



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 153 OF 2019

TRIDENT INSURANCE COMPANY LIMITED.....APPLICANT

-VERSUS-

RIPE FREIGHT SERVICES LIMITED.....RESPONDENT

RULING

1. The Applicant herein, Ripe Freight Services Company Limited, through an application dated 18/2/2020 seeks for the following orders:
 - a. Spent;
 - b. That the Honourable Court review the orders made by Honourable Lady Justice D. Chepkwony on the 13th November, 2019 and set aside the same;
 - c. That upon setting aside the orders made on 13th November, 2019 the court delivers another ruling upon reading and considering the written submissions dated 17th July, 2019 by the Respondents that had been filed on 22nd July, 2019 but erroneously misplaced within the court file;
 - d. That costs be in the cause.
2. The application is premised on grounds that the Respondent had filed submissions on 17/7/2019 in respect to the application dated 3/4/2019 and those submissions were served upon the Applicant's advocates. That the court did not consider those submissions before making the ruling delivered on 13/11/2019 having indicated that the Respondents submissions were not on record. That the mistake is attributable to failure of the court's staff who failed to place the submission in the court file. Further that the Respondents right to be heard was compromised due to an erroneous and administrative mistake.
3. The application is supported by affidavits sworn on 18/2/2020 and on 12/10/2020 by **Johannes A. Gwada**; the Respondent's director. The deponent explicates the grounds on the face of the application. A copy of the Respondent's submissions is annexed to the application.
4. The application is opposed vide a replying affidavit sworn by **Alex Kikolya**, the Respondent's Legal Officer on 28/9/2020 wherein he has deponed that where submissions are missing from the court file as a result of either a mistake on the part of an officer of court at the registry, cannot by itself be deemed as an error apparent on the record to warrant the issuing of orders for review. Even if the court did not consider the Applicant's submissions, it is averred that the same was not prejudicial because the affidavit that had been filed in opposition to the Appellant's application was duly considered by the court.
5. According to the deponent, there was no effort by the Applicant's advocates on record to ensure that the submissions were on record. And in any event if they are dissatisfied with the ruling of the court, then the best avenue is appealing against it.
6. When the matter came up for hearing of the application on the 18/2/2020, parties were directed to dispose it by way of written submissions in support of their respective cases. Unfortunately, again the Respondent to this application did not file his submissions though directions were given in his presence. The submission by the Applicant largely mirror the contents in the affidavits and which this court has carefully considered.

The Determination

7. The main prayer sought for in the application is for review of the

Ruling dated 13th November, 2019. Review is provided for under **Order 45 Rule 1** of the **Civil Procedure Rules**:-

“45 (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 an 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.”

8. The foregoing provisions are based on **Section 80** of the **Civil Procedure Act** which provides that:

“any person who considers himself aggrieved: -

a. By a decree or order from which no appeal is allowed by this Act, but from which no appeal has been preferred, or

b. By a decree or order from which no appeal is allowed by this Act.

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

9. Therefore an Applicant seeking an order for review needs to satisfy the court with the following:-

a. There is a 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 or order was made.

b. There is some mistake or error apparent on the face of the record.

c. Or for any other sufficient reason.

10. The Applicant herein seeks to review the ruling delivered by this court on 17/7/2019, on ground that his submissions were not considered when the court wrote the said Ruling. A perusal of the court record shows that on 24/9/2019, **Mr. Tindi** informed the court that both parties had filed their written submissions which they wished to entirely rely on and a ruling date was then fixed. Inadvertently, **Mr. Tindi's** submissions on behalf of the Respondent were not placed in the court file and this explains why the ruling delivered on 13/11/2019 indicates that only the Applicant had filed their submissions.

11. In light of the foregoing, the Applicant submitted that the court in failing to consider submissions which had already been filed had made an error apparent on the record worthy enough to warrant the review of its Ruling.

12. I have taken the liberty to read through the said submissions and the ruling subject to this review application. In the said ruling, this court not only relied on the Respondent's grounds of opposition dated 7/5/2019 and the Replying affidavit sworn by **Johannes A. Gwada** on 21/5/2019, but also other independent legal authorities in arriving at the decision that it did. I need not to reproduce the submissions which were allegedly not considered by the court since they are a replica of the grounds upon which the application is based, alongside the Replying Affidavit.

13. Needless to say, the court considered all the issues canvassed in the written submissions by all parties as they were presented in the Respondent's grounds of opposition and the replying affidavit in arriving at its ruling delivered on 13/11/2019. Therefore, even if I were to rewrite the ruling in consideration of the submissions of the Respondent having considered the same points of law and facts as addressed in the grounds of opposition as well replying affidavit, nothing would change.

14. In the premises, having found no plausible ground to review the ruling delivered on 13/11/2019, the order that commands itself to this court and which I hereby grant is that the Notice of Motion application dated 18th February, 2020 is hereby dismissed with no orders as to costs.

15. The Appellant is however advised to fast track the hearing of the appeal and to fix a date at the court registry for further directions.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 16TH Day of DECEMBER, 2020.

D. O CHEPKWONY

JUDGE

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 March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.