POCAMLA, came into force on 28th June, 2010. Its provisions on civil forfeiture contained in Part VIII of the Act are clear-section 92 (4) expressly providing that a conviction is not required as a condition precedent to a suit for recovery of funds reasonably believed to be proceeds of crime. It is not sufficient reason for review under Order 45(1) that the applicants and their Counsel adopted a line of defence that completely ignored existing statutory provisions. That the applicants' previous advocate adopted one line of argument, believed it to be the correct position, and did not even consider presenting an alternative argument cannot be a basis for review as contemplated under Order 45.

55. The second argument advanced in support of the application for review, which is in a sense linked to the first, is that the applicants have new and important evidence that they could not produce at the time of the suit with the exercise of due diligence. This new evidence is, first, the evidence that they allege they gave to their advocates, but which he advised them against producing. The second is the documentary evidence they allege they found, in their offices, on 20th April 2020.

56. Order 45 provides that an application for review may be made ***"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."***

57. The applicants' contention that they only discovered the documents on 20th April 2020, on such an important matter as this where, in their own words, they stand to lose *'colossal sums of money'*, is hard to credit. The evidence, as they concede, was always in their office. It is possible that they deliberately decided not to present, or did not have, any credible evidence to explain their receipt, in a matter of days, of public funds in excess of a billion shillings.

58. Whatever their reasons, their explanation after the full hearing of the forfeiture application, after they had every opportunity to present their case, does not satisfy the court that their attempt is anything but an attempt to re-litigate a matter that is already determined. The applicants seek to present a new line of defence after failing to do so when they had every opportunity to do so. To expand the parametres of review under Order 45 to circumstances in which parties wish to re-open their defences would open floodgates for unsuccessful litigants.

59. I accordingly find no merit in this application, and it is hereby dismissed with cots to the respondent.

Dated Delivered and Signed at Nairobi this 21st day of August 2020

MUMBI NGUGI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties electronically with their consent.

MUMBI NGUGI

JUDGE