



**Amota Nyasae Nyang'era t/a Nyasae & Associates v Disciplinary Committee of
the Institute of Certified Public Accountants of Kenya; Kenya Tea Development
Agency Limited (Interested Party) (Constitutional Petition E403 of 2020)
[2023] KEHC 1397 (KLR) (Constitutional and Human Rights) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E403 OF 2020**

M THANDE, J

MARCH 3, 2023

BETWEEN

AMOTA NYASAE NYANG'ERA T/A NYASAE & ASSOCIATES PETITIONER

AND

**DISCIPLINARY COMMITTEE OF THE INSTITUTE OF CERTIFIED PUBLIC
ACCOUNTANTS OF KENYA RESPONDENT**

AND

KENYA TEA DEVELOPMENT AGENCY LIMITED INTERESTED PARTY

RULING

1. The petitioner has by an application dated April 12, 2022, approached this court seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to review, vary and/or set aside *ex parte* orders dated March 22, 2022.
 4. That the costs of this application be provided for.
2. The petitioner had approached this court *vide* his petition dated December 4, 2020 challenging the disciplinary proceedings instituted against him by the interested party before the respondent.



3. The petitioner averred that the petition herein was listed for mention on March 22, 2022 for the petitioner to consider settlement of the suit as the same had been overtaken by events. However, when the matter was called out, his advocate had not logged in to the virtual session. The impugned orders were then granted.
4. It is the petitioner's case that the orders were issued ex-parte; that there was no settlement consent filed by the parties to necessitate the matter to be marked as settled and that the order that the petitioner pays costs is one sided; that the respondent has filed a party and party bill of costs for taxation. The petitioner urged the court to set aside, vary and review the said *ex parte* orders.
5. The respondent opposed the application *vide* a replying affidavit sworn on April 22, 2022 by CPA Edwin Makori, its Chief Executive Officer. He deponed that the petitioner filed the petition herein seeking several reliefs concerning disciplinary proceedings against him before the respondent. The petitioner also filed an application seeking stay of the said proceedings. However, in the absence of orders of stay, the respondent proceeded and finalized the proceedings against the petitioner. In its judgment, the respondent found the petitioner not guilty of professional misconduct. Following the judgment, the petition was overtaken by events. When the matter came before the court for mention on February 23, 2022, the petitioner's counsel informed the court that judgment had been delivered and requested a further mention date to enable him avail a copy of the said judgment. The matter was stood over to March 22, 2022 to consider settlement of the petition on the premise that the same had been overtaken by events.
6. The respondent further stated that on March 22, 2022, counsel for the respondent and the interested party who were present, confirmed to the court that judgment had been delivered thereby rendering the petition moot. It is the respondent's contention that the impugned Orders were not granted *ex parte* as the petitioner's counsel was aware of the date and the purpose for the mention. Given the said judgment, to grant the orders sought would keep the petition live, yet there is nothing to prosecute in the petition. The respondent further argued that instead of the petitioner awaiting the outcome of the proceedings before the respondent, he opted to drag the respondent and the interested party to court in the present proceedings causing the respondent to incur costs in defending the petition. Additionally, the respondent asserted that costs are a discretion of the Court and follow events. The respondent urged that the application be dismissed with costs.
7. On April 26, 2022, the petitioner was directed to file a further affidavit and submissions in respect of the present application within 14 days, which he failed to do. On June 13, 2022 he was given another 14 days to do so. When the matter came up on December 5, 2022, the petitioner was given yet another opportunity to file submissions and the court stated that no further extension would be given to him. As at February 1, 2023 when this ruling was reserved, the petition had still not complied. Accordingly, the only submissions before the court for consideration, are those of the respondent. I have considered the said submissions and note that they simply reiterate the averments in the respondent's replying affidavit.
8. The *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* makes provision for setting aside, varying or discharge or orders. Rule 25 provides:

An order issued under rule 22 may be discharged, varied or set aside by the court either on its own motion or on application by a party dissatisfied with the order.
9. Rule 22 makes provision for written submissions. Accordingly, the scope of rule 25 is very limited.



10. This court however has jurisdiction to review of orders as provided for in section 80 of the [Civil Procedure Act](#) and order 45 of the [Civil Procedure Rules](#). Section 80 allows an aggrieved litigant to apply for review of an order or decree and empowers the court to make such order as it deems fit 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.
11. Order 45 rule (1) of the [Civil Procedure Rules](#) stipulates the grounds upon which an order may be reviewed:
- (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.
12. The law allows an aggrieved party to apply for review of an order on the basis of discovery of new and important matter or evidence which after due diligence, was not within his knowledge. Such application must be made without unreasonable delay. A mistake or error apparent on the face of the record is another ground upon which a party may seek review of orders. An order may also be reviewed for any other sufficient reason.
13. In the present case, the petitioner has not told the court that he has discovered new and important matters or evidence, which after due diligence, was not within his knowledge or could not be produced at the time the order was made. He has also not claimed that there is a mistake or error apparent on the face of the record. The court will therefore consider and determine if the last limb has been satisfied, namely, for any other sufficient reason.
14. Parliament was deliberate in making provision for this last limb, the intention being to buttress the unfettered discretion of the court. In the case of [Shanzu Investments Ltd v Commissioner of Lands \[1993\] eKLR](#), the Court of Appeal stated:
- In [Wangechi Kimita & Another v Mutahi Wakabiru CA No 80 of 1985 \(unreported\)](#) it was held that “any other sufficient reason need not be analogous with the other grounds set out in the rule because such a restriction would be a clog on the unfettered right given to the court by section 80 for the [Civil Procedure Act](#). The court further went on to hold that the other grounds set out in the rule did not in themselves form a genus or class of things with which the third general head could be said to be analogous.



15. The petitioner’s grounds for review are that the orders were given exparte and that the suit cannot be marked as settled in his absence. Further that the order requiring him to pay costs was one sided.
16. A careful look at the record shows that on February 23, 2022 , the petitioner’s counsel informed the court that judgment the matter before the respondent had been heard and judgment delivered. He asked for time to appraise the court. The matter was thus stood over to March 22, 2022 . On that date the petitioner’s counsel did not attend court. The respondent’s counsel told the court that the petitioner had indicated he intended to withdraw the petition as judgment in the matter before the respondent was in his favour. He then asked that the matter be marked as settled with costs to the respondent. The court then made the following orders:

Given that the substratum of the petition is now dispensed with, the pending of the petition serves no purpose. As such the following orders do hereby issue:
 - a. The petition is hereby marked as settled.
 - b. Costs to the respondent to be borne by the petitioner.
 - c. File closed.
17. In his petition, the petitioner had challenged the disciplinary proceedings against him before the respondent. It is therefore quite evident that following the judgment of the respondent acquitting the petitioner of professional misconduct, the substratum of the petition abated. In the premises, keeping the petition live would serve no useful purpose and would clog the court system. Further its is noted that the petitioner had himself informed the court that judgment had been delivered in the proceedings before the respondent. The court after being told that judgement had been delivered marked the petition as settled. On costs, it is trite law that costs follow the event and are awarded at the discretion of the court. The court exercising its discretion awarded costs to the respondent.
18. The petitioner did not tell the court why he and his counsel, though aware of the date, were absent from court on March 22, 2022 when the order was issued. Further as indicated, he has not demonstrated the existence of any of the statutory grounds for reviewing the said order. Accordingly, I find and hold that the application does not meet the threshold set out in order 45 rule 1 of the Civil Procedure Rules to warrant the grant of the orders sought.
19. In the premises, and for the reasons stated, the court finds that the application dated April 12, 2022 lacks merit and the same is hereby dismissed with costs to the respondent.

DATED AND DELIVERED IN NAIROBI THIS 3RD DAY OF MARCH 2023

M THANDE

JUDGE

In the presence of: -

..... **for the petitioner.**

..... **for the respondent.**

..... **for the interested party.**

..... **court assistant.**

