



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 43 of 2008

**KENYA ANTI-CORRUPTION COMMISSION.....
PLAINTIFF/RESPONDENT**

VERSUS

**SAMMY SILAS KOMEN MWAITA 1ST
DEFENDANT/RESPONDENT**

**HILLARY KIPKORIR MWAITA 2ND
DEFENDANT/APPLICANT**

RULING

This is an application made under the provisions of **Order 45 Rule 1 and 2** of the **Civil Procedure Rules** and **Sections 3A** of the **Civil Procedure Act**. The applicant, Hillary Kipkorir Mwaita is seeking the following orders:-

- 1. That pending the inter-parties hearing and determination of this application, there be a stay of orders issued by this honorable court on the 18th May 2012 ad 5th June 2012;**
- 2. That this court to stay, review and or vary the orders made on the 18th May 2012 and the subsequent proceedings and the Applicant be allowed to proceed with the hearing and determination of application dated 13th December 2011 on priority basis;**
- 3. That in the alternative, the applicant be granted leave to re-call the plaintiff's witnesses for further cross-examination;**
- 4. That costs of this application be provided for.**

The grounds in support of the application are stated on the face of the application. The application is further supported by the affidavit of the applicant dated 12/10/2012. The application is opposed. Counsel for the plaintiff/respondent, Ben Murei swore a replying affidavit in opposition to the application.

This court heard the submission made by Mr. Mengich, learned counsel for the applicant and Mr. Murei learned counsel for the respondent. Having carefully considered the said submissions and pleadings filed by the parties to this application, the issue for determination by this court is whether the applicant has established sufficient grounds to enable this court stay, review and or vary the orders issued 18th May 2012 and recall the witnesses for further cross examination.

Order 45 Rule 1 and 2 of the **Civil Procedure Rules** provides that:-

“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 other 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.”

In the **Mulla on the Code of Civil Procedure, 16th Edition** at page 1191, the learned authors state that:-

“... the scope of the power of review envisaged under Order 47 Rule 1 of the CPR is very limited and the review must be confined strictly only to the errors apparent on the face of the record. Re-appraisal of the evidence on record for finding out the error would amount to exercise of appellate jurisdiction which is not permissible by the statute.”

In **Kithoi v Kioko (1982) KLR 177**, page 181, the Court of Appeal held that:-

“The Civil Procedure Rules Order XLIV demands inter alia, that an application for review must be based in the discovery of new and important evidence which was not within the applicant's 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 on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or apparent error on the record, failing which the application will not be granted.”

From the foregoing, it is clear that for an application for review to succeed, the applicant must show that there was an error or mistake apparent on the face of the record or that there is new evidence that is material to the matter that was not available to the applicant at the time the orders were issued or the decree was passed or for any sufficient reason. Although the applicants did not precisely state under which limb of **Order 45 Rule 1** of the **Civil Procedure Rules** they were making this application, the reading of the affidavits and submissions go to show that the application is made on the basis of a mistake apparent on the face of the record. The applicants contend that the matter proceeded for hearing without the determination of the applicant's application dated 13/12/2011; That the court gave directions for the parties to file and exchange their written submissions and to seek further directions on 18/5/2012. However, when the matter came for mention, the court did not issue a date for the ruling of the applicant's application but instead ordered the matter be set down for full hearing. The applicant argues that he was condemned unheard and if the orders are not varied, the applicant stands to be prejudiced. The questions therefore that arises for consideration are, were the orders issued by court on 18/5/2012 and subsequent proceedings on 5/6/2012 an error apparent on the face of the record and, is the fact that the applicant's application was not heard sufficient reason to warrant a review of the said orders under **Order 45 Rule 1**?

The applicant filed an application dated 13/12/2011 seeking leave to amend his statement of defence and to file a counterclaim; leave to enjoin other parties as co-defendants. On 21/3/2012, Emukule J. directed the parties to file and exchange their submissions on the application. He also directed that the matter be mentioned in court on 18/5/2012. Despite counsel for the applicant being aware of the mention date, he was absent in court on that date. The matter was placed before me and on application by Mr. Murei, I directed that the matter proceeds to full hearing on 5/6/2012 since the plaintiff counsel had taken date way back on 18/11/2011 before the application dated 13/12/2011 was filed. I need to point out here that by 18/5/2012 the application dated 13/12/2011 had not been heard and it was not coming for ruling as the applicant would have the court believe. It was then that Mr. Mengich sought to have his application heard

and disposed off before the case proceeded to the main hearing. I upheld my previous orders that the matter does proceed to full hearing. Thereafter Mr. Mengich attempted to have the matter adjourned because he was not familiar with the documents and that he also needed time to comply with the new Rules (Civil Procedure Rules 2010) but again the court found that attempt to derail the hearing unmerited. The plaintiff therefore proceeded to prosecute its case and upon close of the plaintiff's case the matter was adjourned to 30/7/2012 for the defence hearing. However the court did not sit on that day. The plaintiff's counsel took a date on 12/10/2012 and it is then that the defence counsel came up with the instant application. From the foregoing, I find no error apparent on the face of the record. To the contrary, I do think that the applicant's intention is to further delay the expedient disposition of this case. The effect of the proposed defence would mean that the defendants introduced therein be served with the proceedings and the case starts from scratch. As of 5/6/2012 when the case was heard, this case had been pending for 4 years. The applicant had done nothing towards enjoining the new parties and introducing the amendments.

The second issue is whether the reason adduced by the applicant is sufficient to warrant a review. I do not think so. Firstly, Counsel for the applicant admits that he was absent from the court on 18/5/2012. It was his application that was coming up for further directions by the court and I cannot over emphasize the need for the appellant to attend court. Although counsel for the applicant was aware of the mention date, he says that he chose to send a legal assistant. There is no evidence on record that the legal assistant was indeed in court nor did any other advocate hold his brief. Furthermore, counsel for the applicant has not given any reason for non attendance in person. Though the mistakes of the counsel should not be visited upon an innocent litigant, there must be a balance with the interest of the other litigants. I do note that this case was instituted in 2008 and not much progress has been made to prosecute it. I am also guided by the Court of Appeal in **Municipal Council of Thika and Another Vs Local Government Workers Union (Thika Branch) Civil Appeal No. 41 of 2001** when it stated that:-

“We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in more leisure age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at every stage of the proceedings.”

This is such a case where I would let the consequence of the negligence of the counsel fall on his own head.

The applicant prayed that in the alternative to the review orders made on 18/5/2012, that he be granted leave to recall the plaintiff's witnesses for further cross-examination. Counsel for the applicant did not adduce sufficient reasons to support this prayer, for example what issues did he require to clarify from the witnesses. On 5/6/2012, he had the opportunity and did cross-examine the plaintiff's witnesses substantively but in exercise of any discretion and so that justice is not only done but is seen to be done, I will allow this alternative prayer to recall the plaintiff or further cross examination by the defence counsel.

To this end, the prayer for review or variation is refused but I allow the alternative prayer of recalling the plaintiff for further cross examination. The defendant/applicant will bear the costs of this application.

DATED and DELIVERED this 28th day of March, 2013.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Ogola holding brief for Mr. Murei for the plaintiff

N/A for the 1st and 2nd a defendants

