



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**MISC. APPLICATION NO. 267 OF 2017**

**THOMAS K'BAHATI T/A K'BAHATI & CO ADVOCATES.....ADVOCATE/RESPONDENT**

**VERSUS**

**JANENDRA RAICHAND SHAH.....CLIENT/APPLICANT**

**RULING**

*(Application for review; applicant seeking review of an order that denied him stay pending appeal; reasons for denial being that the applicant had not demonstrated a competent notice of appeal and had delayed for 7 months without bringing the application; applicant now claiming an error apparent on the face of record because he has an explanation for the delay; issue of the incompetent notice of appeal not part of the reasons for review and since it was one of the grounds upon which the application was dismissed there will be no basis to disturb that ruling; delay now being explained should have been explained within the dismissed application; in any event even if the same was to be considered, same not persuasive to be grounds explaining delay; application dismissed with costs)*

1. Before me is an application dated 22 June 2021 filed by the client in this Advocate/Client taxation cause. The application seeks orders to review, vary and/or set aside the ruling of this court delivered on 20 May 2021. That ruling dismissed the applicant's application dated 5 October 2020 seeking a stay of execution pending appeal of a ruling delivered on 25 February 2020. The ruling of 25 February 2020 was a ruling where judgment was entered for the Advocate/respondent for the sum of Kshs. 1, 160,000/= as taxed Advocate/Client costs. In the application dated 5 October 2020, the applicant had averred that he has sought to appeal that decision and had filed a notice of appeal. I heard the application dated 5 October 2020 and did not find merit in it. I dismissed it through the ruling of 20 May 2021 for two main reasons. Firstly, that there was no competent notice of appeal as what was filed was outside the 14 days provided for filing a notice of appeal; secondly, that the applicant was guilty of inordinate delay, the application having been filed more than 7 months after the order entering judgment for the respondent, which delay I did not consider as properly explained.

2. In this application, the applicant seeks review of that ruling on grounds inter alia that the delay in filing the application was caused by factors beyond the control of the applicant because of delay in getting the ruling and Covid-19 regulations; that there is an error apparent on the face of record; that mistakes of counsel should not be visited upon a client; and that the applicant is aggrieved by the ruling. The application is supported by the affidavit of the applicant. He has more or less repeated the grounds I have set out above. He believes that it is an error apparent on the face of record that the court declined to consider the reasons for the delay.

3. The application is opposed by the respondent who has sworn a replying affidavit. He has deposed inter alia that the application is incompetent since a review only applies to judgments; that there is nothing that would be shown to be an error apparent on the face of record but what the court pronounced was the legal position; that the decision is on merit and can only be challenged on appeal; that one does not need a ruling to file a notice of appeal; that the Covid-19 directives became operational after 12 March 2020 when the first Covid case in Kenya was reported, and there were no health restrictions before then.

4. I have considered the application alongside the submissions made by Ms. Oruta learned counsel holding brief for Mr. Kibara for the applicant, and Mr. K'Bahati, the Advocate/respondent.

5. This is an application for review and therefore Order 45 applies. Order 45 provides as follows :-

*Application for review of decree or order [Order 45, rule 1.]*

*(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.*

*(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.*

6. It will be seen from the above that a person aggrieved by a decree or order can file for a review if he satisfies the other conditions spelt out. I therefore do not agree Mr. K'Bahati's position that review is restricted to a judgment only. One can also seek review of an order. The grounds for review are spelt out in Order 45 Rule 1, and one needs to show:-

*(i) Discovery of new evidence not available at the time the order was made;*

*(ii) An error or mistake apparent on the face of record; or*

*(iii) Sufficient cause.*

7. In this application, I do not think that the application is based on any new evidence for none indeed was presented. The application is solely based on the ground of error or mistake apparent on the face of record. From what I can see, the alleged error is that this court failed to consider the reasons for delay before dismissing the application. Within this application, the applicant states that there was delay in lodging his earlier application for stay pending appeal owing to factors beyond his control; these factors are said to be that there was delay in receiving the copy of ruling of 25 October 2020 and Covid-19 directives.

8. Before I go too far, I need to point out that I did not dismiss the application of 5 October 2020 only because of delay. I also pointed out that the application was incompetent because the Notice of Appeal was out of time. That has not been addressed within this application meaning that one basis for dismissal of the application stands unchallenged. On that ground alone this application must fail and must be dismissed.

9. What I can see the applicant trying to do here is to give an explanation for the delay in filing his application that was dismissed. He needed to do that within that application and not wait for it to be dismissed so that he can now give an explanation. This ground is therefore not maintainable. Even if I am to consider the explanation given, which I am not supposed to, the application will still fail. Nothing stopped the applicant from filing his application pending the collection of the ruling formally. He even does not say when the ruling was obtained so that we can see the time between when it was obtained and the application for stay filed. The applicant, having run out of options, appears to now blame Covid-19. He forgets that on 25 February 2020 when the ruling was delivered, the first case of Covid-19 had not been confirmed in Kenya and all operations were normal. The first case was confirmed after the 14 days to file a notice of appeal had lapsed.

10. Even now as we speak, no appeal has been shown to me close to two years later. Nothing also stops the applicant from filing an application for stay pending appeal at the Court of Appeal.

11. I think I have said enough to demonstrate that this application must fail.

12. It is hereby dismissed with costs. With the dismissal, the interim orders issued are hereby vacated.

13. The advocate is at liberty to file bills for taxation for the now two dismissed applications and proceed to execute for the judgment sum.

14. Orders accordingly.

**DATED AND DELIVERED THIS 28TH DAY OF OCTOBER 2021.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA.**