



REPUBLIC OF KENYA

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 339 OF 2015

**IN THE MATTER OF AN APPLICATION BY KELLEN WANJERI KIMANI FOR AN ORDER
OF MANDAMUS PURSUANT TO LEAVE GRANTED ON 14/12/2015**

IN THE MATTER OF ORDER 53R 3 (1)

KELLEN WANJERI KIMANI.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

PRINCIPAL SECRETARY DOD.....2ND RESPONDENT

RULING

1. On 8th August, 2016, this Court while declining to **direct the respondent to release the sum claimed by the applicant to her, directed the Kenya Defence Force to furnish the applicant with the information on the total sum due to the Estate of the deceased from the Kenya Defence Force within 30 days from the date of the said decision.**

2. **The applicant is back before this Court vide a Motion on Notice dated 31st October, 2016 seeking the following orders:**

A. The second respondent be prosecuted for disobeying a lawful order under the penal code.

B. This court be pleased to allow the second part of the application dated 29th February 2016 and amended on 1st March 2016 to wit that the amount certified to be due to the application Kellen Wanjeri Kimani be paid to her within a certified time and in this case immediately.

C. This court be pleased to order the Inspector-General of the National Police Service through the D.P.P to investigate the conduct of officers of the K.D.F and in particular Kirimi Kaberia the Principal Secretary Col D.O. Odeny, Capt. Antony Munyeti Major Kilunda Senior Sergeant Mbugua Senior Sergeant Ongeru Lance Corporal P. Maina Ndirangu (Karen) and Joy Maina and Chilaka Lumiti of the A.G's Chambers in connection with the following;

a. The introduction of a fake marriage certificate into the records of the deceased Peter Chege Kimani and the origins of the said certificate.

b. The release of the deceased's phones/identity card and all other confidential

documents to one Beth Wangari which enabled her to withdraw Kshs.293,200 from the deceased's bank account at Co-operative Bank City Hall Branch.

c. The whereabouts of Kshs.10,000,000 payable to the deceased by the insurance company following his death after the Garissa attack as he was on duty and was covered for such eventuality.

d. The circumstances surrounding the directive to the treasury that benefits payable to the estate of the late Peter Chege Kimani be paid to the Public Trustee.

3. According to the applicant, an order was made herein requiring the K.D.F to supply her with the accounts of what she was entitled to as the result of her son's death which order was not obeyed.

4. According to the applicant, her full application was that she be supplied with the accounts and the money she was entitled to be released to her within a specified time. She averred her said prayer followed the letter from the K.D. F dated 25th May 2015 in which KDF acknowledged that she was named her son's next of kin in the K.D.F's official documents and what they needed to release her son's benefits to her were letters of administration. The applicant further averred that it was mentioned by KDF for the 1st time that her son had published a marriage within one **Beth Wangari Githnji** yet the applicant had never heard of any such marriage.

5. According to the applicant, she decided to investigate the said allegation upon which the said marriage certificate was found to be fake and that no such marriage took place at the church stated in the said "Marriage Certificate". The applicant disclosed that even before the above letter was written to her the Board of Enquiry at Embakasi had already confirmed all rights to her deceased son's gratuities, emoluments and pensions and attendant monthly payments upon one **Beth Wangari** based on the fake marriage certificate. As a result, she filed a suit in the Civil Division of this court to stop any such payments being made to the said **Beth Wangari**. According to the applicant, amongst the payments the most important and the highest is the one from the insurance company for it amounts to Kshs 10,000,000/=.

6. The applicant contended that the K.D.F, **Wangari** and Officers in the A.G's Chambers and in particular **Joy Maina** and **Chilaka Lumiti** were involved in the racket that includes denying any knowledge of the receipt of the said money or that it is payable at all which matters according to the applicant need immediate investigation.

7. It was averred that on presentation of the confirmed grant to the K.D.F a letter was written to the applicant's counsel stating that the terminal benefits of her son would be forwarded to the Public Trustee Nyeri. However there was no of the money payable by the insurance company which paid only 2 months after the death of the officer. To the applicant, the said money from the insurance company is not safe hence the need by those involved both in K.D.F and the A.G's Chambers to suppress any mention of it. The applicant therefore asserted that since there is nothing holding the release of the monies payable to her the same should be released forthwith to enable her meet her obligations to both her estate and that of her deceased's son. She disclosed that the grant of letters for her son's estate was made before expiration of six months in order to pay a loan he had borrowed using the applicant's property as collateral which property is about to be sold by Public Auction for recovery of this loan.

8. The applicant contended that the application before this Court was unnecessary as already orders had been issued by **Justice Muigai** to release the amount due to the applicant on confirmation of the grant and that the said orders were directed at the military and in particular **Col. Odeny** was prepared to release the funds but was misled by the AGs chambers in particular **Joy Maina** and **Chilaka J.**

Respondents' Case

9. In response to the application, the Respondent averred that judgment in this matter was delivered on 8th August 2016 wherein the court declined to direct the respondent to release the said sum to the applicant

and only directed the Kenya Defence Force to furnish the applicant with the information on the total sum due to the estate of the deceased from the Kenya Defence Force within 30 days from the date of the decision. According to the Respondents they complied with the said judgment as directed by the court.

10. According to the Respondents, if the applicant was aggrieved by the said decision, her only recourse lay in filing an appeal to the Court of Appeal as provided for in section 8(5) of the **Law Reform Act**. Accordingly, the application before the court is an abuse of the court process and based on a grave misunderstanding of the law by the applicant's advocates.

11. It was the Respondent's view that prayer A as sought in the application cannot be granted for the following reasons:

a. This Court has no mandate to prosecute as that is reserved solely for the Director of Public Prosecutions by dint of the provisions of article 157 (6) of the Constitution.

b. The applicant has not demonstrated the disobedience of any lawful order by the 2nd Respondent.

12. To the Respondents, prayer B as sought in the application cannot also be granted since the court has already made a determination on this matter and is therefore *functus officio*. Similarly, prayer C as sought by the applicant cannot be granted as it is not within the ambit of this honourable Court and in any event those issues were never before the court for determination. The Respondents contended that there must be an end to litigation and the application before the court is an attempt by the applicant to unnecessarily clog the justice system with frivolous and vexatious applications.

Determinations

13. Having considered the application, the affidavits both in support of and in opposition to the application, this is the view I form of the matter.

14. The application made by the applicant is not clear in its terms what exactly the applicant is seeking. This Court appreciates that pursuant to the decision of the Court of Appeal in **Mumby's Food Products Limited & 2 Others vs. Co-Operative Merchant Bank Limited Civil Appeal No. 270 of 2002** it has a residual jurisdiction and may where circumstances warrant review its orders. However, 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 a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion. Misconstruing a statute or other provisions of the law therefore cannot be a ground for review. The Court cannot similarly in an application for review grant orders which were not in the contemplation of the parties at the time the earlier application was being argued.

15. In its earlier decision this Court expressed itself as hereunder:

“In this case the only document exhibited by the applicant to show entitlement to the sum in issue is a copy of the Limited Grant of Letters of Administration *Ad Coligenda Bona*. It is expressed therein that the purpose of the said grant is for collecting protecting and accounting for the deceased estate. In other words the said grant does not entitle the applicant to distribute the estate. The applicant, from the affidavit, however seems to require the said money for the purposes of meeting the aforesaid obligation. It ought to be appreciated that the holder of the letters of administration is in the position of a trustee with respect to the beneficiaries of the estate. He does not necessarily become a beneficiary by the mere fact that he holds the said letters. Where it becomes necessary for him or her to disburse some of the funds belonging to the estate it is my view that he or she ought to obtain an order from the Court from which he or she obtained letters of administration. Otherwise, he must proceed to seek for and obtain a confirmation of the letters of administration. Although the applicant contended that the said letters were confirmed, there is no such evidence on record.

16. I agree with the Respondents that prayer A cannot be granted in these proceedings as this Court cannot direct that the 2nd Respondent be prosecuted. If the applicant believes that a crime has been committed it is upon her to lodge her complaint with the relevant authorities for appropriate investigations and necessary action.

17. With respect to prayer B no basis has been laid before this Court to warrant this Court making a variation to its earlier orders. The applicant has not shown that there is a discovery of a new and important matter or evidence which, after the exercise of due diligence, was not within her knowledge or could not be produced by her at the time when the decree was passed or the order made. She has not alluded to the existence of some mistake or error apparent on the face of the record and has not satisfied the Court that there is a sufficient reason warranting review.

18. With respect to prayer C it is clear that what are being sought are entirely fresh orders which were not the subject of the proceedings before the Court at the time the earlier decision was delivered. Such orders cannot be granted by way of an application in the nature of review which seems to be what the applicant is seeking. If the applicant is not seeking review then this Court is *functus officio* since section 8(3) of the **Law Reform Act**, provides as follows:

No return shall be made to any such order, and no pleadings in prohibition shall be allowed, but the order shall be final, subject to the right of appeal therefrom conferred by subsection (5) of this section.

19. It is therefore my view that the issues being raised herein are merely an afterthought meant to close the stable after the horses have bolted. In **Ndungu Njau vs. National Bank of Kenya Limited Civil Appeal No. 257 of 2002**, the Court of Appeal expressed itself as follows:

“Neither in the application, its grounds or supporting affidavit nor in the instant appeal was or has been raised any important matter or evidence which was not within the knowledge of the appellant at the time the decree was passed in spite of exercise of due diligence which requires strict proof...Nor was there any submission before the Court about any mistake or error apparent on the face of the record to warrant an order of review which was sought. The error or omission on record must be self-evident on the part of the court and should not require elaborate argument in order to be established...There was no reference to such mistake or error before the trial Court and the grounds of appeal in the instant appeal do not point to any such omission or error.”

20. Similarly in **National Bank of Kenya vs. Ndungu Njau Civil Appeal No. 211 of 1996 [1995-98] 2 EA 249**, the same Court expressed itself as follows:

“In an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought. Although this was, in the court’s view, a fatal omission, yet the court in the broad interest of justice, asked counsel for the appellant on which ground under Order 44 he had argued the said notice of motion in the Superior Court and he replied that he had sought the review on the ground that there was a mistake or error apparent on the face of the record of the Superior Court...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 and the error or omission must be self-evident and should not require an elaborate argument to be established. It will not be sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached erroneous conclusion of the law...Misconstruing a statute or other provision of the law is not a ground for review...In the instant case the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of law, it would be a good ground for appeal but not for review. Otherwise the learned Judge would be sitting in appeal on his own judgement which is not

permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

21. In the premises I agree with the Respondents that the instant application is frivolous and amounts to an abuse of the court process. The same is clearly devoid of merits. Accordingly, the same is dismissed but with no order as to costs. Orders accordingly.

Dated at Nairobi this 25th day of May, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Macharia for the Applicant

Miss Odhiambo for Miss Maina for the Respondent

CA Mwangi