



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CIVIL APPEAL NO. 42 OF 2016**

**JOHN KIMANI WANDUMA.....APPELLANT**

**VERSUS**

**MARY WANJIRU WANDUMA.....RESPONDENT**

**RULING NO. 2**

1. The appellant prays for *review* of the order and ruling dated 10<sup>th</sup> July 2018. He also prays that his earlier *notice of motion* dated 15<sup>th</sup> May 2018 be allowed.

2. The two prayers are contained in the *notice of motion* dated 31<sup>st</sup> July 2018. The application is predicated on a deposition sworn by the applicant on even date.

3. In a synopsis, the applicant contends that there are two errors on the face of the record: First, that he was not guilty of *tardiness* as held by the court; and, secondly, that his representative was in court on 22<sup>nd</sup> May 2017 when the earlier application was taken out of the cause list.

4. The motion for review is contested. The respondent has filed two affidavits sworn on 16<sup>th</sup> August 2018 and 10<sup>th</sup> September 2018. In a nutshell, she avers that the applicant has not met the threshold for *review*; and, that the motion will delay or defeat justice.

5. Under section 80 of the **Civil Procedure Act**; and, Order 45 of the **Civil Procedure Rules**, the court has power to *review* its decision. To do so, the applicant must demonstrate that there is *new* and important matter or *evidence* which, after exercise of due diligence, was *not* within his knowledge or could *not* be produced at the time; or, on account of some *error* or *mistake* apparent on the face of the record; or, for any other *sufficient cause*.

6. In the earlier motion, the appellant prayed for *reinstatement* of the interim order granted by the court on 2<sup>nd</sup> December 2016. On 10<sup>th</sup> July 2018 I partly found as follows:

*“The application was then scheduled for inter-parties hearing on 22<sup>nd</sup> May 2017. On the latter date neither the applicant nor the respondent appeared in court. The application was taken out of the cause list”*

7. I agree with the applicant that his counsel was in court on 22<sup>nd</sup> May 2017. But the painful truth is that *the application was taken out of the cause list* because the applicant had *not* served the respondent.

8. I also found that the interim stay *lapsed* and that that there was nothing to *reinstate*. If the court was wrong on that aspect, it is not an error on the face of the record. Rather, it entitles the applicant to an appeal.

9. Lastly, I held that-

*“There had been tardiness: the motion was presented on 15<sup>th</sup> May 2018; well over one year since the lapse of the interim order. The inordinate delay militates against the grant of any discretionary order”*

10. Again that finding does not constitute an error on the face of the record but a *ground* for appeal.

11. For all those reasons the applicant’s notice of motion for *review* dated 31<sup>st</sup> July 2018 is devoid of merit. It is hereby *dismissed*.

12. However, the interests of justice are better served by hearing the *main appeal* and eschewing numerous interlocutory applications. I am well guided by **Stephen Boro Gittha v Family Finance Bank & 3 others**, Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09)

[2009] eKLR.

13. The *memorandum of appeal* was filed way back on 29<sup>th</sup> July 2016. The original records of the lower court have been availed. I thus, *suo moto*, order that the *status quo* shall be maintained pending the hearing of the appeal.

14. But I will grant directions to ensure the appellant does not fall into slumber: The appellant *shall* now file and serve the *record of appeal* within *60 days* of today's date. He *shall* also move the Deputy Registrar not later than *90 days* from today's date for the file to be placed before the judge for admission or directions.

15. In default, the respondent will at liberty to apply for *dismissal* of the appeal.

16. Costs shall be in the appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 12<sup>th</sup> day of March 2019.

**KANYI KIMONDO**

**JUDGE**

***Ruling read in open court in the presence of:***

Mr. Odinga holding brief for the applicant instructed by Rumba Kinuthia & Company Advocates.

The respondent (in person)

Ms. Dorcas and Ms. Elizabeth, Court Clerks.