



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION MILIMANI**

**MISCELLANEOUS APPLICATION NO. 17 OF 2016**

**THE ASSETS RECOVERY AGENCY.....APPLICANT**

**VERSUS**

**CHARITY WANGUI GETHI.....1<sup>ST</sup> RESPONDENT**

**JEDIDAH WANGARI WANGUI.....2<sup>ST</sup> RESPONDENT**

**JOHN KAGO NDUNG'U.....3<sup>RD</sup> RESPONDENT**

**PATRICK ONYANGO OGOLA t/a**

**OGOLA AND MUJERA ADVOCATES.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. The Originating Summons dated 14<sup>th</sup> March 2016 was served upon the respondents on various dates culminating to the 1<sup>st</sup> and 2<sup>nd</sup> respondents filing their advocates' notices of appointment on 21<sup>st</sup> April 2016 and the 3<sup>rd</sup> respondent filing his on 9<sup>th</sup> October 2016.
2. On 27<sup>th</sup> February 2017 both parties appeared before court. The respondents sought leave to file their responses within 30 days. The petitioner was granted corresponding leave to file a further affidavit in response within 2 days from the date of service. Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed their joint replying affidavit on 13<sup>th</sup> June 2017. The 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their replying affidavits on 12<sup>th</sup> June and 13<sup>th</sup> June 2017 respectively. On the same day (13<sup>th</sup> June 2017) the court directed parties to file their written submissions in readiness for highlighting.
3. Unfortunately, the applicants did not file their further replying affidavit within 21 days upon being served with the replying affidavits of the respondents. On 16<sup>th</sup> May 2018 the petitioner/applicant sought for enlargement of time to file their submissions. The court granted them a further 30 days within which to file the submissions. The matter was fixed for mention on 4<sup>th</sup> July 2018 to confirm compliance. On that day, M/s Muchiri holding brief for Mohamed for the applicant sought for more time to file a further affidavit.
4. Taking into account that it had taken the applicants over one year to file a further affidavit, the court declined to extend time. Consequently, the applicants proceeded to file the supplementary affidavit on the same day without leave of the court. Later on 19<sup>th</sup> July 2018, the applicants filed an application dated same day under certificate of urgency seeking review of the court's orders issued on 4<sup>th</sup> July 2018 declining leave for filing and service of the supplementary affidavit dated 4<sup>th</sup> July 2018. It is this refusal that culminated to filing of this application with a view to setting aside the orders of the court.
5. The application is brought pursuant to Article 159 (2) (d) and 50 of the Constitution and Order 45 and 50 (5) of Civil Procedure Rules. It is premised upon grounds on the face of it and affidavit in support sworn by one Mohamed Adan in which he averred that the delay in filing a further affidavit was due to conducting further investigations into the funds stolen from the NYS. He further contended that the further affidavit makes reference to pertinent issues referred to in the already filed submissions. That the affidavit having been filed, the respondents will not suffer any harm.
6. In reply, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit on 8<sup>th</sup> August 2018 the 3<sup>rd</sup> respondent filed his on 13<sup>th</sup> August 2018 opposing the application on grounds that the applicant had not met the threshold for review under Order 45 of the Civil Procedure Rules and that the delay in filing the further affidavit was inordinate.

7. When the matter came up for hearing on 26<sup>th</sup> September 2018 both counsels canvassed the application orally thereby adopting their averments in their respective affidavits.

8. I have considered the application herein, affidavit in support and replying affidavits plus oral submissions by counsels. The issue before me is whether the application meets the threshold for grant of orders of review.

9. The law governing issuance of review orders is order 45 rule 2 (1) (b) of the Civil Procedure Rules. Under this provision, a party can seek review of a decree or order from which an appeal is allowed but from which no appeal has been filed or a decree or order from which no appeal is allowed. It is incumbent upon the applicant to prove that there is discovery of new or important matter or evidence which after due diligence was not within his knowledge or on account of mistake or apparent error on the face of the record or any other sufficient reason.

10. In the instant case, the only ground cited for delay was the complexity of the matter necessitating further investigations. There is no dispute that leave to file further affidavit was granted way back 27<sup>th</sup> February 2017. Even after the replying affidavits were filed on 13<sup>th</sup> June 2017, the applicant did not do anything one year down the line.

11. When a party files a suit in court the same should be ripe for prosecution and not for further investigation. The applicant has not alleged discovery of any new evidence or material facts after 4<sup>th</sup> July 2018 when the court refused to enlarge time. There is no apparent mistake or error on the part of the court. These grounds are therefore not available for review to succeed.

12. I am therefore left with the ground of whether there is any other reasonable cause persuasive enough to warrant review of the orders of 4<sup>th</sup> July 2018 declining filing and service of the further affidavit outside time. Grant of orders to extend time is an issue that falls squarely within the discretion of the court. It is a creature of equity which can be enjoyed only if one seeking to enjoy it acts equitably. Extension of time is not an automatic right to a litigant. It is subject to proof that the applicant acted reasonably in the circumstances in complying with the orders. In the case of **Nicholas Kiptoo Salat vs IEBC and 6 Others (2013) eKLR** the court of appeal held that courts must never provide comfort and cover to parties to exhibit scant respect for rules and time lines hence, the applicant cannot invoke Article 159 (2) (d) of the Constitution to oust mandatory rules of procedure.

13. Unfortunately, the applicant went ahead and filed a further affidavit without seeking leave to extend time. I do not find sufficient reason for the delay in filing a further affidavit for more than an year. The applicant has not demonstrated due diligence in doing what they were required to do. I have not been persuaded enough to review my orders of 4<sup>th</sup> July 2018. Accordingly, application for review dated 19<sup>th</sup> September 2018 be and is hereby dismissed and the supplementary affidavit filed on 4<sup>th</sup> July 2018 without leave of the court expunged from the court record.

Order accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF OCTOBER, 2018.**

**J.N. ONYIEGO**

**JUDGE**