REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU.

PETITION NO. 11 OF 2016.

AUTO SELECTION (KENYA) LIMITED.....PETITIONER/APPLICANT

-VERSUS-

ANN CHERONO CHERUIYOT.....1ST RESPONDENT

BERNARD PARSOI.....2ND RESPONDENT

STEPHEN OMURO MESA.....3RD RESPONDENT

RULING

1. This matter is coming up for ruling of an Application brought by way of Notice of Motion dated 6th November 2017. It is expressed to be brought under Order 45 Rule 1 & 2, Order 51 Rules 1 & 2 of the Civil Procedure Rules and Section 3A, 1A & 1B of the Civil Procedure Act and filed on the same day seeking for orders that;

i. Spent.

ii. This honourabe court be pleased to Review 10/10/2017 dismissing the Petition and substitute it with a judgment in favour of the Petitioner.

iii. *Cost of the Review abide the outcome of the Petition*.

2. The history of the case is as follows. The Applicant herein was a defendant in ***Nakuru CMCC No. 863 of 2010***. This was a personal injury claim arising out of a road traffic accident involving Motor Vehicle Registration No. KAW346A (Tuktuk). The Applicant claims that the 3rd Respondent had purchased the Subject Motor Vehicle and that he had handed over possession to him.

3. The Subject Motor Vehicle was involved in a Road Traffic Accident on 31/10/2007. The 1st Respondent instituted ***Nakuru CMCC No. 863 of 2010*** seeking damages for the injuries she suffered in the accident. The Applicant filed a Memorandum of Appearance and defence. However, during the scheduled hearing of the personal injury case, the lawyers for the Applicant apparently failed to turn up. Hence, the suit proceeded *ex parte*. Judgement was duly entered in favour of the 1st Respondent.

4. The Applicant responded by filing an application to set aside the *ex parte* judgment and seeking for temporary stay of execution. That Application was dismissed prompting the Applicant to seek another application seeking review of the orders to dismiss the application. That, too, was dismissed.

5. The Applicant, then, proceeded to file an appeal at the High Court being ***Nakuru HCCA No. 163 of 2013*** against the judgment and decree of the lower court. It also sought a stay of execution pending the hearing and determination of the appeal. Both applications were dismissed.

6. Undeterred, the Applicant has filed a petition in the High Court. That, too, was dismissed on the grounds that there was a pending appeal before the Court. The Applicant responded by filing a Notice of withdrawal of the Appeal. They then proceeded to file the current application seeking for review of the orders of 10th October 2017 dismissing the Petition.

7. The application is based on the ground that the judgment delivered on 10th October 2017 was based on the impression that there was an appeal pending in court addressing the same matter as per the petition and the appeal has since been withdrawn.

8. In the supporting affidavit the advocate for the Applicant states his client's case is a clear demonstration on how the arm of the court as failed to address it as his client is being condemned unheard due to the negligence of his previous advocate. He further urges the court to give

the applicant a chance to ventilate his case as he was held liable while he had already sold the vehicle to 3rd Respondent a fact that was admitted by the 2nd respondent and h being denied an opportunity to be heard is an indication there is not justice in our courts.

9. The applicant also seeks stay of execution of both the lower court and the high court judgment.

10. The 1st Respondent strongly opposes the application through a Replying affidavit deponed on 16th November 2017 on the grounds that the application is misconceived, frivolous, oppressive, an afterthought, incompetent and it lacks merit for the supporting affidavit being sworn by an advocate there being contentious issues of facts and it is an abuse of the process of the court. The application does not satisfy the threshold set out in order 45 of the Civil Procedure Rules for review.

11. The Respondent states that no material has been placed before the Honourable Court to show that the appeal has been withdrawn other the notice of withdrawal of appeal dated 31st October 2017 which was filed in court bur not adopted as order of the court, she therefore concludes that the applicant is employing all mechanisms available to deny her the chance to enjoy the fruits of her judgment which was delivered back in 2013.

12. The Application is grounded on Order 45 (1) of the Civil Procedure Rules. It provides as follows:

> *Any person considering himself aggrieved –*
>
> *By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *By a decree or order from which no appeal is hereby, and who from the 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 the or der 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."*
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> *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.*

13. The question for determination is whether the Applicant can persuade the Court to review its decision. They cite ***Eunice Wangui Kiragu v Mary Adhera Adhaya (Nakuru ELC No. 330 of 2012***) for the proposition that Order 45 Rule 1 is not confined only to situations where there is a discovery of new matter. They also cite an Indian Supreme Court case: ***Parimal v Veena [2011] 3 SCC 545*** to explain that the words "sufficient reason" in Order 45 cover their situation. The main argument the Applicants advance is that the Court's judgment ought to be reviewed because the Applicant's case has never seen the light of day. They insist that the right to be heard must be protected at all costs and the only just course of action is for the Court to grant the orders they seek so that they can present their evidence to Court. Their evidence is that it had sold the Motor Vehicle at the time of the accident.

14. It is true that the right to be heard is a cardinal rule in our justice system. It is true that the Courts will always, whenever possible, do everything just in their power to ensure that cases are decided on their merits and after hearing all the parties. However, it is also true that litigation must come to an end. That, too, is a cardinal rule of justice. A party cannot be permitted to vex another party with the same litigation in various mutations only on the basis of the fact that the party has a right to be heard. This is one reason why the doctrine of review as stipulated in Order 45, Rule 1 is so circumscribed. It is not meant to re-open the floodgates of litigation and allow parties to re-litigate issues already determined between them.

15. In the present case, the Applicant's real complaint is that it was through the mistake of counsel that it failed to present its case in the lower Court. If that be true and it is left saddled with a judgment debt it must satisfy, it has a remedy: sue the advocate concerned for negligence.

16. In ***Joseph Mwangi Mutero & Another v Rachel Wagithi Mutero (Succession Cause No. 76 of 2005)***, Justice Mativo explained in extensor the limits of the review doctrine as it exists in our law:

> *Counsel for the applicants strongly argued that the application before the court is premised on "sufficient reason." The reason offered for the delay is that the applicants previous advocates are to blame for failing to take the necessary steps until the present advocates came on record. The crucial question to resolve is whether indeed the alleged failure on the part of the advocates constitutes sufficient reason. Discussing what constitutes "sufficient reason" in an application for review, the Supreme Court of India in the above cited case of* ***Ajit Kumar Rath vs State of Orisa& Others*** *stated "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"*
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> ***Shah, Owuor*** *and* ***Waki JJA*** *in the case of* ***Zacharia Ogomba Omari and Another vs Otundo Mochache*** *held that "An application for review based on any other sufficient reason which is not analogous to or ejusdem generis with the first two circumstances in Order 44 (Now O. 45) is not available where the reason given is that their advocate was not available at the hearing when his absence amounted to taking the Court for granted."*
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> *A similar view was held in the case of* ***Sadar Mohamed vs Charan Signh and Another*** *where it was held that "Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."*

> ***Mulla*** *in the Code of Civil Procedure (writing on Order* ***47*** *Rule* ***1*** *of the Civil Procedure Code of India), (the equivalent of our Order* ***45*** *Rule* ***1****), states that 'the expression sufficient reason' is wide enough to include misconception of fact or law by a Court or even by an advocate."* <u>*This definition only covers misconception of facts of law but not negligence or conduct of an advocate*</u>.
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> *In the present case, there is in action in that the blame is placed on the advocate then on record at the material time who is alleged to have failed to act and or the blame is placed upon the said advocate though no details have been given to demonstrate that the advocate failed to act as alleged….I am not persuaded that the reason offered amounts to 'sufficient reason' within the meaning of the rules cited above nor is it analogous or ejusdem generis to the other reasons stipulated in Order* ***45*** *Rule* ***1.*** (Internal quotations removed)

17. This extensive quotation makes it very clear that the circumstances covered under the Applicant's application in this case do not constitute <u>*sufficient reason*</u> to review the decision of the Court. It is that simple. It has been said in ***Evan Bwire v Andrew Nginda*** where the Court remarked as follows: "*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 a fresh."*

18. Our decisional law is consistent that negligent or culpable conduct by Counsel does not constitute sufficient reason to review Court orders absent exceptional circumstances. Our case law holds that pure and simple inaction or mistakes by an advocate does not amount to a mistake such as to attract the positive exercise of discretion by the Courts. Indeed, our jurisprudence draws a distinction between mistakes/errors and negligence. See, for example, ***Mawji v Lalji [1992] LLR 2778 (CAK)*** and ***Kinuthia v Mwangi [1996] LLR 505 (CAK).***

19. This is a case which has a long and torturous history. At every step on the way, the Applicant has claimed that a mistake of Counsel or misapprehension of his Counsel it to an unfavourable decision by the Court. In its most recent iteration, the Applicant filed both an Appeal and a self-standing Petition. The Court dismissed the Petition because an appeal from the lower Court was still active. To correct that error and get a second bite at the cherry, the Applicant withdrew that appeal and then brought the present application.

20. This is as close to an abuse of the process of the Court as one can get. When a party brings these kinds of numerous applications on the same issue, its opponent is entitled to feel vexed by the litigation. Right to a fair trial does not extend to a right to endlessly vex a party over the same matter. Litigation must come to an end at some point. In my view, this should be the end of this litigation.

21. Re-opening this matter which is based on a road traffic accident which occurred on 31/10/2007 – more than thirteen years ago – on the basis of advocate's failure to act is, in my view, otiose. Matters should lie where they are.

22. 20. **Consequently, I find no merit in the Notice of Motion dated 06/11/2017. It is dismissed with costs**.

23. Orders accordingly.

Dated and delivered at Nakuru this 7th August, 2019

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JOEL NGUGI

JUDGE