



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISCELLANEOUS APPLICATION NO. 11 OF 2012**

**IN THE MATTER OF: THE LAW REFORM ACT, CHAPTER 26 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE ANTI-COUNTERFEIT ACT, 2008**

**IN THE MATTER OF: THE CHIEF MAGISTRATE**

**IN THE MATTER OF: THE CHIEF MAGISTRATE’S COURT AT NAIROBI, MISCELLANEOUS CRIMINAL APPLICATION NO. 28 OF 2011**

**IN THE MATTER OF: THE ORDER OF THE CHIEF MAGISTRATE NAIROBI MADE ON THE 21<sup>ST</sup> OF DECEMBER 2011 IN MISCELLANEOUS CRIMINAL APPLICATION NUMBER 28 OF 2011**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**THE ANTI-COUNTERFEIT AGENCY.....1<sup>ST</sup> RESPONDENT**

**THE CHIEF MAGISTRATE’S COURT AT NAIROBI.....2<sup>ND</sup> RESPONDENT**

**WILSON MURIITHI KARIUKI T/A WISKAM AGENCIES .....INTERESTED PARTY**

**EX-PARTE .....SURGIPPHARM LIMITED**

**RULING**

1. By a Notice of Motion dated 28<sup>th</sup> May 2012, the applicant herein, **Surgipharm Limited**, seeks the following orders:

1. **THAT this application herein be certified as urgent and service hereof be dispensed with in the first instance.**
2. **THAT pending the hearing and determination of this application there be a stay of the order of court on 8<sup>th</sup> May 2012 and all consequential orders thereto.**
3. **THAT the Honourable court be please to review, uplift and or set aside the orders made on 8<sup>th</sup> May 2012.**
4. **THAT the costs of this application be in the cause.**

#### **Applicant's Case**

2. The said application is supported by an affidavit sworn by **Caroline Kamende**, the applicant's advocate on 28<sup>th</sup> May, 2012.
3. According to the deponent, on the 19<sup>th</sup> of March 2012, she attended court on behalf of the Applicant when the Honourable Court gave directions that the parties do file and serve written submissions within a period of time provided. However, in the meantime, she got correspondence from the counsel of the 1<sup>st</sup> Respondent indicating that its client wished to settle this matter out of court with the Applicant and in the in the process she got so distracted by her engagement in the said negotiations that she inadvertently forgot to draft and file the written submissions as ordered by court on the 19<sup>th</sup> of March 2012.
4. Apart from that she also served as a Legal Assistant in the International Criminal Tribunal for Rwanda (ICTR) and was barely in Kenya in the month of April 2012.
5. She deposed that when they attended court on 30<sup>th</sup> of April 2012 before the **Mr. Justice Korir**, the Judge gave them a further mention on 8<sup>th</sup> May 2012 before **Mr. Justice Warsame**. However, soon thereafter she left the country and left instructions in her firm to draft submission for filing before the said mention date. As fate would have it, he Senior, **Mr. Kyalo Mbobu** was involved in an accident where he sustained a serious fracture of the left arm. As a result, **Mr. Kyalo Mbobu** delegated the matter to a **Ms. Jeniffer Kaniu** Advocate to draft the said submissions owing to his absence from the office for medical check-ups on his hand but the said advocate erroneously drafted submission on an earlier application for reconstruction of the court file. When the deponent sought to find out what happened in court on the 8<sup>th</sup> of May 2012 from **Ms. Kaniu** who held her brief, she was informed that the court had dismissed the matter for failure by the Applicant to file its submissions as order on 19<sup>th</sup> March 20
6. According to the deponent, she was shocked and surprised that the court dismissed the entire suit during a mention against the cardinal rule of practice that no substantive orders can be made at a mention. She averred that the dismissal order was due to the above inadvertent mistake on the part of the legal advisor of the Applicant which is an excusable mistake and that the dismissal of a suit during a mention is a procedural mistake on the face of the record which ought to be cured by way of exercise of the review jurisdiction of this Honourable Court.
7. According to the deponent, as the Applicant has a good case against the Interested Party it is only fair and just that in accordance with the rules of natural justice it be granted an opportunity to ventilate the same. It was therefore deposed that if the prayers sought are not granted, the Applicant is likely to suffer irreparable loss and damage as the warrant of entry, search and seizure issued in Miscellaneous Criminal Application No. 28 of 2011 (hereinafter referred to as the said Criminal Case) is still in existence. To her, failure to file written submissions should not detract from the merits of the case and to hold otherwise is tantamount to condemnation of a party without a hearing. The deponent further contended that she was most apologetic to this Honourable Court and the advocates on record for the unfortunate events highlighted above which led to the dismissal order aforesaid. On the other hand the Respondent will not suffer any prejudice or damage that cannot be compensated by an order of costs should the orders in this application be granted.

#### **Interested Party's Case**

8. In opposition to the application, the said applicant filed the following grounds of preliminary objections:

1. **That the Court cannot entertain an application for review of its orders when an appeal against the same Orders has been lodged at the Appellate Court.**
2. **That the provisions of the Civil Procedure Act and of Civil Procedure Rules, 2010 relied upon do not avail as Judicial Review Proceedings are special in nature.**
3. **There are no Orders in respect of which stay of execution can be sought.**
4. **The entire application is fatally defective, incurable by amendment, lacks in merit and amounts to abuse of the Court process and therefore should be dismissed with costs.**

### **Applicant's Submissions**

9. In support of the application the applicant submitted that though the applicant initially filed a notice of appeal before resorting to the application for review, the notice merely served as notice of intention to appeal and does not by any means amount to an appeal and relied on **Yani Haryanto vs. E D & F Man (Sugar) Ltd Civil Appeal No. 122 of 1922** and **Christopher Musau vs. Daly & Figgis & Others Misc. Appl. No. 1100 of 2003.**
10. It was further submitted that the application is filed pursuant to section 3A of the Civil Procedure Act and while Order 53 of the Civil Procedure Rules does not provide for review of judicial review orders what the applicant is seeking is not review of any prerogative orders but review of a decision to dismiss the application for judicial review without affording the parties an opportunity of being heard hence the invocation of the inherent jurisdiction of the court as well as Article 159(2) of the Constitution.
11. According to the applicant there is an error on the face of the record as the application was dismissed when the matter was coming up for mention. According to the applicant the justice of the case called for the hearing of the matter on merits rather than its dismissal which was dismissal to the applicant. The applicant relied on **Wanjiku vs. Esso Kenya Ltd [1995] LLR 3916 (CAK), AG vs. Simon Ogila Civil Appeal No. 242 of 2000.**
12. It was further submitted based on **Nyamogo & Nyamogo Advocates vs. Moses Kipkolum Kogo Civil Appeal No. 322 of 2000 [2001] 1 EA 173,** that the failure by the judge to take into account the merits of the case and the documents already filed is in itself an error apparent on the record. It was submitted further that there was sufficient reason for the court to review its sad decision. Based on **Samwel Mbugua Githere vs. Muiruri Laban Kimungu CACA No. Nai 56 of 1983** the mistake of counsel ought not to be visited on an innocent litigant.

### **Interested Party's Submissions**

13. On behalf of the interested party, it was submitted that the order sought to be reviewed was made after hearing of all the parties to the suit after the court was convinced that there was no pending claim before the court following the withdrawal of the suit against the 1<sup>st</sup> Respondent and that there could be no claim against the interested party if there was none against the Respondent. As the judge took into account all material placed before him there was no error on the face of the record. It was submitted that as the Judge was aware that the matter was coming up for mention when he made the orders sought to be reviewed, the said order can only be challenged on appeal and as the applicant had filed a Notice of Appeal, he cannot pursue and appeal and an application for review simultaneously. It was submitted that a party interested in pursuing both remedies should file an application for review before filing an appeal and reliance was placed on **African Airlines International Ltd vs. The Eastern & Southern African Trade & Development Bank Civil Appeal No. 50 of 2002, Pyari Mohan Kundu vs. Kalu Khan Indian Law Reports 1917 [Vol. XLIV] 1011.**
14. In the interested party's view, a Notice of Appeal is an appeal as provided under Rule 5(2)(b) of the Court of Appeal Rules as read with the decision in **Kipkemboi Kosgey & 7 Others vs.**

**Samuel Murithi Njogu & 4 Others [2007] eKLR.**

15. It was submitted that it was the 1<sup>st</sup> Respondent, Anti-Counterfeit Agency that made an application for issuance of warrant of entry search and seizure in the said Criminal Case which claim was wholly withdrawn. According to the interested party judicial review order of certiorari cannot be issued against a private body.
16. Citing **Welamondi vs. Chairman Electoral Commission of Kenya Bungoma High Court Misc. Application No. 81 of 2002**, it was contended that Civil Procedure Rules do not apply to judicial review hence the applicant's application has no merit and should be dismissed.

**Determinations**

17. I have considered the foregoing.
18. In order to justify the Court in granting an application for review sought by the applicant under the provisions of Order 45 rule 1(b) of the Civil Procedure Rules, certain requirements must be met. The said provision provides as follows:

***“(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.***

***(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”***

19. The foregoing provisions are based on section 80 of the ***Civil Procedure Act*** Cap 21 Laws of Kenya which states as follows:

***“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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”***

20. It is clear that unlike Order 45 (which is a delegated legislation), section 80 of the ***Civil Procedure Act***, (which is the parent Act) gives the Court wide and unfettered jurisdiction in the exercise of its powers of review and does not prescribe the conditions upon which an application for review may be granted. In the case of **Official Receiver and Provisional Liquidator Nyayo Bus Service Corporation vs. Firestone EA (1969) Limited Civil Appeal No. 172 of 1998** the Court of Appeal held that section 80 of the ***Civil Procedure Act*** enables a court to make such orders on review application which it thinks just so that the words “or any sufficient reason” as used in Order 44 [now Order 45] rule 1 of the ***Civil Procedure Rules*** are not *ejusdem generis* with the words “discovery of new and important matter” etc. and “some mistake or error apparent on the face of the record” and that those words extend the scope of the review. Accordingly, the said

court held that there is no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly section 80 of the *Civil Procedure Act* confers an unfettered right to apply for review and so the words “for any sufficient reason” need not be analogous with the other grounds specified in the Order.

21. In dealing with the delegated legislation made under the Act **Farrell, J** in **Sardar Mohamed vs. Charan Singh Nand Singh & Another HCCA No. 51 of 1959 [1959] EA 793** was of the following view, with which view, I respectfully associate myself :

“In terms section 80 of the Civil Procedure Ordinance confers an unfettered right to apply for review in the circumstances specified and an unfettered discretion in the court to make such order as it thinks fit. The omission of any qualifying words at the beginning of the section appears to have been deliberate, since the section is obviously based on section 114 of the Indian Code, which is qualified, and similar qualifying words appear in a number of the other sections. Under section 81(1) of the Ordinance the Rules Committee has power to make rules “not inconsistent with the provisions of this Ordinance”. If a rule is inconsistent it is to that extent *ultra vires*; and if the Ordinance confers unfettered power, a rule which limits the exercise of the power is *prima facie* inconsistent with the Ordinance and *ultra vires*. If, however, a rule is capable of two constructions, one consistent with the provisions of the Ordinance, and one inconsistent, the court should lean to the construction which is consistent on the principle “*ut res magis valeat quam pereat*”. If the words “or for any other sufficient reason” can be given a liberal construction, there is nothing in Order 44, rule 1(1) in any way inconsistent with section 80 of the Ordinance. The paragraph is perhaps unnecessary, but serves to make it clear that at least the two grounds specified are such as would entitle an aggrieved party to apply for review”.

22. The first issue for determination is the effect of the filing of a Notice of Appeal before an application for review. In **Nairobi High Court Civil Division Civil Case No. 1100 of 2003 between Christopher Musyoka Musau vs. Daly & Figgis**, I expressed myself as follows:

“Before I deal with the merits of the application, I wish to deal with the preliminary issues raised. It is clear from the foregoing that the review remedy is only available to a party who is not appealing. See **Orero vs. Seko [1984] KLR 238**. Who, then is a party who is appealing. There are two contradictory decisions from the Court of Appeal. In **Kisya vs. Attorney General** (supra) the Court held that a party who has filed a notice of appeal cannot apply for review but if application for review is filed first, the party is not prevented from filing appeal subsequently even if a review is pending. However in **Yani Haryanto vs. E. D. & F. Man. (Sugar) Limited Civil Appeal No. 122 of 1992** the Court of Appeal was of the following view:

“The facility of review under Order 44 of the Civil Procedure Rules is available to a person who is aggrieved by an order or decree which is appealable but from which no appeal has been preferred or from which no appeal is allowed, and who from the discovery of new and important matter or evidence or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review. A notice of appeal apart from manifesting a desire to appeal, appears to have a two-fold purpose; one of the purposes is apparent from the rules that follow up to and including rule 79. The other purpose is to enable the High Court to entertain an application for stay of execution before the appeal is filed...What rule 4(1) of Order 41 of the Civil Procedure Rules prescribes for is an exception to the rule relating to the actual filing of the appeal which is rule 81(1) of the Court of Appeal Rules. The exception is the deeming of the appeal to be filed for the purposes of rule 4 of Order 41 only on the giving of the notice of appeal. Therefore despite the lodging of a notice of appeal the court has jurisdiction to entertain an application for review... An appeal is not instituted in the Court of Appeal until the record of appeal is lodged in its registry, fees paid and security lodged as provided in rule 58 and the inclusion of a memorandum of appeal”.

In light of the two decisions emanating from the same Court of Appeal, this Court is entitled to adopt either of the two decisions. In my view the Haryanto Case reflects the true legal position. A Notice of Appeal is not an appeal but just a formal notification of an intended appeal. In fact under Rule 77(1) of the Court of Appeal Rules it is provided that an intended appellant shall, before or within seven days after lodging notice of appeal, serve copies thereof on all persons directly affected by the appeal. Clearly, a strict reading of this rule contemplates a situation where a Notice of Appeal may even be served before the same is lodged. Where that happens I cannot see how such a Notice which has not even been lodged can by any stretch of imagination be equated to an appeal. Accordingly, the mere fact that a party has given a Notice of intention to appeal does not amount to an appeal for the purposes of review...However, the same Court in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi Civil Application No. 277 of 2005 had this to say:

“The Board took an active part in giving instructions to the advocate on the various matters the advocate was pursuing before the superior court. In particular the Board gave instructions that an application be filed for review of the ruling and it is the same ruling against which instructions had already been given for filing an appeal to the Court of Appeal. In those circumstances the options available to the Board were exhausted when the application for review was determined by the superior court and it is doubtful whether the intended appeal would be valid even if it was filed. An aggrieved party under Order 44 of the Civil Procedure Rules can apply for the review of a decree or order either where “no appeal has been preferred” or where “no appeal is allowed”. An appeal is allowed on orders made under Order 9A rule 2 Civil procedure Rules, as in this case, and indeed the Board filed a notice of appeal under rule 74 of the rules to challenge the orders. A notice of appeal however is only a formal notification of an intention to appeal and it cannot be said that the aggrieved party has “preferred” an appeal at that stage and was thus precluded from exercising the option of review. The issue as to whether a respondent having filed a notice of appeal, which had not been withdrawn, was answered in the affirmative by the Court of Appeal in *Yani Haryanto Vs. E. D. & F. Man (Sugar) Ltd Civil Appeal No. 122 Of 1992 (UR)*... The Board was at liberty to pursue the option of review of the orders despite the filing of a notice of appeal to challenge the same orders. However upon the exercise of that option and pursuit therefrom until its conclusion, there would be no further jurisdiction exercisable by an appellate court over the same orders of the court. That was the end of the matter and the notice of appeal was rendered purposeless. Both options cannot be pursued concurrently or one after the other”.

Whereas under Order 45 rule 1, a person aggrieved by a decision whether an appeal is allowed or not but who is not appealing, is at liberty to apply for review of the decision, that provision, in my respectful view, is not a *carte blanche* for abuse of the process of the Court. In the case of Stephen Somek Takwenyi & Another vs. David Mbuthia Githare & 2 Others Nairobi (Milimani) HCCC No. 363 of 2009 Kimaru, J dealing with the issue of abuse of the process of the Court stated as follows:

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown

by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

Whereas there is no express bar in the rules to a party who has attempted to review a decision from subsequently appealing against the same, it must be noted that the Rules are subject to the provisions of the Civil Procedure Act under which section 3A empowers 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 allow parties who have in the past unsuccessfully attempted to review a decision, to attack the very decision of review on appeal would in my view open several fronts in litigation since the possibility of the applicant also appealing against the decision refusing the review cannot be ruled out. The provisions of Order 45 rule 1 are meant to assist genuine litigants and not to assist parties who have deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. In my considered view the wording of the provisions of Order 45 rule 1 are meant to take into account the fact that the said provisions are not restricted to parties to a suit since it talks of “any person considering himself aggrieved”. An aggrieved party may not find the avenue of an appeal feasible and may apply for review without locking out those parties who may wish to pursue an appeal from doing so. But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed amounts, in my view, to an abuse of the process of the Court. It would also contravene the overriding objective as provided under sections 1A and 1B of the Civil Procedure Act whose aim is the disposal of cases expeditiously and avoidance of multiplicity of proceedings. To find otherwise would amount to giving the Court’s seal of approval to persons who wish to play lottery with judicial process. Accordingly I associate myself with the decision in The Chairman Board of Governors Highway Secondary School vs. William Mmosi Moi (supra) that both options cannot be pursued concurrently or one after the other.”

23. It is therefore my view that as long as an appeal has not been instituted in accordance with Rule 82 of the Court of Appeal Rules a party who has intimated his intention to appeal by filing a Notice of Appeal is not thereby barred from applying for review of the same decision which is the subject of the said Notice. Under that Rule an appeal is instituted by lodging in the appropriate registry within sixty days of the date when the notice of appeal was lodged, a memorandum of appeal, the record of appeal, the prescribed fee and security for costs. It has not been alleged that the applicant had carried out the said actions in this case.
24. The next issue is whether an order made in an application for judicial review is itself capable of being reviewed. The Court of Appeal in Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the *Civil Procedure Act* which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same.
25. The court, no doubt has inherent powers to make such orders as may be necessary for the ends of justice. Inherent power, it must be stressed is not donated by Section 3A of the *Civil Procedure Act*. In Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675 it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.
26. Dealing with inherent powers of the Court it was held in Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa

- Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.
27. Accordingly, I find that in appropriate cases the Court when properly moved may perfectly grant orders reviewing or setting aside orders made in judicial review proceedings.
28. That leads me to the issue whether the provisions of the ***Civil Procedure Rules*** apply to judicial review applications. Section 3 of the ***Civil Procedure Act*** provides:

***In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.***

29. It follows that where there is a special jurisdiction or power conferred, or any form or procedure prescribed, by or under any other law, the provisions of the ***Civil Procedure Act*** are inapplicable. It must be remembered that apart from Order 53 of the ***Civil Procedure Rules***, the provisions of the ***Civil Procedure Act*** and the Rules made thereunder do not apply to judicial review proceedings. Accordingly Order 45 of the ***Civil Procedure Rules*** does not strictly speaking apply to these type of proceedings. In **Kuria Mbae vs. The Land Adjudication Officer, Chuka & Another Nairobi HCMCA No. 257 of 1983** the court held that where proceedings are governed by a special Act of Parliament, the provisions of such an Act must be strictly construed and applied and therefore the provisions of the ***Civil Procedure Act*** and Rules do not apply unless expressly provided by such an Act and the provisions of the ***Civil Procedure Act*** and rules cannot be applied merely because the special procedure does not exclude them. In **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya** (supra) the Court held that Judicial review is a special procedure and as the Court is exercising neither a civil or criminal jurisdiction in the strict sense of the word, the invocation of the provisions of section 3A and order 1 rule 8 of the ***Civil Procedure Rules*** render the application wholly incompetent.
30. However, in light of the provisions of Article 159(2)(d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the Court of a jurisdiction where such jurisdiction exists. As I have demonstrated above jurisdiction to review or set aside orders made in judicial review proceedings exist hence the mere fact that the instant application is expressed to be brought under Order 45 in my view does not render the application fatally defective or incompetent.
31. In the present case the applicant is seeking orders of certiorari to quash the proceedings and decision in the said criminal, an order prohibiting the court in the said criminal case from issuing further orders therein, a mandamus compelling return of documents seized pursuant to the said orders, an order prohibiting the first respondent from entering and searching the applicant's premises or using information obtained from the search of the applicant's premises, prosecuting the applicant and publishing information in respect of the said documents.
32. On 18<sup>th</sup> April 2012, a consent letter was filed in this Court signed by the advocates for the applicant and the 1<sup>st</sup> Respondent by which the suit against the 1<sup>st</sup> Respondent was withdrawn with no order as to costs. That consent was adopted as an order of the Court on 8<sup>th</sup> May 2012 when the matter came up for mention for directions. Thereafter the application was dismissed on the ground that after the withdrawal of the claim against the principal offender there was nothing remaining for determinations.
33. First and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties consent to the hearing. In **Central Bank of Kenya vs. Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998** the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In **Mrs. Rahab Wanjiru Evans vs. Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332**, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties.

Dealing with the same issue the Court of Appeal in **AG vs. Simon Ogila Civil Appeal No. 242 of 2000** (supra) held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly in **Peter Nzioki & Another vs. Aron Kuvuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487**, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in **Kenya Commercial Bank vs. N J B Hawala Civil Application No. 240 of 1997**.

34. What emerges from the foregoing jurisprudence is that the Court, without the consent of the parties could not lawfully dismiss the application. However, if the Court was minded to proceed, it was obliged to hear the submissions of the parties. In this case, it is clear from the record that the advocate for the applicant was not ready to proceed on the day the application was dismissed hence there was no consent. Again even if the Court was minded to proceed, the proper procedure would have been to disallow the adjournment of the matter and the ordering of the matter to be heard before dismissing the same. In **Dr. Samson Auma vs. Jared Shikuku & Another Civil Appeal No. 191 of 2002** the Court of Appeal expressed itself as follows:

**“Where an application for adjournment was made, it needed to be dealt with on its merit first and either be allowed or rejected and whichever way the Judge was minded to decide it, it was his duty to dispose of it first. It was a matter that called for his discretionary powers.....To avoid deciding on an unopposed application for adjournment which was not frivolous as the appellant’s counsel was before the Court of Appeal, the other counsel bereaved and the case was not yet ready for hearing as certain procedures were yet to be finalised before it could be heard, and dismissing the entire case on another ground not canvassed before it was a serious misdirection. The correct procedure that the Superior court should have adopted was first to decide on whether or not to allow the adjournment application, then the suit would proceed to hearing and then it would be up to the appellant’s counsel to decide on how to prosecute his client’s case in the absence of the plaintiff..... The action taken by the court in this matter of failing to decide the application for adjournment on its merits and proceeding to dismiss the entire case on grounds that were not before him namely the absence of the parties at a time before the hearing proper could begin involved an incorrect exercise of the learned Judge’s discretion and did result in grave injustice as the appellant’s case was terminated before the appellant could be heard on its merits and therefore the Court of Appeal is entitled to interfere.”**

35. Similarly, the Supreme Court of Uganda in **Natin Jayant Madhvan vs. East Africa Holdings Ltd & Others SCCA No. 14 f 1993** held that “after the refusal of the application for adjournment, the plaintiff ought to have been asked to proceed with the case. It is not to be implied that since the plaintiff said the case was complicated, he could not proceed since the plaintiff has a right to reply to all the facts and state how he would proceed.”
36. It is however contended that the applicant having withdrawn the claim against the 1<sup>st</sup> Respondent, the application was for dismissal. That may be so. However, that did not justify the applicant not being heard. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.
37. From the supporting affidavit, it is contended that the dismissal of the application was as a result of a mistake by the applicant’s advocates. However it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the Court. In **John Onger Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

**“Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of**

procedure are meant to regulate administration of justice and they are not meant to assist the indolent”.

38. In Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002 Kimaru, J expressed himself as follows:

“Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate’s failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate’s failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff’s determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

39. However the principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173 it was held as follows:

“That discretion must be exercised upon reasons and must be exercised judiciously..... In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate”.

40. In Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.

41. Having considered the foregoing I am satisfied that the Notice of Motion dated 28<sup>th</sup> May 2012 ought to succeed, firstly on the ground that the dismissal of the application was unprocedural thereby constituting a sufficient reason for review as well as an error on the face of the record and that there are sufficient reasons adduced to warrant the setting aside of the dismissal order.

## **ORDER**

42. In the premises the order that commends itself to me and which I hereby grant is that the Notice of Motion dated 28<sup>th</sup> May 2012 is allowed with the result that the order made herein on 8<sup>th</sup> May, 2012 dismissing this application is hereby reviewed and set aside. The costs of this application

will be in the cause.

**Dated at Nairobi this 24<sup>th</sup> day of February 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of Miss Kanini for the Applicant.**