



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO 176 OF 2016**

**GEORGE NDEMO SAGINI.....PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**REGISTRAR OF COMPANIES.....2<sup>ND</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA.....1<sup>ST</sup> INTERESTED PARTY**

**NATIONAL ASSEMBLY.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. This is a Notice of Motion dated 31<sup>st</sup> July 2017 and filed in Court on the same day. It is brought under **Articles 48** and **159** of the **Constitution**, **order 45** of the Civil Procedure Rules, 2010, Sections 80 and 3A of the Civil Procedure Act and all enabling provisions of the law, seeking in principle, an order in the following terms.

*That the Honourable Court be pleased to review its judgment and order made on 7<sup>th</sup> July 2017 allowing the amended petition dated 3<sup>rd</sup> May 2017 declaring Legal Notice No 61 of 2016 issued by the 1<sup>st</sup> respondent null and void by suspending the immediate implementation of the said judgment and orders thereto for a period of six months.*

2. The Notice of Motion is supported by grounds appearing on its face and the affidavit of **Kenneth Gathuma**, the Registrar of Companies the 2<sup>nd</sup> respondent herein. The applicants state that in order to ease the way of doing business and more so in registering companies, it was recommended that the period would be reduced significantly if certain steps were taken. In view of this the registration fees was consolidated to Kshs10,000 through legal notice No 61 of 2016.

3. Prior to this, there were two types of charges, namely; stamp duty collected by the Ministry of lands under Stamp Duty Act (Cap 480) and Registration Fees which was collected by the Registrar of Companies. This made the process of doing business not only expensive but also time consuming.

4. The respondents state that publication of two Legal Notices Nos. 60 of 2016 and 61 of 2016 was

meant to correct this. According to the deponent, the petitioner challenged implementation of Legal Notice No 61 of 2016 and after a hearing, the Court (Lenaola J, as he then was) nullified Legal Notice No 61 of 2016.

5. It is deposed that the judgment was entered without the court being made to appreciate that Legal Notice No 61 ought to have been read together and applied in tandem with Legal Notice No 60 of 2016 contained in Gazette Notice No 49 of 12<sup>th</sup> April 2016 which was not challenged.

6. According to the applicants, the import of the judgment is that only registration fees can be levied which will negatively impact on the government revenue. The deponent states that it will be difficult to implement the judgment herein since the process of registering companies has been automated and will require redesigning of the system otherwise the system cannot access stamp duty and apply pro-rated fees. The applicants state that unless a grace period is allowed, implementation of the judgment will not be possible.

7. The petitioner filed a replying affidavit sworn on 31<sup>st</sup> August 2017 opposing the Notice of Motion. The petitioner states that the Legal Notice was done without following the law and was therefore found null and void. He deposed that the Court does not have the flexibility of suspending its decision since the law is clear that if statutory instruments are not placed before parliament within 7 days, they are of no effect.

8. He also deposes that the applicants have not come to Court with clean hands. He contends that the system can be redone to accommodate the situation at hand as they wait to comply with the law. The petitioner contended that only the judge who heard the matter and made the decision can review the same.

9. At the hearing of the motion Mr Sekwe and Miss Koech appeared for the applicants, but there was no representation on the part of the respondent. Mr Sekwe moved the motion and submitted that the application for review was merited. According to counsel, the trial judge had stated in the judgment that the respondents had not adduced evidence to address the pertinent issues raised in the petition and for that reason granted the petition quashing Legal Notice No 61 of 2016.

10. According to Counsel, there were two legal notices namely Nos. 60 and 61 and annulment of legal notice No 61 left legal notice no 60 intact. Counsel submitted that system of registration had been adjusted and it will not be easy to reverse it hence the stay sought. He submitted that the respondents are intent in re- enacting the regulations and therefore prayed for grant of the orders sought in the application. Counsel relied on the case of **Anthony Otiende Otiende v Public Service Commission & 2 Others** [2016] eKLR and **George Bola v Attorney General** [2017]eKLR.

11. I have considered the application, the grounds in support in the motion, the supporting affidavits as well as the replying affidavit. I have also considered submissions by counsel for the applicant. The respondent did not attend Court although he filed a replying affidavit which the Court has duly considered.

12. The motion is grounded principally under sections 80 and 3A of the civil procedure Act and order 45(1) of the Civil Procedure Rules 2010. It is for review of the judgment delivered on 12<sup>th</sup> July 2017, on behalf of Hon Mr Justice Lenaola(as he then. was). Section 80 of the Civil Procedure Act, and Order 45 of the Civil Procedure Rules give this Court jurisdiction to review its judgments decrees and or orders for correction of errors or mistakes on the face of the record or for any other sufficient reason. Section 80 provides-

***“Any person who considers himself aggrieved;***

***a) by a decree or order from which an appeal is allowed but from which no appeal has been preferred; or***

***b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of***

**judgment to the court which passed the decree or made the order; and the court may make such order thereon as it thinks fit”(emphasis)**

13. On the other hand Order 45 (1) provides as follows:-

**“Any person considering himself aggrieved:-**

**a) by a Decree or Order from which an appeal is allowed, but from which no appeal has been preferred; or**

**b) by a Decree or Order from which no appeal is hereby allowed-**

**and who from the discovery of new and 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 reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court, which passed the decree or made the order without unreasonable delay”.(emphasis)**

14. When the Court is exercising its review jurisdiction, it exercises discretion which it must exercise judiciously. Order 45(1) gives situations under which the court may review its judgment decree or order. There should be an error or mistake apparent on the face of the record, discovery of new and important evidence that could not be availed at the time of the hearing despite due diligence or any other sufficient reason. An application for review should be made without delay.

15. The applicants have called upon this Court to exercise review jurisdiction in their favour. What I gather from the application and submissions by Counsel, is that by annulling Legal Notice No 61 of 2016, way of charging fees for registration companies to revert to its original position and the respondents will have difficulty in implementing that decision because the system that is used to charge registration fees for companies was configured in a way that took into account the changes that were implemented by Legal Notice Nos. 60 and 61. They also say that Legal Notice No 60 was left intact hence the challenges they face now with this decision cannot be resolved immediately to enable them go back to the earlier system.

16. Counsel for the applicant pointed out paragraph 49 of the judgment to show that certain facts and evidence was not placed before the Court hence the court arrived at the decision without the benefit of such evidence from the respondents.

17. The law on review is clear that a party seeking review under Section 80 and Order 45(1) must show that there is an error or mistake apparent on the face of the record to form a factual basis for a review. The error or mistake must be apparent and not difficult to search from the record. or there must be new and important evidence which the person applying for review could not place before court despite due diligence and therefore he could not produce it in Court at the time the matter was heard and the decree or order passed, or that there is some other sufficient reason.

18. In the case of **National Bank of Kenya Ltd v Ndungu Njau (Civil Appeal No 211 of 1996)** the Court of Appeal stated with regard to review;

**“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 must be self-evident and should not require elaborate arguments 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 in correct position of the law and reached an incorrect conclusion”**

19. The exercise of review jurisdiction is meant to assist the Court correct errors or obvious mistakes in

the judgment, decree or order but not to aid a party who could otherwise exercise the right of appeal or a party who would simply want to persuade the court to change its mind on an issue it has already pronounced itself.

20. The foundation for the jurisdiction on review was well stated by the Court of Appeal in the case of **Benjoh Amalgamated Ltd and another v Kenya Commercial Bank Ltd** (2014)eKLR thus;

***“The basic philosophy inherent in the concept of review is acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice.”***

21. The Court of Appeal appreciated that circumstances under which this court can undertake review and the latitude given to the court by section 80 of the civil procedure Act. It stated;

***“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)***

22. Section 80 gives this court power to review its judgments and make orders it may think fit. This jurisdiction is given to the court to ensure that its actions in exercising the review jurisdiction meet the ends of justice in order to ameliorate injustice or hardship if any.

23. The applicants’ counsel referred to paragraph 49 of the judgment where the court stated.

***“Prayers (ii) and (iii) seek judicial review orders of certiorari and prohibition consequent upon the declaration above. The effect would be that if the said orders are granted, then the requirement for an increment/ adjustment in registration fees for companies would not be effected. I have agonized over these particular prayers because there is no doubt that the intention of the respondent in enacting the impugned regulations under the Ease of Doing Business Initiative were noble but face the clear expectations of the Constitution and statute, it is very difficult to find any lawful reason why the said orders should not be granted. It is even more disconcerting that the respondent not only failed to address pertinent issues of law and fact raise by the petitioner but also failed to file any submissions to justify a different cause of action by the court. In the event, the two prayers must also be granted.”(emphasis)***

24. The Court was clear in that paragraph that it appreciated the good intentions of the legal notice, but the respondent not only failed to satisfactorily answer the issues raised in the petition but also failed to file submissions to address the legal and constitutional issues raised therein. That would mean the respondent did not do much to help the Court yet there were pertinent constitutional and legal issues raised by the petitioner. The Court also lamented that the respondent did not justify the Court taking a different course given the value of the impugned regulations to the public. I perfectly understand the court’s lamentation and it is a serious indictment on the part of the 1<sup>st</sup> respondent’s office.

25. I have carefully considered the application before Court examined the affidavit as well as the annexures. The respondents have moved the court, under the review jurisdiction asking the Court to suspend the judgment for sometime to enable them comply. The judgment annulled the Regulations because they were enacted without complying with the Constitution and the Statutory Instruments Act.

26. The applicants’ counsel have contended that there is another legal notice No. 60 that remains in force but which was to be read together with the one annulled. If that be the case, these are matters that were within the respondent respondent’s knowledge and which ought to have been brought to the court’s attention during the hearing of the petition. Furthermore, I do not know the import of the said Legal Notice No 60 of 2016 and whether it was to be enacted in accordance with the law or not. Whatever the case, the existence of Legal Notice No 60 of 2016 cannot constitute a ground for review in terms of order

45 (1).

27. Looking at the application and the material before Court, the respondents have not identified any error or mistake on the record that would entitle them to a review on those grounds. Secondly they have not argued that there is new and important evidence that even with due diligence, they could not produce in Court before the judgment was made. Those are the two main grounds upon which one can successfully approach the court for review.

28. However there is another ground which can justify an application for review that is; **any sufficient reason**, This must be a reason that is justifiable to warrant the court review its judgment, decree or order. The respondents though not clearly stating so, appear, in my view, to base their arguments on this ground. I say so because the reason advanced is that there is difficulty in complying with the judgment of the Court given that the payment system had already been designed to accept a single payment and it will take time to re-work and reverse it to the position it was before it was implemented.

29. The court in its judgment made three orders, first, it nullified Legal Notice No 61 of 2014. Second, it issued an order of certiorari quashing the legal notice, and third, it prohibited the respondents from implementing the Legal Notice and in particular, adjusting the fees payable for the registration of companies..

30. As it is, this legal notice is no longer law and its implementation is prohibited. The Court had power to suspend its decision to allow the applicants comply with the law. What the judgment and decree meant was that the applicants had to go back to the drawing board and have the regulations made in accordance with the Constitution and the law. They could have asked the Court suspend its decision to give them time to comply but did not do so. They now realize that it is critical and have moved this court at this time seeking time to take steps to comply with the law in enacting the regulations.

31. As was stated by **Musinga JA** in the case of *Equity Bank v West Link MBO limited* ( civil Application No. 78 of 2011) ,2013 eKLR, 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 the ends of justice are met. What **Musinga JA** meant was that where a party approaches the court albeit with some level of optimism that the court will hear him and grant him some measure of relief, the court should be able to exercise its discretion hear the party make a determination on the case to meet the ends of justice.

32. The applicants are before this court but obviously their application does not satisfy the requirement review on account of for error or mistake on the face of the record. There is no discovery of new and important evidence either. The court can however still determine their application on the basis of any other sufficient reason. But what does any other sufficient reason mean and is the fact that the applicant is unable to reverse the process of charging fees good reason for allowing their application for review?

33. In the case of *Pancras T Swai v Kenya Breweries Ltd* [ 2014] eKLR the Court of Appeal had this to say with regard to *any other sufficient reason* for purposes of review jurisdiction under section 80 of the civil procedure Act and order 45(1) of the rules;

***“Order 44 rule 1 (now Order 45 rule 1 in the 2010 Civil Procedure Rules) gave the trial Court discretionary power to allow review on the three limbs therein stated or “for any sufficient reason.” ... As repeatedly pointed out in various decisions of this Court, the words, “for any sufficient reason” must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, 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.”***

34. In *Shanzu Investments Limited v. Commissioner for Lands* (Civil Appeal No. 100 of 1993 the Court of Appeal also stated;

***“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous.”***

35. I have considered this application and the grounds in support. it is clear that the applicant is apprehensive that the reversal of the system will take time and in the process it will impact negatively on the revenue to be collected from members of the public seeking to register companies. All the applicants want from the court is a “grace” period, to enable them comply with the judgment by enacting the regulations in compliance with the constitution and the law. The applicants have attached in their further affidavit documents to show that they have embarked on the process of re-enacting the regulations. This was in response to the petitioner’s assertion that the applicants had not shown that they had done anything to rectify the situation.

36. A perused the petitioner’s replying affidavit shows that his notable concern is that the regulations were annulled hence there cannot be a review. However it must be understood that this court has a wide and unfettered discretion to review its judgments, decrees or orders as can be seen from section 80 of the Civil procedure Act. This has been reinforced by the Court of Appeal decisions quoted above, the overall aim being to ensure that the ends of justice are met. The petitioner has not also said that he will suffer any prejudice if the orders sought are granted. In any case, the annulled gazette notice and reduced registration fees for company if of benefit to the public including the petitioner.

37. From the record the learned judge appreciated the good intentions the respondents had in enacting the annulled regulations and it is clear at paragraph 49 of the judgment reproduced elsewhere in this ruling, that the court agonized over the matter and in particular the orders it was to make. Save for the respondents’ counsel’s inaction the court would have had no difficulty in suspending its orders bearing in mind the effect of the orders on the progress that had already been made.

38. The petitioner raised a somewhat misplaced argument that the order for review can only be made by the judge who wrote the judgment or made the order. Ordinarily that should be the case but in the circumstances of this case, the judge who wrote the judgment is no longer a member of the court and therefore, any judge of concurrent jurisdiction with the judge who wrote the judgment or order can deal with the matter. Section 80 also refers to the Court as opposed to the judge. For the above reasons, I am inclined to grant the application.

39. Consequently, the application dated 31<sup>st</sup> July 2017 is hereby allowed as follows;

***1. The judgment and decree of this Court dated 7<sup>th</sup> July 2017 and delivered on 12<sup>th</sup> July 2017 is hereby suspended for SIX (6) MONTHS from the date of this ruling to enable the respondents finalize the process either of reversing the payment system or enactment of new regulations whichever comes earlier.***

***2. In default of meeting the timelines in 1 above, the judgment shall take its full effect.***

***3. No order as to costs.***

**Dated Signed and Delivered at Nairobi this 13<sup>th</sup> Day of October 2017**

**E C MWITA**

**JUDGE**