



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

SUCCESSION CAUSE NO. 503 OF 2013

IN THE MATTER OF THE ESTATE OF MAERO TINDI (DECEASED)

RULING

1. On 12th February 2018, this matter was listed before Judge Musyoka for hearing of the applicant's application dated 24th September 2013 seeking revocation of grant issued on 13th June 2013. On the material day, the applicant's counsel Mr. Amendi was not ready to proceed on grounds that he had not informed his client of the hearing date as he mistook the date for a mention. His application for adjournment was vehemently opposed by Webare counsel for the respondent on grounds that the date was taken by consent and that the applicant had on similar ground been granted previous adjournments hence an abuse of the court process. The court considered the application and found that the date had been taken by consent and that the matter was an old one which had been adjourned severally at the behest of the applicant.
2. The hon. Judge found that the applicant (objector) was not keen and serious in prosecuting his case. He therefore rejected the application for adjournment and ordered for hearing to proceed. When the objector failed to proceed, the objection application was struck out for want of prosecution.
3. Subsequently, the applicant lodged a notice of appeal dated 23rd February 2018 intending to challenge the orders dismissing the application. On 9th May 2018, the applicant filed summons of even date seeking to set aside and or review the orders of Justice Musyoka issued on 12th February, 2018 on grounds that non attendance of the objector for hearing on 12th February 2018 was occasioned by her advocate who failed to notify her hence counsel's mistake should not be visited on his client and that issues in controversy are so sensitive requiring ventilation by each party and determination on merit.
4. Application is premised on grounds on the face of it and affidavit in support sworn by Mr. Billy Amendi counsel for the applicant. Mr. Amendi however gave a chronology of events pertaining to the various hearing dates taken and who was responsible for the adjournments that were granted. He basically admitted that it was his mistake not to have informed his client to attend court as he thought it was a mention.
5. In response to the application, the respondent filed a replying affidavit of even date on 31st May 2018 together with grounds of opposition challenging the application arguing that the application was struck out legally and procedurally. The respondent challenged the inordinate delay in filing the application and that the applicant having filed a notice of appeal intending to challenge the order, cannot turn around and ask this court to set aside substantive orders made by a Judge of the same competent jurisdiction hence sitting on an appeal on a colleague's orders.
6. Secondly, the respondent took issue with the application being supported by an affidavit sworn by counsel instead of the applicant thus terming the application incompetent for lack of supporting affidavit.
7. During the hearing, both counsels adopted their respective affidavits in support and reply to the application. Mr. Munyao holding brief for Mr. Amendi counsel for the applicant however indicated that the applicant had filed a notice withdrawing the notice of appeal and that there was no inordinate delay in filing the application. Mr. Wabare for the respondent opined that there was nothing new to warrant a review of the orders sought.
8. I have considered the application herein, supporting affidavit, replying affidavit and oral submissions by both counsels. There is no dispute that the application for revocation dated 24th September 2013 was struck out on 12th February 2017 by Justice Musyoka for want of prosecution owing to the absence of the objector/applicant. Counsel for the applicant owned up that the failure to avail the objector was his hence pleaded for the court not to punish his client because of his mistake. After evaluating the application herein, supporting affidavit, replying affidavit and oral submissions, issues that rise for determination are:

(1) Whether the order for review can apply or issue in the circumstances;

(2) Whether by setting aside the orders of 12th February 2018 will amount to sitting on an appeal of a Judge of the same jurisdiction;

(3) Whether the mistakes of an advocate can be visited on his client.

9. The law governing review of court orders is entrenched under Order 45 (1) of Civil Procedure Rules which provides that any person who is aggrieved with a decree or order of the court from which an appeal is allowed but from which no appeal has been preferred may apply for review of the order or judgment without unreasonable delay upon discovery of new or 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 case.

10. In the instant case, the impugned orders were made on 12th February 2018 and the current application filed on 9th May 2018 about three months from the date they were pronounced. It has not been explained to the satisfaction of the court why it took about three months to file the instant application. Three months can clearly be described as inordinate delay. In the case of **Abdulrahman Adam Hassan vs National Bank of Kenya Kisumu High Court Civil Case No. 446/2001**, Judge Tanui found that an unexplained delay of 3 months is unreasonable. In this case there is no justifiable explanation given by the applicant to warrant exercise of unfettered discretion of the court in her favour. On that ground alone this application fails.

11. The applicant has not demonstrated discovery of new or important matter or evidence that was not within her knowledge after exercising due diligence. There is no proof of neither apparent mistake nor error on the face of the record or any other sufficient ground. The orders of Justice Musyoka are substantive in nature. The reasons advanced before me for setting aside or reviewing the order of Justice Musyoka made on 12th February 2018 are the same ones laid before him and rejected hence nothing has changed. To ask this court to set aside Justice Musyoka's orders would amount to sitting on an appeal on orders of a court with similar jurisdiction. To allow this will also amount to opening fresh litigation. The fact that Justice Musyoka is on transfer does not mean that my views will be different from his.

12. It is not unusual for counsels to revive matters already determined after the determining Judge has left that particular station. Orders for review cannot issue on the belief by litigants that one Judge will hold a different view from the other. In the case of **POP- in (Kenya) Ltd and 3 others vs Habib Bank A.G. Zurich (1990) eKLR** the court of appeal held:

“Parties are not permitted to begin fresh litigation because of the new view they may entertain of the law of the case, or new versions which they may present as what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted, litigation would have no end and except when legal inequity is exhausted.”

13. As to whether mistakes of an advocate should not be visited on his client, the same will depend on the circumstances of each case. Justice is not a one way affair. Justice is about fair game between litigants (adverse parties). Each party is entitled to a fair, just, affordable and expeditious delivery of justice. The application that was struck out has been lying before court since 2013 five years down the line. The court observed that the applicant was largely to blame for the delay. To delay the same further will amount to an injustice and a breach of Article 50 & 159 of the Constitution with regard to expeditious delivery of justice. A counsel who is responsible for the suffering of his client due to negligence or lack of due care or exercise of due diligence should be able to bite the bullet and indemnify a client rather than punish the innocent party on the other side of the game.

14. In arriving at this holding, I am guided by J. Ringera's holding in the case of **Trust Bank vs Portway Stones (1993)Ltd and Others Nairobi (Milimani) HCC No. 413/1997: (1997) LLR 1310 (CCK) (2001) IEA 269** where he held:

“There are no reasons why errors of commission and omission by a duly instructed advocate who is obviously the agent of the instructing party should not be visited on his principal. If the acts and omissions of the agent with actual or ostensible authority in other spheres of life are not without consequences to their principals why should it be to the legal profession?”

15. With regard to the affidavit in support being sworn by the counsel representing the applicant, Order 19 (3) of the Civil Procedure Rules is clear on the same. An advocate can swear an affidavit if the source of information is disclosed and more particularly where he is seized of the facts in issue. In this case it is the advocate who is seized of the facts in issue hence nothing wrong in swearing the affidavit as the reasons for non attendance of the objector is within his knowledge. Having held as above, the application herein dated 9th May 2018 has fell short of the threshold set out under order 45(1) hence dismissed for lack of merit with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2017.

J.N. ONYIEGO (JUDGE)

In the presence of:

M/S Githinji.....Counsel for applicant

M/S Amendi.....Counsel for respondent

Edwin.....Court Assistant