



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. CASE NO. 171 OF 2008

REPUBLICAPPLICANT

VERSUS

SENIOR RESIDENT MAGISTRATE 1ST CLASS

MAGISTRATES COURT, CITY HALL, NAIROBI1ST RESPONDENT

THE MEDICAL OFFICER OF HEALTH

CITY COUNCIL OF NAIROBI2ND RESPONDENT

EX-PARTE

PETERSON GATENDE

RULING

Through the notice of motion dated 1st December, 2011 Peterson Gatende (the applicant) seeks orders as follows:-

1. THAT the firm of Oluoch Olunya and Associates Advocates be and is hereby given leave to come on record in this matter for Peterson Gatende, the Ex-parte Applicant.

2. THAT this Honourable Court be pleased to review its order made on 7th October, 2009 and specifically order number 3 in the following terms:-

(i) That the Applicant be refunded the fine in the sum of Kshs 260,000.00 paid as fine in the 1st Class Resident Magistrate's Court at City Court, Nairobi together with interest at court rates from the date of the order being 7th October, 2009 until payment in full.

(ii) THAT the refund be made within 14 days from the date of this order failure to which the Town Clerk, City Council of Nairobi be committed to civil jail for contempt of court.

3. THAT this Honourable Court does grant any order or further relief it may deem fit.

4. THAT costs of and occasioned by the application be provided for.

The application is supported by grounds on its face together with the supporting affidavit of the applicant sworn on 1st December, 2011. Through written consent dated 9th October, 2012 and filed in court on 10th October, 2012 the firm of Oluoch Olunya and Associates was granted leave to come on record in place of Maina Muiruri & Company for the ex-parte applicant. The said consent therefore took care of the 1st prayer in the notice of motion.

The application is brought under Order 9 Rules 9 and 10, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. Order 9 Rule 9 deals with change of advocate. As already stated, this particular prayer was allowed by consent. Order 51 Rule 1 provides the procedure for bringing applications to court.

That then leaves the court with Order 45 Rule 1(1) which 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 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.

A review of a decree or order is only available if there is a discovery of new and important matter or evidence which was not within the knowledge of the party at the hearing or could not be produced at the time the decree or order was passed. A decree or order can also be reviewed on account of some mistake or error apparent on the face of the record; or for any other sufficient reason. The applicant has not demonstrated that he has discovered new and important matter or evidence since the order was passed. He has also not demonstrated that there is a mistake or error apparent on the face of the order. The applicant has argued that the 2nd respondent has failed or refused to make a refund as directed by the court and he should be awarded interest on the amount that was to be refunded to him. The fact that the respondent has not complied with a court order is not sufficient reason for reviewing the same.

There is also a prayer that the 2nd respondent be directed to pay the amount in question within 14 days failure to which its Town Clerk should be committed to civil jail. It should however be noted that there is a specific procedure for instituting contempt of court proceedings. The applicant is trying to bring such proceedings through the back door and this cannot be allowed.

In short the application fails and the same is dismissed. Since the same was not defended, I make no orders as to costs.

Dated, signed and delivered at Nairobi this 16th day of April , 2013

W. K. KORIR,

JUDGE