



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO 341 OF 2012

FLORENCE DOROTHY

SEYANOI KIBERA MOSCHION.....1ST PETITIONER

JOHN WAMITI NJAGI.....2ND PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

COMMISSIONER OF POLICE.....2ND RESPONDENT

THE DIRECTOR CRIMINAL INVESTIGATION....3RD RESPONDENT

THE CHIEF MAGISTRATE COURT MILIMANI...4TH RESPONDENT

CONSTANTINE GEORGE SPHIKAS.....1ST INTERESTED PARTY

DEBORAH ACHIENG ADUDA.....2ND INTERESTED PARTY

RULING

1. By a Notice of Motion dated 12th April 2017 and filed in court on 13th April 2017, **John Wamiti Njagi**, the applicant, sought an order of this court to review the judgment delivered herein on 14th March 2013 to the effect that the applicant does not bear costs of the petition as had been ordered in the judgment.
2. The application which was brought under section 80 of the Civil Procedure Act and Order 45 rule 1 and of the Civil Procedure Rules is supported by the applicant's affidavit also sworn on 12th April 2017 and the grounds on the face of the motion.
3. The grounds upon which the application is premised as can be seen from both the face of the motion and the supporting affidavit, are that the applicant who was the 2nd petitioner, never instructed the firm of **Lumumba Mumma and Kaluma Advocates** to institute the petition on his behalf; that the said firm in instituting the petition acted without instructions from the applicant; that the 1st petitioner had no authority to sign pleadings on behalf of the applicant and that the applicant never executed authority in favour of the 1st petition to sign such pleadings binding him to the petition.
4. The applicant contends that being an advocate of this Court, he was capable of representing himself in the petition and could ably swear his own affidavit. He also contends that he never participated in the proceedings in the petitioner and was not aware of its existence. He feels, therefore, that he should have not been made to bear costs of the petition and wants this court to review the order for costs to that extent.
5. **Florence Dorothy Seyanoi**, the 1st petitioner herein, filed a replying affidavit to the application sworn on 31st May 2018 and filed in court on 8th June 2018 opposing the application. She deposes that the applicant and her were arrested and charged with criminal cases at the Chief Magistrates Court at Nairobi; that whereas she was charged in criminal case No. 1133of 2012 the applicant was charged in criminal case No.

6. It is her deposition that they both instructed **Mr. Peter Kaluma** to represent them in the criminal cases; that after they were released on bond, they met **Mr. Kaluma** in his chambers and instructed him to institute the petition seeking to stop their prosecution in the criminal cases and the firm obtained orders staying their prosecution. She deposes that **Mr. Kaluma** only stopped representing them after he was maliciously enjoined into the criminal proceedings.

7. **Constantine George Sphikas**, the 1st interested party, also filed a replying affidavit sworn on 27th September 2017 and filed in court on the same day opposing the application. He deposes that the application is frivolous and has no merit. He contends that the court having made an order for costs, the remedy available to the applicant was to appeal against the judgment; that for review to succeed, there should be an error apparent on record, discovery of new and important matter or some other good reason.

8. He contends that the petition was instituted following the petitioners' prosecution in the Chief Magistrate's Court on **Criminal case Nos 1133, and 1134 of 2012** and that the 1st petitioner in the petition sworn the supporting affidavit with the authority of the 2nd petitioner/Applicant. The 1st interested party further contends that although the judgment was delivered in 2013, the applicant did not take any action until 2017.

9. During the hearing of the application, **Mr. Wamiti** who was the 2nd petitioner and is the applicant herein, submitted that he did not give instructions for the petition to be filed on his behalf hence there was no retainer. He stated that although the 1st petitioner's affidavit states that instructions were given, that is not true and that there was no authority to the Advocates instructing them to file the petition.

10. **Miss Jakinda** submitted in opposition to the petition, that the 2nd petitioner/applicant instructed the firm of **Lumumba Mumma and Kaluma Advocates** to represent them and that the court awarded costs against the two petitioners on dismissing the petition. In learned counsel's view, the application is meant to saddle the 1st petitioner with costs. She asked that the application be dismissed. **Miss Mwachiro**, learned counsel for the 1st respondent left the matter to court.

11. I have considered the application, the responses and submissions. I have also perused the record herein. The application seeks review of the order for costs only so that the 2nd petitioner/applicant is exempted from paying costs of the petition. The primary reason advanced in support of the application is that the 2nd petitioner did not instruct that the petition be instituted on his behalf. The applicant argues that he never gave instructions either for execution of pleadings or affidavits on his behalf. He therefore feels that he should not be made to bear costs of the petition when he was erroneously enjoined in the petition.

12. The 1st petitioner and 1st interested party oppose the application contending that there were instructions to file the petition on behalf of both petitioners. The 1st interested party points to the fact that in the supporting affidavit, the 1st petitioner deposed that she had authority to swear the affidavit on her behalf and that of the 2nd petitioner/applicant. She deposes as much in the affidavit in response to the application.

13. What is before court is an application for review brought under Section 80 of the Civil Procedure Act and Order 45 rule (1) of the Civil Procedure Rules (2010). The Act and rules lay down the basis upon which a court may review its judgment, decree and or order. There is no doubt that both Section 80 and Order 45 rule (1) confer on the court wide discretion to review its judgments decrees and orders. This can only happen if there is a mistake or error apparent on the face of the record, discovery of important matter or because of any other sufficient reason.

14. The import of Section 80 as read with Order 45 rule (1) was appreciated by the Court of Appeal in the case of **Benjoh Amalgamated Ltd and another v Kenya Commercial Bank Ltd** (2014)eKLR thus;

“In the High Court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review.” (Emphasis)

15. The Court's power of review is meant to ensure that it serves justice to the parties before it but not cause injustice or hardship in situations that can be avoided or corrected. That is why **Musinga JA** observed in **Equity Bank v West Link MBO limited** [2013] eKLR, that Courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met.

16. With this in mind, it emerges clearly that for a party to succeed in an application for review, he/she must show that there is a mistake or error apparent on the face of the record, or that there is discovery of a new and important matter or evidence that has come to the attention of the applicant which he could not lay his hands on at the time the judgment, decree or order sought to be reviewed was made or that there are other sufficient reasons.

17. From the material before court, the only reason why the applicant has come to court a review of the order for costs is that he did not give instruction for the filing of the petition. I understand the applicant to say that he was wrongly enjoined in the petition and proceedings leading to the order for costs.

18. The petition was filed on 6th August 2012. It was signed by **Peter Kaluma**, a partner in the firm of **Lumumba Mumma and Kaluma Advocates**. It was supported by the affidavit of the 1st petitioner who deposed that she had authority to swear that affidavit on behalf of the applicant, the 2nd petitioner in the petition. The judgment was subsequently delivered in 2013 when the order for costs was made but this

application was only filed in 2017. The reason for delay as can be seen from the further affidavit of the applicant sworn on 24th April 2018, is that he was not notified of the existence of the petition and the orders for costs and that he only came to know about the existence of this matter when he was served with the Party and Party Bill of costs.

19. I must state here that I am not persuaded that the applicant has met the threshold for seeking review as required by both Section 80 and Order 45 rule 1 of the Civil Procedure Act and Rules respectively. First, I see no mistake or error apparent on the face of the record or discovery of new and important matter and the applicant has not appointed to any. The fact that the applicant did not instruct the law firm to file the petition in his name is not discovery of a new or important matter. It cannot also be said to be *any other sufficient reason* as contemplated both in section 80 and Order 45 rule (1).

20. In *National Bank of Kenya Limited v Ndungu Njau* (Civil Appeal No. 211 of 1996), the Court of Appeal stated that;

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be ground for review.”

21. And in *Pancras T Swai v Kenya Breweries Limited* [2014] eKLR the Court of Appeal stated with regard to sufficient reason as a ground for review that the words, “*for any sufficient reason*” must be viewed in the context firstly of Section 80 of the Civil Procedure Act which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. The court emphasized that the discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 45, relates to issues of facts which may emerge from evidence.

22. The 1st petitioner has sworn an affidavit explaining that both the applicant and her instructed **Mr. Peter Kaluma of Lumumba Mumma and Kaluma Advocates** to file the petition. She swore that **Mr. Kaluma** was the one representing both of them in the criminal cases. These facts have not been seriously disputed by the applicant. There cannot be doubt therefore that what the 1st petitioner has stated is a true reflection of the circumstances under which the petition was filed and that indeed the applicant not only knew of it but also acquiesced to its institution.

23. If on the other hand, the applicant was convinced that the petition was filed without his instruction or authority and that he was not aware of the same, that is a matter he could pursue in another forum against the law firm but cannot it found the basis for reviewing the order for costs.

24. On the basis of what I have stated above and considering the evidence on record, I see no merit in the application. Consequently, the application dated 12th April 2017 is declined and dismissed with costs to the 1st interested party.

Dated Signed and Delivered at Nairobi this 30th Day of November 2018

E C MWITA

JUDGE