



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW APPLICATION NO. 69 OF 2020**

**BETWEEN**

**TRIPPIN LUXURY LIMITED.....APPLICANT**

**VERSUS**

**DIRECTOR OF PARKING,**

**NAIROBI CITY COUNCIL.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF CITY INSPECTORATE,**

**NAIROBI CITY COUNCIL.....2<sup>ND</sup> RESPONDENT**

**DIRECTOR OF PUBLIC WORKS & TRANSPORT**

**NAIROBI CITY COUNCIL.....3<sup>RD</sup> RESPONDENT**

**PRIDE EXECUTIVE SHUTTLE LTD.....4<sup>TH</sup> RESPONDENT**

**THE NAIROBI AREA TRAFFIC COMMANDANT....5<sup>TH</sup> RESPONDENT**

**THE HONOURABLE ATTORNEY GENERAL.....6<sup>TH</sup> RESPONDENT**

**RULING NO. 2**

1. On 10<sup>th</sup> June 2020, the Applicant's Chamber Summons application dated 16<sup>th</sup> March 2020, which was seeking leave to apply for judicial review orders of mandamus and prohibition against the Respondents herein was dismissed for want of prosecution. This order was made after the Applicant was directed to file and serve submissions on the said application, and failed to do so.

2. The Applicant subsequently filed an application by way of a Notice of Motion dated 2<sup>nd</sup> July 2020, wherein he sought the following orders:

- i) **THAT** this court be pleased to set aside the orders made on 10<sup>th</sup> June 2020.
- ii) **THAT** this Court be pleased to reinstate the suit herein for hearing and determination on merit.
- iii) **THAT** costs of this application be provided for.

3. The application is supported by the grounds on its face and a Supporting Affidavit sworn on 2<sup>nd</sup> July, 2020 by Saidi Chemaswet, a Director of the Applicant. The Applicant averred that as from 5<sup>th</sup> February 2020, the Applicant's operations were disrupted owing to encroachment of the Applicant's parking space along Mfangano Street in Nairobi by Pride Executive, the 4<sup>th</sup> Respondent herein, who claimed that they were given authority to park in the Applicant's parking space by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Further, that the Applicant's advocate filed an application seeking leave to institute judicial review proceedings against the Respondents, and that on 29<sup>th</sup> April 2020, the Court directed that the application be dispensed by way skeletal written submissions and that the matter would be mentioned on 10<sup>th</sup> June 2020 to confirm compliance.

4. It was averred that the Applicant's advocate on record at the time failed to file skeletal submissions within requisite time and that the firm was to seek for more time to file the same when the matter came up for mention. However, that the Advocate was not sent a link for the day's proceedings and that he only realized that the application dated 16<sup>th</sup> March 2020 had been dismissed for want of prosecution through an email sent from the court to his office mail.

5. In conclusion, it was contended that the failure to file the skeletal submissions should not be visited on the Applicant as it stands to suffer loss and damages, and that this advertent mistake on the part of the Advocates should not deny the Applicant justice as provided under Article 48 of the Constitution of Kenya. The Applicant's counsel filed written submissions dated 15<sup>th</sup> September, 2020 wherein the above averments were reiterated, and it was submitted that the Applicant's failure to prosecute the matter as directed by court was not deliberate and therefore the costs of the application should be in the cause.

6. There was no response or written submissions filed by the Respondents with respect to the instant application.

#### **The Determination**

7. The applicable law for setting aside or review of a judgment or decree of the court is section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. Section 80 of the Civil Procedure Act provides 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.”**

8. Order 45 Rule 1 of the Civil Procedure Rules elaborates on the grounds on which a judgment or decree can be set aside as follows:

**“ (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.”**

9. The right to be heard and the duty of this Court to grant substantive justice to parties are in this regard secured by Articles 50 and 159 of the Constitution. In addition, the Court of Appeal (Madan JA) in the case of **Belinda Murai & 9 Others vs Amoi Wainaina (1978) e KLR**, set out the following approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake by his or her counsel;

**“The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule.....**

10. Similarly, Apaloo JA held as follows on mistakes made in the course of a hearing in **Philip Chemwolo & Another vs Augustine Kubede, (1982-88) KAR 103**:

**“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.**

11. I have perused the Court record herein and note that it is not evident if there was transmission to the parties of the directions issued on 29<sup>th</sup> April 2020 by this Court as regards the filing of submissions, which were issued electronically by email due to the COVID-19 pandemic restrictions. There is therefore sufficient reason, and it is in the interests of justice that the ruling and orders granted herein on 10<sup>th</sup> June 2020 are set aside.

12. In light of the foregoing observations and findings, the Applicants' Notice of Motion dated 2<sup>nd</sup> July 2020 is found to be merited to the

extent of the following orders:

**I. The ruling and orders issued herein on 10<sup>th</sup> June 2020 are hereby set aside, and the suit herein and Chambers Summons application dated 16<sup>th</sup> March 2020 are hereby reinstated for hearing.**

**II. There shall be no order as to the costs of the *ex parte* Applicants' Notice of Motion application dated 2<sup>nd</sup> July 2020.**

**III. Further directions on the Applicant's Chambers Summons application dated 16<sup>th</sup> March 2020 shall be given by the Judge seized of this matter.**

13. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2021**

**P. NYAMWEYA**

**JUDGE**

**DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JULY 2021**

**J. NGAAH**

**JUDGE**