REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISCELLENOUS APPLICATION NO.25 OF 2015

SIMON WANYIRI.....1ST APPLICANT

ALOYSIUS WAWERU.....2ND APPLICANT

JULIUS MAINA.....3RD APPLICANT

JULIUS NJORA.....4TH APPLICANT

JAMES GITHINJI.....5TH APPLICANT

BENARD GITAHI.....6TH APPLICANT

VERSUS

CATHOLIC DIOCESE OF NYERI TRUSTEES

BISHOP PETER KAIRO.....1ST RESPONDENT

FR.DONATUS MATHENGE.....2ND RESPONDENT

FR.PETER KIHARA.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

RULING

On 31st January 2018 I dismissed the applicants' application seeking extension of time to file their suit out of time.

On 23rd April 2018, the applicants filed Notice of Motion dated 1st March 2018 seeking review of that Ruling.

The grounds for review are set out on the face of the application and

a) The Court proceedings and Ruling in C.M Criminal Case No.1629 of 2004 were given to the Applicants in 2015 and they immediately filed this case.

b) That although the Advocates engaged caused part of the delay, the CM's Criminal Registry clerks also played larger part of the delay and this seems that the Court Registries and the Advocates work together to frustrate the True and Fair Justice of a litigant who is not represented and this is what happened to the Applicants case.

c) The Applicants have really suffered and are continuing to suffer irreparable damages and the Applicants request the Court to consider this point and allow the Applicants Application for review.

d) The Constitution allows every person to institute Court proceedings and this Honourable Court may consider the Applicants' Application guided by the following Articles: -

1. Article 22 (1) (3) (d)

2. Article 23 (1)

3. Article 27 (1) and (5)

4. Article 165 (3) (a) and (b)

The application is also supported by the affidavit sworn by Simon Wanyiri on 1st March 2013.

The thrust of the application is that the delay in filing suit by the applicants was caused by their lawyers who failed to act to file for them their claim for damages; that the court registry also refused to release to them the proceedings and rulings because they (applicants) had advocates on record who were supposed to collect the said documents.

The applicants blame the court registry and the advocates for colluding to *"give them a hard life under the rich Archdiocese of Nyeri"*.

In his affidavit Simon Wanyiri narrated how the applicants had engaged several lawyers to pursue their claim in vain.

First it was one Mr. Ng'ang'a Thiong'o who wrote to the court asking for the typed proceedings on 8th February 2006. Being based in Nairobi he never came to check for the proceedings but when the applicants went to the registry they were told that it was up to their lawyer to follow up. They later learnt that the said Mr. Ng'ang'a had died.

They engaged Mr. Muthui Kimani whom they claim they paid him a lot of money but he never filed their claim. By now it was 2013. They engaged a Mr. J Macharia. He also did nothing to pursue their claim. The applicants complain that all these are advocates of this court whom they trusted to pursue their case.

The applicants also blame the Chief Magistrate's registry for refusing to release the proceedings to them to enable them file their claim in time. That being lay men, they did not know the law they were being accused of having breached yet it was the Court and the advocates who had failed them.

An application for review is brought under order 45(1) by a person who

> *(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. (emphasis mine)*
>
> *(2)* …

The applicants are expected to place before this court new and important matters or new evidence which was nor within their knowledge at the time the orders they are seeking to review were made. They are also required to demonstrate that they even with the exercise of due diligence they would not have been able to avail that new important matter or evidence at the material time, and that these matters were not within their knowledge. Or, that there is an error or mistake on the face of the record sufficient to warrant the court to change its ruling already on record.

I am alive to the fact that the applicants herein are not represented by counsel. However, they have cited certain specific provisions of the Constitution in support of their application which I shall look at one by one: The first one is about equality before the law.

> ***27. Equality and freedom from discrimination***
>
> *(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.*
>
> *(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).*

The applicants must be alluding to the issues raised in the supporting affidavit with regard to the manner in which they allege they were treated by the registries. However, they have not annexed a single letter they wrote to the registry asking for the proceedings, or any note any receipt that they indeed paid as alleged. Surely it was their case, their proceedings. It is not logical that the registry, where they would have paid money would deny them what was due to them. There is no evidence of any complaint to the court or anywhere that they had been denied their proceedings. Without any supporting evidence that they may have come across after 31st January 2018, this is untenable.

> ***22. Enforcement of Bill of Rights***

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(3) The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that—

(d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and…

The first thing to note here is that what is before me is not a petition regarding the violation or infringement of the applicant's rights. It is an application seeking review of orders already made. Hence the citing of this provision is misplaced here.

Secondly, this court is not bound by technicalities. The ruling sought to be reviewed was not based on technicalities but on the law. The applicants have not pointed out any procedural technicality upon which the court relied to determine the issues that were before me.

With regard to the application before me, I am considering it on its merits within the parameters of the law. If it was about procedural technicalities the first thing I would have pointed out is that the application is not brought under any provision of the law. However, from the wordings I have discerned that it seeks review of the orders in place. I have sought and applied the laid down legal principles.

23. Authority of courts to uphold and enforce the Bill of Rights

(1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

I will consider this together with article 165 as cited on the jurisdiction of the High Court:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

The jurisdiction of this court '*to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights* 'is not in question. In any event, there is no question for determination before me with regard to the issues set out above. The appellants cannot introduce a new cause of action while seeking the review of orders already in place. That is untenable and would be prejudicial t the other parties who also enjoy the equal protection of the law.

In a nutshell every fact the applicants are stating was said in the previous application. There is no evidence to support the allegation that the court registry staff and the advocates colluded to deny them the opportunity to file their suit- there is nothing to support the allegation that they sought for and were denied proceedings and the ruling the court registry – neither is there any evidence attached to the affidavit to support any of the allegations made against the registry.

As I stated in the ruling of 31st January 2018 the case belonged to the applicants. By appointing an advocate, the case did not become the advocates; it remained their case. It was upon them to pursue the advocate to pursue their case for them. I found that they had slept on their rights, and that 11 years down the line was inordinate delay.

In this application they were expected to produce before the court new evidence or matters that they did not know r were not in possession of to explain the inordinate delay. They have produced none.

In the circumstances, I must find that the application is not merited. The same is dismissed with no orders as to costs.

Dated delivered and signed at Nyeri this 8th Day of February 2019.

Mumbua T Matheka

Judge

In the Presence of:

Court Assistant: Juliet

Simon Wanyiri

James Githinji

Bernard Waimbuchu

Julius Njora

Julius Maina

Aloysius Waweru

Mumbua T Matheka

Judge

8/2/19