REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 142 OF 2012

Stephen Gathua Kimani...Plaintiff

Versus

Nancy Wanjira Waruingi T/A Providence Auctioneers........Defendant

RULING

By a notice of motion dated 7th December 2015, the Plaintiff (hereinafter referred to as the applicant) moved this court seeking orders "*That this honourable court be pleased to review its judgement delivered and dated 28th November 2014 and that the case be heard again on merit."*

The application is grounded on the grounds stated on the face of the application and the annexed affidavit of the applicant annexed thereto. Essentially, the applicants grounds can be summarized as follows:-

i. That the respondent was ordered by the court in HCC No 1345 of 2005 (OS) to release motor vehicle KUP 953 but refused to comply.

ii. That the court did not consider an order issued in CMCC No. 9965 of 2000.

iii. That the applicant has suffered irreparable damages and loss of use of his motor vehicle under the respondents custody who could not obey the said orders.

iv. That in HCCC No 1345 of 205,orders were issued to the effect that no attachment should be made against properties previously insured by United Insurance Co Ltd until the cases before the courts were heard and determined, but this court did not consider the documents attached hence the application for review.

The supporting affidavit reiterates the above grounds in detail and enumerates the history of the case and a second affidavit was filed on 25th January 2016.

The Respondent filed grounds of objection on 28th January 2016 expressing only one ground, namely that the application is bad in law, frivolous and an abuse of the court process.

At the hearing of the application, the applicant adopted his aforesaid affidavits and reiterated the contents therein while **Mr. Ng'ang'a** advocate appearing for the Respondent opposed the application and relied on the aforesaid grounds of opposition and insisted that the application does not qualify for review because no new matter had been discovered and that the documents relied upon are not new and that they

are all court documents delivered a long time ago and that the application was file after one year.

The applicant did not state the provisions of the law under which his application is premised, a fact that did not escape the attention of counsel for the Respondent, but I take the view that the application cannot be defeated on account of the said omission.

However, a look at the relief sought confirms that this is an application for Review which falls under Order **45** of the Civil Procedure Rules 2010.

I have carefully considered the grounds in support of and against the application and the submissions by both parties and the relevant law and authorities and the peculiar facts of this case. In my considered opinion the key issues that emerge for determination are:-

> *i. Whether the applicant has satisfied the grounds for review.*
>
> *ii. Whether the circumstances of this case are of such a nature as to warrant this court to invoke the overriding objective of the Civil Procedure Act as provided for under Section **1A &1 B** of the Civil Procedure Act.*

At the outset it is important to distinguish grounds of appeal and grounds for review. In my discernment, the grounds relied upon in this application qualify to be grounds of appeal opposed to grounds for review. In the case of *National Bank of Kenya Ltd vs Ndungu Njau*[1] the court held:-

> *"In my discernment, an order cannot be reviewed because it is shown that the judge decided the matter on a foundation of incorrect procedure and or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case. Much less could it be reviewed on the ground that the other judges of coordinate jurisdiction and even the judge whose order is sought to be reviewed have subsequently arrived at different decisions on the same issue? In my opinion the proper way to correct a judge's alleged misapprehension of the procedure or the substantive law or his alleged wrongful exercise of discretion is to appeal the decision unless the error be apparent on the face of the record and therefore requires no elaborate argument to expose."(Emphasis added).*

Bennet J was in my humble view correct in *Abasi Belinda vs Fredrick Kangwamu and another***[2]** when he held that:-

> *"a point which may be a good ground of appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal"*

Also of useful guidance is the following excerpt from the judgement in the above cited case of *National Bank of Kenya Ltd vs Ndungu Njau***[3]Kwach R.O, Akiwumi A. M & Pall G. S, JJA** stated:-

> *"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 a ground for review."*

At this juncture, I find it is necessary to examine the provisions of Section **80** of the Civil Procedure Act[4] and Order **45** Rule **1** of the Civil Procedure Rules, 2010. In my view, the High Court has a power of review, but such said power must be exercised within the framework of Section **80** Civil Procedure Act[5] and Order **45** Rule **1**.[6]

Section **80** of the Civil Procedure Act[7] provides as follows:-

> ***80.*** *Any person who considers himself aggrieved-*
>
> ***(a)****by a decree or order from which an appeal is allowed by this Act, 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

45 *Rule* ***1 (1)****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 review of judgement to the court which passed the decree or made the order without unreasonable delay."*

Section **80** gives the power of review and Order **45** sets out the rules. The rules in my view restrict the grounds for review. In my view, the above rule lays down the jurisdiction and scope of review limiting it to the following grounds; ***(a)*** *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;* ***(b)*** *on account of some mistake or error apparent on the face of the record, or* ***(c)*** *for any other sufficient reason and whatever the ground there is a <u>requirement that the application has to be made without un reasonable delay</u>.*

The reasons offered are that there was in existence various court orders staying cases concerning properties insured by United Insurance Company Ltd. The crucial question to resolve is whether or not the above reason falls within the scope of Order **45** Rule **1** cited above and more particularly as enumerated in paragraphs **(a), (b) & (c)** cited stated above.

Discussing the scope of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa& Others*[8] had this to say:-

> *"the power can be exercised on the application of a person on the <u>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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" used in Order 47 Rule 1 means a reason sufficiently analogous to those specified in the rule"</u>*

A similar view was held in the case of *Sadar Mohamed vsCharan Signh and Another***[9]** where it was held that:-

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

Akiwumi & O'kubasu JJA in the case of *The official Receiver and Liquidator vs Freight Forwarders Kenya Limited***[10]**added that *"these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice 'be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record"*

Mulla in the *Code of Civil Procedure***[11]** (writing on Order **47** Rule **1** of the Civil Procedure Code of India), (the equivalent of our Order **45** Rule **1**), states that 'the *expression sufficient reason' is wide enough to include misconception of fact or law by a Court or even by an advocate*." This definition only covers misconception of facts of law but not negligence or conduct of an advocate.

Mulla[12] also states that **'the expression**'*any other sufficient reason'* used in Order **47** Rule **1** means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in Order **47**, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.[13] These words *(i.e. sufficient reason)* mean that the reason must be one sufficient to the court to which the application for review is made and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or an error apparent on record.[14]

The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others*[15] discussing what constitutes sufficient cause had this to say:-

"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

In *Daphene Parry vs Murray Alexander Carson*[16] the court had the following to say:-

'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, ..."(Emphasis added)

I also find useful guidance in the decision of **Kwach, Lakha** and **O'kubasu JJA** in the case of *Tokesi Mambili and others vs Simion Litsanga*[17]delivered on 28th March 2003 where they held as follows:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

The reason offered by the applicant is that there were orders issued in the various cases he referred to. This is not new evidence. The applicant has not satisfied that the orders in question were not within his knowledge. In fact he says he was an interested party in one of the cases. Alternatively, he has not demonstrated when he came to know about the said court decisions or that he could not obtain them despite due diligence. There is no allegation that there is an error apparent on the face of the record. It has not been shown that there is a sufficient reason to warrant the review.

In other words, I am not persuaded that the reasons offered amounts to *'sufficient reason'* within the meaning of the rules cited above nor is it *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.**

My above finding that the grounds offered by the applicant do not amount to sufficient reasons is further fortified by the holding in the case of *Evan Bwire vs Andrew Nginda***[18]**where the court held that '*an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.* In other words, I find no material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he could not get even after exercising due diligence.

Further, no explanation has been offered to enlighten to the court why it took more than one year to file the present application. To order that this case be re-opened where sufficient grounds have not been given would in my view amount to injustice.

One thing is clear in this application. The delay of one year has not been explained. Perhaps, it's important to recall the last sentence of Order **45** Rule **1 (1) (b**) which reads '…….*may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.'*

The logical question that follows is, was the present application made without unreasonable delay? Or is a delay of **one year** reasonable. The issue for determination is whether or not the applicant has unreasonably delayed in filing the present application. Under normal circumstances it should not take an applicant **one** year to file an application in court. It would require sufficient explanation to justify a delay of **one** year. To my mind this is a long period, and indeed an unreasonable delay.

Such a long delay must be sufficiently explained. In *John Agina vs Abdulswamad Sharif Alwi,* **[19]Cockar, Akiwumi** and **Tunoi** had this to say:-

> *'An unexplained delay of two years in making an application for review under Order **44** Rule **I** (now Order 45 Rule 1) is not the type of 'sufficient reason' that will earn sympathy from any court'(Emphasis added).*

I also find useful guidance in the decision of **Mwera J** in the case of *Godfrey Ajuang Okumuvs Nicholas Odera Opinya***[20]** where he held *inter alia* that *'an aggrieved party seeking a review of a decree or order on whatever basis must apply without unreasonable delay.'* In the case of *Abdulraham Adam Hassan vs National Bank of Kenya Ltd***,[21]**an unexplained delay of **three months** was found to be unreasonable. Similarly, in the case of *Kenfreight (E.A.) Limited vs Star East Africa Company Limited*[22]**Onyango Otieno J** (as he then was) found a delay of **three months** to be unreasonable and disallowed an application for review. The court of appeal (**Omolo, O'kubasu & Githinji JJA**) in *Francis Origo & Another vs Jacob Kumali Mungala***[23]**succinctly stated:-

> *'In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay'* ***(Emphasis added)***

A similar holding was made in the case of *Muyodi vs. Industrial and Commercial Dev. Corp and another***[24]** where the court emphasised the application must be brought to court without unreasonable delay.

I am alive to the fact that the discretion donated to the court under Section **80** of the Civil Procedure Act is unfettered, but for the discretion to be exercise in favour of the applicant, the application for review must be based on the grounds specified under Oder **45** or on any sufficient reason **but** in either case the application must be made within a reasonable time.

In *Mbogo Gatuiku vs A.G*.**[25], Mwera J** emphasising on the need to file applications for review without delay stated that *‘even a delay of a day or two calls for an explanation’*.

Musinga JA in *Equity Bank vs West Link MBO Limited***[26]** put it correctly when he held that *‘Courts of law exist to administer justice and in so doing they must balance between competing rights and interests of different parties but within the confines of law, to ensure the ends of justice are met.’* ’Thus, there is a need to balance the rights of both parties before the court.

I find that in absence of any explanation for the delay this is not a proper case for the court to exercise its discretion in favour of the applicant. In this regard, I find useful guidance in the court of appeal decision in the case of *Richard Nchapai Leiyangu vs IEBC & 2 others*[27] where the court expressed itself as follows:-

> *“We agree with the noble principles which go further to establish that the courts’ discretion to set aside ex parte judgement or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice”(Emphasis added)*

In the present case, guided by the facts of this case, the authorities cited herein and the relevant provisions of the law, I humbly find that the applicant has not demonstrated that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time nor has he shown that there is some mistake or error apparent on the face of the record nor has he proved that there is any other sufficient reason to warrant the court to exercise its discretion in his favour and as already stated the application for review was not made without unreasonable delay. The upshot is that my answers to number one is in the negative.

I also find it necessary to consider the *“overriding objective”* under Sections **1A &1B** of the Civil Procedure Act[28] and also the provisions of Article **159 (2) (d)** of the Constitution of Kenya 2010. Before I examine the said provisions I find it fit to recall with approval the words of **Justice Hancox** in *Githere vs Kimungu***[29]** where he stated that *“the relation of rules of practice to the administration of justice is intended to be that of a handmaid rather than a mistress and that the Court should not be too far bound and tied by the rules, which are intended as general rules of procedure, as to be compelled to do that which will cause injustice in a particular case.”*

Commenting on the same subject, the **Hon. Mr. Justice Robert Makaramba**, judge of the High Court Tanzania stated *“the inherited common law adversarial system with its attendant English practice and procedure has always been at the centre of public criticism for contributing to delays in the dispensation of justice together with its attendant procedural technicalities.”***[30]**

Procedural laws refer to rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties.[31] It was this strictness of having due regard to the rules of Civil Procedure that occasioned the loss of many legitimate claims by plaintiffs thus denying them access to justice.

The overriding concept however came to cure this. **Michael Howard**[32] defines the Overriding Objective *“as a principle from the civil procedure rules. The purpose of the overriding objective is for the civil litigation and dispute resolution process to be fair, fast and inexpensive. The principle is that each case should be treated proportionately in relation to size, importance and complexity of the claim and the financial situation of the parties. The courts must consider the overriding objective when they make rulings, give directions and interpret the civil procedure rules.”*

The double O’s in the phrase Overriding Objectives are what coined what is today famously known as the term Oxygen Principle. In *Hunker Trading Company Limited vs Elf Oil Kenya Limited*,**[33]**perhaps the first case to be grounded on the new provisions the Appellate Jurisdiction Act (Sections **3A** and **3B)**, it was held that section **1A** of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. The courts' duty

in performing such mandate under section **1B** of the Civil Procedure Act are:-

> *a. The just determination of the proceedings,*
>
> *b. The efficient disposal of the business of the Court,*
>
> *c. The efficient use of the available judicial and administrative resources,*
>
> *d. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties,*
>
> *e. The use of suitable technology.*

Article **159 (2) (b)** of the Kenya Constitution 2010 propounds that in exercising judicial authority, the courts and tribunals shall not delay justice.

Considering the above provisions which introduced the oxygen principle, in *Kamani vs Kenya Anti-Corruption Commission*[34] the court drew comparisons to the *Wolf reforms* which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of *Bigizi vs Bank Leisure*[35] in which **Lord Woolf** himself talked about the concept of overriding principle objective as follows:-

> *"Under the {Civil Procedure Rules}the position is fundamentally different. As rule **1.1** makes clear the {rules} is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings….."*

In the above cited case of *Kamanivs Kenya Anti-Corruption Commission***[36]**the court had this to say:-

> *"It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away the well-known and established principles of law hitherto in place before the said amendment…--------This to our understanding means sections **3A** and **3B** of cap **9** <u>cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate appeals to this court"</u>**(Emphasis added)***

In my view the overriding objective was brought to ensure that justice is served to both parties and further where there is a conflict of the Oxygen Rules Principles with the substantive law, the law ought to be interpreted in such a manner that will ensure the administration of justice.

In this regard, I stand guided by the above quotation from the case of *Kamani vs Kenya Anti-Corruption Commission***[37]**that the amendments did not come *to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases.* I find nothing in the **overriding objective** to suggest that a delay of one year which has not been sufficiently explained can be excused nor is there anything to suggest that the conditions set out in order **45** for review have been done away with.

Section **3A** of the Civil Procedure Act[38]provides that *'Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'* To me, re-opening a case after one year of unexplained delay and without the party tabling good grounds for review would be an abuse of the court process. In *Abdulrahaman Abdi vs Safi Petroleum Products Ltd & 6 others*[39] the court stated:-

> *"The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party"*

I am persuaded that the scales of justice tilt in favour of the Respondent. Having so found as herein above stated, I find that this is not a proper case for this court to exercise its discretion in favour of the applicant and that the application before me does not satisfy the grounds for review. Accordingly, the application dated 7th December 2015 is hereby dismissed with costs to the defendant/Respondent.

Orders accordingly

Right of appeal 28 days

Dated at Nyeri this **19th** day of **February** 2016

John M. Mativo

Judge

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[1]{1996} KLR 469 (CAK) at Page 381

[2] {1963}E.A 557, also see Chittaley&Rao in the Codev of Civil Procedure, 4th Edition, Vol 3, Page 3227.

[3] Supra note 4

[4] Cap 21 Laws of Kenya

[5] Ibid

[6] See Sinha J in Union of India vs B. Valluvan, AIR 2007 SC 210; (2006) 8 SCC 686

[7] Supra

[8] 9 Supreme Court Cases 596 at Page 608

[9] {1963}EA 557

[10]Civil Appeal No. 235 of 1997; {1997} LLR 7356

[11] Sir DinshahFardunjiMulla, The Code of Civil Procedure, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (cak)

[12]Supra, paragraph 17, page 3672

[13]

[14] Supra note 9 above

[15] Civil Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA)

[16] {1963} E.A. 546

[17]

[18] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340

[19] Civil Appeal No. 83 of 1992; {1992} LLR 5734 (CAK)

[20] Kisumu High Court Civil Case No. 337 of 1996

[21] Kisumu High Court Civil Case No. 446 of 2001

[22] {2002} 2 KLR 783

[23] Civil Appeal No. 149 of 2001; {201} LLR 4720, {2005} 2 KLR 307

[24] {2006} 1EA 243 (CAK)

[25]HCCC 1983 of 1980, High Court, Nairobi.

[26] Civil App No. 78 of 2011

[27] Civil Appeal No. 18 of 2013

[28] Supra

[29] {1975-1985} E.A 101

[30] Ho. Mr. Justice Robert V. Makaramba, "Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania: Experience from the Bench, TLS, February 2012 in Arusha, Page 7

[31]Elizabeth A M, Oxford Dictionary of Law, Oxford University Press, London, 2001 at Page 1241

[32] Howard Michael, Civil Litigation and Dispute resolution: Vocabulary Series, Legal English Books Publishers, 2013

[33] {2010} eKLR

[34] Ibid

[35] PLC {1999} 1 WLR 1926

[36] Supra note 35

[37] Supra note 35

[38] Cap 21, Laws of Kenya

[39][2011] eKLR