



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 595 OF 1988

EIIZABETH WANGUGU MUNGARA.....APPLICANT

VERSUS

ANTONY MAINA KAIRUKI.....1ST RESPONDENT

MUCHEMI MUGEMI.....2ND RESPONDENT

RULING

Before the court for determination is the Notice of Motion dated the 4th day of September, 2015 brought under order 45 Rule 1 and order 51 Rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act Cap21 laws of Kenya. The applicant seeks to review orders made on costs in the Ruling of the court dated the 4th day of March, 2015 and/or set them aside altogether. He has also sought for the costs of the application.

The application is premised on the grounds set out on the body of the same and it's supported by the annexed affidavit of Elizabeth Wanjugu Mungara sworn on the 4th September 2015. The grounds as set out are that; the maintenance of the same order is contrary to justice, is unjust and/or oppressive and would otherwise not serve ends of justice.

In her affidavit, the applicant depones that she had just learnt of the court ruling of the 4th March, 2015 which required her to pay costs to the 2nd Respondent. That as a Civil Servant, her work involves a lot of travelling throughout the country from time, to time and that since March 2015 she had been out in the field in the course of official duties to places where there is no mobile network and she could not contact her advocate on record in the case.

That upon her return, she instructed her advocate to apply for review of the orders and hence the application herein. She contends that, the application that gave rise to the ruling of 4th March, 2015 was necessitated by an error on the face of the record which the learned Judge regreted and it was none of her fault that the said application had to be made and that her advocate did not even oppose the said application to correct the said error.

It is for that reason that she contends that it would be unfair and contrary to good justice to penalize her in costs for the application which was otherwise not necessary had the said presiding Judge not overlooked. She has urged the court to allow the application as the advocate for the 2nd defendant has already drawn a bill of costs in the sum of ksh 120,566 much more than the amounts allocated to her by the court.

The 2nd defendant has opposed the application vide grounds of opposition dated 5th October, 2015 and a

replying affidavit of Hasmukhrai Manilal Parekh sworn on 5/10/2015. The replying affidavit sets out the facts whereas the grounds of opposition are mainly on points of law which are that; the plaintiff's application has no merits and does not comply with order 45 of the Civil Procedure Rules, the plaintiff has not shown that the ruling of the court made on 4/3/2015 had any mistake or error apparent on the face of the record, the plaintiff has not shown that she has discovered any new and important evidence which was not within her knowledge when the application dated the 1st August 2011 was heard, there is too much delay in bringing the application, the plaintiff's object in bringing the application is to delay the matter and that the 2nd defendant has been kept out of his funds which was deposited several years ago in HFCK.

The application was disposed off by way of written submissions which the parties highlighted in the court. The court has considered all the materials before it. This is a very old matter and so much has happened since it was filed. From what I gather from the record and the submissions by the parties, the application herein was necessitated by the ruling of 4th day of March 2015 by Hon Justice Onyancha who awarded costs to the 2nd Respondent. The said ruling was made pursuant to the application dated 1st day of August 2011 and filed in court on the 2nd August 2011. The said application was brought by the 2nd defendant and it sought to review orders that were made on 15th October 2010 following an application dated 20th July 2007.

It is clear that the plaintiff /Respondent opposed the application dated 1/8/2011 but when the same came up for hearing, her advocate conceded to the same but parties could not agree on who was to meet the costs of the application. The learned Judge invited the parties to make submissions and vide, a ruling dated 3rd December 2012, he granted costs of the application to the applicant, who was the 2nd defendant.

In the ruling dated the 4th day of March 2015, the court referred to its ruling of 3rd December 2012 and made several orders as set out therein, one of the orders being that, the 2nd defendant is entitled to costs of the application dated 1st August 2011.

The application herein is brought under order 45 rule 1 of the Civil Procedure Rules. Under the said provision, order for review would only be granted if the following conditions are satisfied;

- a)** Discovery of new and important matter of evidence which, after exercise of due diligence, was not within the knowledge or could not be produced by the applicant at the time the decree was passed or Order made,
- b)** There was some mistake or error apparent on the face of the record.
- c)** Or for any other sufficient reason
- d)** Such an application has to be made without unreasonable delay.

It is noted that the application seeks to review orders that were made on 4th March 2015 and not the orders made on the 3rd December 2012. As rightly argued by the counsel for the Respondent, the costs of the application dated 1st August 2011 were awarded in the ruling dated 3rd December 2012 and the reference by the Judge on costs, in the Ruling dated 4th March 2015 was a mere repetition and cannot be considered as a separate order. The Ruling of 3rd December 2012 is still intact and has not been reviewed and/or set aside. In view of the above, it is my considered view that there is no error apparent on the face of the record and there is no discovery of new and important matter of evidence. In the ruling of 4th March, 2015, the court merely corrected an error that was on the face of the record in the application dated 1st August 2011.

The applicant has also not sworn sufficient cause to warrant the orders sought herein.

On the issue of delay, it is noted that the application was brought six months from the date of the ruling. Though the applicant avers that since March 2015 she was out on official duties and that she was unable to communicate with her advocate, the letter by her advocate dated 28th July 2015 betrays her. The said letter refers to the ruling dated 4th March 2015 and in that letter, it is stated that she accepted the position as set out therein. In essence, the applicant herein accepted the contents of the ruling dated 4th March 2015. The import of Part of that ruling is that costs were awarded to the 2nd defendant. The effect of that letter to my mind are two fold;

a) That as early as 28th July 2015, the applicant herein was aware of the ruling dated the 4/3/2015. It is not therefore true when she depones that she had just learnt of the ruling when the application herein was filed on 4th September 2015.

b) Having accepted the position as set out in the ruling dated 4th March 2015, she cannot challenge the same, as she has done, in the present application.

In view of the aforesaid, I find that the application dated the 4th September 2015 has no merits and the same is dismissed. In view of the history of this matter the court, makes no orders as to costs.

Dated, Signed and Delivered at Nairobi this 13th day of **December, 2017**

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L. NJUGUNA

JUDGE

In the presence of:-

.....*for the plaintiff*

.....*for the defendant*