



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2018

JOSEPH KARIUKI NJOKA T/A

JOFOCO CONTRACTORS.....PLAINTIFF/APPLICANT

VERSUS

ACTION AID INTERNATIONAL

KENYA (NGO).....DEFENDANT/RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on the application dated 10th August 2018 seeking for orders that: -

a) *That the honourable court be pleased to review paragraphs 26,28,29,30 and 31 of its ruling delivered by this honourable court on 18th July 2018.*

b) *That consequent upon the said review, this honourable court do grant orders in favour of the applicant in the following terms:-*

i. *The allegations of bias against the trial magistrate have been proved on the balance of probability by the plaintiff/applicant.*

ii. *The upon proving biasness against the trial magistrate the matter is hereby transferred to Wanguru Court*

iii. *The applicant having particularized the alleged forgery of the documents on the part of the respondent counsel an order is hereby issued for DCI to investigate the same*

c) *That in the alternative, this honourable court do review orders issued in and as contained and reflected in the ruling delivered by this honourable court on 18th July 2018 as it deems fit.*

2. In response, the respondent filed grounds of opposition dated 19th October 2018 in which he raised the ground of the application being res-judicata and an abuse of the court process and should be dismissed.

3. The parties disposed of this application by way of written submissions.

B. Applicant's Submission

4. The applicant submits that section 80 of the Civil Procedure Act gives him unfettered right to apply for review. He further submits that he has come upon new and important matters that were not in his possession at the time of prosecution of his case which include bundle of documents in the defense list of bundle of documents which he alleges are forged.

5. The applicant further submits that he is seized with information which point to the fact that the court stamp in this case being misleading as it states the matter was registered in court on 17th June 2015 whereas the respondent received the same on 6th June 2014 which indicates that the respondent received the document before it was registered in court.

6. He further submitted that the Chief Magistrate was biased during hearing of his case and this constituted sufficient reason to warrant review.

C. Respondent's Case

7. The respondent submit that the application is *res judicata* and that the way forward for the applicant is in way of filing an appeal and not in review as the same issues raised by the applicant in the instant application were raised in his chamber summons dated 6th February 2018.

8. The respondents further submit that the applicant has failed to satisfy the requirements for review as he has failed to show what new evidence that has come to his possession to warrant this court upset its ruling delivered on 18th July 2018.

9. The respondent relies on section 7 of the Civil Procedure Act that bars a court from trying a suit that it had already determined between the same parties.

D. Analysis & Determination

10. Basically, the applicant seeks review of this court's ruling delivered on the 18th July 2018 claiming that some new evidence has come to his possession, specifically records of site meetings that were contained in the respondent's bundle of documents and further alleges forgery of court documents and pleadings on the part of the respondent. The applicant further alleges bias on the part of the trial magistrate Hon. M. N. Gicheru, Chief Magistrate.

11. The background facts are that the applicant filed an application dated 6th February 2018 in which he alleged bias against him in CMCC NO. 139 of 2015 by the trial magistrate therein and subsequently urged this ought to transfer the case to the Principal Magistrates court in Wang'uru. This court found the application dated 6th February 2018 to have no merit in its ruling delivered on the 18th July 2018 and dismissed it.

12. The issues for determination is whether the application is *res judicata* and whether the applicant has satisfied the requirements of **Order 45 of the Civil Procedure Rules**.

13. The doctrine of *res judicata* is set out in the **Civil Procedure Act at Section 7** as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

14. The **Civil Procedure Act** also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

15. In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction.

16. This application seeks review of orders given by this court in an earlier application. There has been no other application for review of the same orders.

17. **Order 45(1) of the Civil Procedure Rules** sets out the requirements for an application for review as follows:

“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 review of judgment to the court which passed the decree or made the order without unreasonable delay”.

18. The new and important matters the applicant says he has found include bundle of documents in the defense list of documents which he alleges are forged in that he is seized with information which point to the fact that the court stamp gives the date of filing as 17/06/2015 whereas the applicant received them on 6/06/2014. This suggests that the documents were received before they were filed and amounts to forgery.

19. In the case of Evan Bwire V Andrew Aginda Civil Appeal No. 147 of 2006 cited fin the case of Stephen Githua Kimani V Nancy Wanjira Waruingi T/A Providence Auctioneers [2016] eKLR the Court of Appeal Held as follows: -

“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case afresh. In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.”

20. The bundle of forged documents the applicant refers to were filed in court in June 2015. These documents were served on the applicant by the respondent’s counsel as required by the law which must have been after June 2015. The wrong date on the court stamp must have been an error on part of the court registry. Neither can it be alleged that the respondent forged the documents since the court stamp was not under his possession or control.

21. The court in the case of Muyodi Vs Industrial & Commercial Development Corporation & Another [2006] 1 EA 243, stated: -

“For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.

22. The applicant also submitted that there was bias by the trial magistrate against him. There is no new or important evidence that has been presented in this regard to justify review the court’s ruling of 18/07/2018.

23. The documents were in the file CMCC No. 139 of 2015 at the time the application sought to be reviewed was filed. This cannot be said to be new and important evidence.

24. The upshot of the above is that the application dated 10th August 2018 lacks merit and is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF MAY, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Applicant in person