



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 705 OF 2009

SEHIT INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

JOSEPHINE AKOTH ONYANGO.....1ST DEFENDANT

SIMON OTIENO.....2ND DEFENDANT

SAVINGS & LOAN KENYA LIMITED.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

RULINGS

1. By a Notice of Motion application dated 26th February, 2013 supported an affidavit of Rose Mbithe Mulwa sworn on the same date, the Plaintiff sought the following orders of which prayers (i) and (ii) were spent:-
 - i. Spent
 - ii. Spent
 - iii. **THAT this Honourable Court do review and set aside the Ruling dated and delivered on 19th February 2013 together with all consequential orders.**
 - iv. **THAT the chamber summons dated 24th September 2009 be heard *DENOVO* by a Judge with competent jurisdiction.**
 - v. **THAT costs of this application be provided for.**
2. The grounds on which the Plaintiff relied on in support of its application were as follows:-
 - i. **The Ruling dated and delivered on 19th February 2013 was not written by the Judge who heard the application and the same is therefore a nullity and ought to be set aside.**
 - ii. **The Ruling dated and delivered on 19th February 2013 was signed by a Judge after the Judge had been declared unfit to continue serving as a Judge and is therefore of no legal effect.**
 - iii. **The circumstances under which the Ruling was written, signed and delivered undermine the proper administration of justice and it is in the interests of upholding the Justice system that the said ruling be set aside.**
 - iv. **The Applicant will suffer irreparable harm/loss if the Orders sought are not granted.**

- v. **The Applicant is willing to abide by any term that may be imposed by this Honourable Court for the granting of the said Orders.**
3. The gist of the Plaintiff's case was that Njagi J who heard the matter could not have signed his ruling in respect of the Plaintiff's chamber summons application dated 24th September, 2009 because as at 19th February, 2013, he had been declared unfit to continue serving as a judge by the Judges & Magistrates Board on 21st January, 2012.
4. The Plaintiff contested the validity of the said ruling as it was delivered to the deponent's gate on 14th January, 2013 and it was the same as the one that was delivered by Ogola J on 19th February, 2013.
5. The Plaintiff raised objection on the validity of the said ruling as a report by the Judiciary ombudsman revealed that the said Ruling had been prepared by one Rodgers Otieno Odhiambo, a legal researcher not by Njagi J A copy of the said Report was annexed to the Supporting Affidavit and marked RMM 3.
6. On 27th March, 2013 Ogola J issued orders staying or suspending the said Ruling and directed that the matter be heard by another judge to bring in greater independence.
7. In addition to filing a Replying Affidavit sworn by James Odwako, M/s Robson Harris & Co Advocates filed Grounds of opposition on behalf of the 3rd Defendant on 12/3/2013 raising the following issues:-
 - i. **THAT the application lacked merit, was a sham and an outright abuse of the court process meant to embarrass the Honourable Court and prejudice fair trial of real issues in the suit herein.**
 - ii. **THAT the subject ruling dated 19th February, 2013 written by Hon. Justice Njagi and pronounced by Hon. Justice Ogola was valid in law pursuant to the provisions of order 21 Rule 2(1), (2) & 3(2) of the Civil procedure Rules 2010 and as such ought to be upheld.**
 - iii. **THAT the Plaintiff had not shown any sufficient ground or at all to warrant the review and/or setting aside of the subject ruling dated 19th February, 2013.**
 - iv. **THAT no reason had been shown and/or given by the Plaintiff to warrant a fresh trial of the Application dated 24th February, 2013.**
 - v. **THAT the Application had been brought in bad faith with malicious and unlawful intention to delay trial of the suit herein to the prejudice of the 3rd Defendant herein contrary to Section 1A, 1B of the Civil Procedure Act, Cap 21 Laws of Kenya and Act (Sic)159 (2) (b) 7 (d) of the Constitution of Kenya 2010.**
8. Through M/s Nyawara & Co. Advocates, the 1st & 2nd Defendants, filed their Ground of Opposition which stipulated as shown hereunder:-
 - i. **The application and the orders sought were an intrusive, virulent and contemptuous assault on the bench, the judiciary and the administration of justice generally by a party which has lost in Court and the same should not be entertained at all by the Court.**
 - ii. **The ruling sought to be stayed was already delivered and the only option open to the Plaintiff was to appeal it.**
 - iii. **The application was *re-judicata* (sic).**
 - iv. **Allegations that the honourable Justice Njagi who presided over the application dated 24th September 2009, and who signed the ruling delivered there from, had no authority to do so is completely misplaced and evidence to that effect has been twisted to suit the Plaintiff in its attempt to malign the judiciary.**
 - v. **The application had no basis and was otherwise an abuse of the Court process.**
9. In its written submissions filed on its behalf by M/s Miller & Co Advocates on 15th April, 2013, the Plaintiff reiterated the contents of its Supporting Affidavit.
10. It was the Plaintiff's submission that according to Order 21(1) of the Civil Procedure Rules, 2010 a Judge could pronounce a judgment written and signed but not pronounced by his predecessor.

Further Order 21 rule 3(2) of Civil Procedure Rules, 2010 provided that judgment pronounced by a Judge other than the Judge by whom it was written shall be dated and countersigned by the Judge who reads it. It argued that Order 21 Rule 3(3) of the Civil Procedure Rules, 2010 did not allow a judgment once signed to be altered or added to, save as was provided for under Section 99 of the Civil procedure Act or on view.

11. The Plaintiff averred that the judgment that was delivered to Rose Mbithe Mulwa on 14th January, 2013 was unsigned and that in any event, by the time the same was delivered Njagi J he had been found unfit to carry on judicial functions.
12. It was therefore the Plaintiff's case that the circumstances surrounding the said Ruling including but not limited to the actual writing, signing and delivery of the same were questionable and could not be allowed to obtain.
13. On their part, the 1st & 2nd Defendants argued that the said Ruling was valid as it contained the signature of Njagi J and that the Plaintiff's assertion that the same was not written by the learned Judge was incorrect unless he renounced it himself.
14. They relied on the case of **HCCC. 230/2000 Peter Dennis Mbwali & Another Vs. Kenya Literature Bureau** (unreported) where Majanja J held as follows:-

“Until the Judge exercises the right of review and a decision is rendered thereon, the Judge is not declared to be removed as the person is still a Judge under the constitution..... Article 48 of the Constitution protects access to justice and it is proper in the circumstances that parties waiting for judgment should not be kept out of their decision for an unreasonable long time.....”

15. They also argued that the Plaintiff was a party to an orchestrated scheme to undermine the proper administration of justice through the leaked Ruling and they could therefore not cause an unfavourable situation when things did not go its way. They submitted that the Ombudsman's letter should be disregarded as it had not probative value.
16. It was also the 1st & 2nd Defendant's submissions that he Plaintiff had not satisfied the grounds of review under Order 45 of Civil Procedure Rules, 2010 because:-
 - i. The applicant had not challenged the decision on the basis of an error on the face of the record.
 - ii. There was no any other sufficient reason to disturb the order.
 - iii. The Plaintiff had not attached an extracted order sought to be set aside. They relied on the case of **Muchagi Nduati & Co Advocates Vs. Karanga [2006] e KLR** in this regard.
17. They further argued that the present application *was res judicata*, the issue of leakage having been dealt with by Ogola J and that the same was an abuse of the court process. They submitted that the court had to ask itself whether if the said Ruling was set aside, a different conclusion would arrived at and therefore asked the court not to act in vain.
18. In its written submissions dated 23rd April, 2013 and filed on 16th May, 2013, the 3rd Defendant reiterated its contention that the said Ruling was valid having been dated by Njagi J and counter – signed by Ogola J It was its case that Njagi J was still a Judge as he had not exhausted his options of a review under Section 22 of the vetting of Judges & Magistrate's Act No. 2 of 2011. It also relied on the case of **Peter Dennis Mbwali Vs Kenya Literature Bureau (Supra)**.
19. The 3rd Defendant argued that there was no evidence to show that the said Ruling was written by a Legal Researcher as had been purported in the Report by the Judiciary Ombudsman and that in any event the Plaintiff had not satisfied the conditions for ordering a review under Order 45 of the Civil Procedure Rules, 2010. It therefore urged the court not to order that the application be heard *denovo*.
20. The court has carefully considered the pleadings, written submissions and the case law cited by all the parties and finds the issued to be determined herein as:-
 - i. Whether or not Njagi J could sign the ruling dated 19th February, 2013?
 - ii. Whether or not Ogola J could read the said Ruling?
 - iii. Whether or not this court had jurisdiction to review the said Ruling?

21. A lot of arguments have been advanced that Njagi J did not have authority to sign the said Ruling as he was found to have been unfit to be a Judge by the Vetting of Magistrates & Judges Board. Whereas the court agrees with the holding of Majanja J in the case of **Peter Dennis Mbwali & Another Vs. Kenya Literature Bureau (Supra)**, none of the parties provided proof when exactly Njagi J signed the said Ruling. It can therefore not be correct for the Plaintiff to have assumed that Njagi J dated the said Ruling on 19th February, 2013 as that would be purely speculative. It is sufficient to note that Ogola J signed and dated the said Ruling when it already bore Njagi J's signature. In the absence of any evidence that Njagi J signed the said Ruling on 19th February, 2013 the court is satisfied that the Ruling delivered by Ogola J was for all intents and purposes a valid Ruling.
22. In view of the provisions of Order 21 Rule 3(2) of Civil Procedure Rules, 2010, the court is satisfied that Ogola J was correct in dating the said Ruling and reading is on behalf of Njagi J who had written it.
23. Section 99 of the Civil Procedure Act provides that:-

“Clerical, provides that arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either on its own motion or on the application of any of the parties.”

24. The circumstances therein are different from when a court can renew a judgment. The Defendants advanced the argument that the Plaintiff had not satisfied the conditions under which an order for review could be granted. They contended that the Plaintiff had not provided the court with proof that:-

- i. **New and important matter or evidence, which after the exercise of due diligence was not within its knowledge or could not be produced by it at the time when the order was made.**
- ii. **There was a mistake or error apparent on the face of the record.**

25. Both Defendants did not, however, extensively submit on the ground that a judgment or ruling can be reviewed for any other sufficient reason.

26. The court finds this ground to be extremely crucial due to the circumstances surrounding the said Ruling. There were complaints that the said Ruling was leaked way before it was delivered and that a Legal Researcher wrote out the same. These are not facts that are before this court but suffice it to state that the court cannot ignore the Report of the Ombudsman.

27. The court has noted the submissions that it would not be in the interests of justice for the court to review the said order and then arrive at the same conclusion when the matter is heard afresh.

28. The court finds that the Report of the Ombudsman is an important matter which the Plaintiff could not produce at the time the said Ruling was made and that there is sufficient reason for this court to exercise its discretion and review the said Ruling in its entirety. As the 3rd Defendant submitted justice delayed is justice denied so is the importance of the principle that justice must not only be done but it must be seen to be done.

29. For the foregoing reasons, the court hereby grants Prayers No (3) & (4) of the Plaintiff's Notice of Motion application dated 26th February, 2013. Costs in the cause.

30. It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of September 2013

J. KAMAU

JUDGE