



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL CASE NO. 364 OF 2011**

**JUSTUS MBAABU MARETE** (Suing on behalf of the estate  
of Anthony Kaimenyi (Deceased)).....**PLAINTIFF**

**VERSUS**

**TOM AYORA**.....**1<sup>ST</sup> DEFENDANT**

**NYERI SHUTTLE LTD**.....**2<sup>ND</sup> DEFENDANT**

**KINYUA MONICAH**.....**3<sup>RD</sup> DEFENDANT**

**MCHEZO COACHES LTD**.....**4<sup>TH</sup> DEFENDANT**

**RULING**

1. This suit was dismissed for want of prosecution on the 17/11/2011 under provisions of **Order 17 rule 2 of the Civil Procedure Rules (CPR)**.

By an **application dated 20/7/2017**, three years after the dismissal, the plaintiff sought to set aside the dismissal order it was found to lack merit, and dismissed on the 7/6/2018.

2. By the present **application dated the 19/12/2019**, made six months after the dismissal, the plaintiff seeks for an order of review, to set aside the court's ruling dated the 7/6/2018 under the provisions of **Order 45 CPR and Section 80 of the Act among other provisions**. I have considered the undated affidavit in support of the application as sworn by the applicants Justus Mbaaru Marete as well as the Replying Affidavit in opposition to the 3/2/2020 by one Isabella Nyambura, the claims director at Direct line Assurance Company Ltd, the insurer of the subject motor vehicle no KBB 437F. I have also considered the oral submissions by the respective parties Advocates before me on the 20/2/2020.

3. By this application, I am being asked to review my ruling, set it aside and re instate the suit for hearing.

**For an application to be allowed under the Provisions of Order 45 CPR**, several pre conditions must be met by the applicant: it reads,

**Rule 1 (i): 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 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.

4. I have noted that the applicants affidavit filed on the 20/12/2019 is undated. It contains the reasons for the application. It was drawn by his advocates. None of the parties advocates seem to have noted that the affidavit was not dated, contrary to the clear provisions stated under **Section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya**, that

**“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jural or attestation at what place and on what date the oath or affidavit is taken or made”**

5. This is a matter of law. The word “**shall**” thereto, connotes the mandatory nature of the requirement-

- **Court of Appeal in Kenneth K. Mwangi Vs. City County of Nairobi & 2 others (2017) e KLR.**

Under **Article 159 (2) (d) of the Constitution**, the court is obligated to look more into the merits of a suit or application as opposed to the procedural flaws, like dating an affidavit. See also **Section 1A, 1B and 3A of the Civil Procedure Act**.

6. The Supreme Court in *Petition No. 3 of 2013 Raila Odinga & 5 others Vs. IEBC (2013) e KLR*, rendered that

**“...our attention has repeatedly been drawn to the provisions of article 159 (2) (d) of the Constitution which obliges a court of law to administer justice without undue regard to procedural technicalities..... The Article simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from courts of law.....”**

7. In very similar circumstances, the Court then took the view that the supporting affidavit was fatally defective for being undated; and posed the question whether the application was incompetent without the supporting affidavit.

In the application before me, the grounds for the application are set out at the body of the application. Without the supporting affidavit that I declare to be defective, and therefore of no probative value, the application would still stand, upon the grounds stated thereon. To that end, I shall not consider the averments and depositions by the applicant in the undated affidavit but on the stated grounds.

8. I agree with the Respondent that matters raised by the applicant in the application were the same matters raised, and dealt with by this court in the applicant's application dated 20/7/2017, and a determination made in the ruling dated 7/6/2018, which is the subject of this application.

9. I have taken the liberty to state the **Provisions of Order 45 CPR above**. An applicant must demonstrate, a new matter or discovery of new evidence, that upon exercise of due diligence, was not within his knowledge, or could not be produced at the time the ruling was made; or any error apparent on the face of the record. The issue raised of the applicant being unwell, and loss of employment and matrimonial problems are not new matters, for all purposes and intent.

10. The suit was dismissed in the year 2011.

No medical report has been exhibited by the applicant to demonstrate that he was unwell in 2011 and thereafter to the extent of not following up with his suit since it was filed in 2011. Annexing laboratory test results, and deponing to unsubstantiated averments are not sufficient, in my view, to sustain the threshold requirements under **Order 45 CPR**.

11. I agree that **Section 80 of the CPA grants** jurisdiction to the court to review its ruling, but it also sets out very strict grounds for the same – **Republic Vs Public Procurement Administrative Review Board and 2 Others (2018) e KLR**.

12. Further, a party ought to distinguish a matter for review, from a matter that would ordinarily be for appeal. In the case **National Bank of Kenya Ltd Vs. Ndungu Njau (1996) KLR 469**, the court rendered that

**“-----an order cannot be reviewed because it is shown that he judge decided the matter on a foundation of incorrect procedure and/or that his decision revealed a misapprehension of the law, or that he exercised his discretion wrongly in the case-----”**

13. The power to review can only be exercised upon discovery of a new and important matter, or on account of a mistake or error, or upon any other sufficient reason. It cannot be exercised to advance fresh arguments, or to correct erroneous views taken earlier.

In my view considered opinion, what the applicant is seeking is sympathy by citing poor health and loss of employment which matters are not new, as they were at all material times in the applicant's knowledge. In arriving at the decision I did by my ruling dated the 7/6/2018, all the cited reasons for the applicant were within the applicant's knowledge. This application brings nothing new for the court's consideration.

14. This court having made its final decision, it can only be called upon to review it on parameters stated under **Order 45 rule (1) CPR**, and not otherwise. The court becomes *functus officio*, and cannot go back to its ruling, which in any event, an aggrieved party has a right to appeal to the superior court. Thus the court's decision is final and conclusive – **See the Raila Odinga Vs. IEBC & 3 others (Supra)**.

15. For the above reasons, I find no merit at in the application dated 19/12/2019.

It is dismissed with costs.

**Delivered, Signed and Dated electronically Nairobi this 20<sup>th</sup> Day of May, 2020.**

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**J.N. MULWA**

**HIGH COURT JUDGE.**

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**J.N. MULWA**

**HIGH**