REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 226 OF 2016

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER, 2014

NASIBWA WAKENYA MOSES.....RESPONDENT

VERSUS

THE UNIVERSITY OF NAIROBI.....1ST RESPONDENT

THE STUDENT ORGANIZATION OF

NAIROBI UNIVERSITY (SONU).....2ND RESPONDENT

RULING

Introduction

1. It is necessary to set out briefly the background information relevant to this ruling. By a notice of motion dated **6th** December 2018, the Respondent in these proceedings moved this court seeking leave to appeal to the Court of Appeal against the judgment dated 21.11.2018 and an order that the Notice of Appeal filed and annexed to the application be deemed as properly filed upon grant of leave.

2. In a ruling dated 27thFebruary 2019, this court after considering the law and the tests for granting stay observed as follows:-

> *"The applicants states that the Respondent is a student and that the decretal sum is in excess of Ksh. **5** Million. The applicants' fear that they will not recover the money if execution proceeds. Faced with this assault, the Respondent had a burden of at least demonstrating that he is not a man of straw and in the event the money being paid to him, and, in the event of the appeal succeeding, he would be able to refund. Unfortunately, counsel for the Respondent did not deem it fit to address this pertinent issue. So crucial is the issue that it was necessary for the Respondent to give it some attention. In fact, an affidavit of means would have sufficed."*

3. The court proceeded to allow the application and made the following orders:-

> *a. **That** the applicants be and are hereby granted leave to appeal to the Court of Appeal against the whole of the judgment/Ruling dated 21.11.2018.*
>
> *b. **That** the applicants are hereby granted leave to file their Notice of Appeal out of time and that the said Notice of Appeal be filed within seven days from the date f this Ruling.*
>
> *c. **That** the applicants be and are hereby granted leave to file their Appeal in the Court of Appeal out of time, and, in any event, the applicants are ordered to file the said appeal within **28** days from the date of this Ruling.*
>
> *d. **That** pending the filing, hearing and determination of the applicants' intended appeal to the Court of Appeal, there be a stay of execution of the judgment/ruling and decree delivered on 21.11.2018.*
>
> *e. **That** as a condition to the stay herein above granted, the applicants are ordered to provide security for the due performance of the decree issued in this case by way of a Bank Guarantee for the payment of the entire decretal sum plus interests thereon. Such*

*guarantee shall be furnished within **twenty-one** days from the date f this order.*

*f. **That** in the event of failing to comply with any of the time frames ordered above on filing of the Notice of Appeal and the Appeal or failure to furnish the security herein above ordered within the time ordered, the orders granted herein shall automatically lapse.*

*g. **That** there be no orders as to costs for this application.*

Applicant's Notice of Motion

4. On 7th March 2019, the applicant filed the Notice of Motion, the subject of this ruling seeking to review and set aside the above order/ruling citing *inter alia* discovery of new and important evidence which was not placed before the court and which would have occasioned the court to grant different orders.

5. The applicant states that the new and important evidence relates to the status of the applicant, which was not within the knowledge of the applicant's advocate on record when the above order was made. The applicant states that at the time of filing the suit he was a student pursuing medicine at the University of Nairobi, but, now he is a qualified doctor based at Kiambu and that he practices medicine at Kiambu county Hospital. The applicant states that he was not in contact with his advocate when he represented him in court, and that, he has demonstrated sufficient reasons to warrant a review of the orders.

6. In his affidavit in support of the application, the applicant deposed that he is a person of means, and, that he is a Medical Doctor currently practising medicine and earning Ksh. 250,000/= per month. He also deposed that he lost contact with his advocate due to his busy schedule. He also averred that the court over looked the fact that the Respondents did not prove that they have an arguable appeal.

Respondent's grounds of opposition

7. The Respondents filed grounds of opposition on 8thAugust 2019 stating *inter alia* that the application is fatally incompetent and incurably defective. The Respondents also stated that there is no discovery of new facts; hence, the application does not meet the threshold for review. The Respondent also stated that during the hearing of the application, his advocate intimated to the court that the applicant was not a person of straw and that he would be able to pay back, and, that, the applicant never filed an affidavit of means.

Applicant's further Affidavit

8. The applicant filed a further affidavit dated 17thMay 2019 stating *inter alia* that the question whether or not he is a person of means was not disclosed to his advocate.

The arguments

9. The substance of Mr. Nyangito's submissions for the applicant was that the application is based on new material, which was no available to him at the time the application was filed and argued that the applicant has demonstrated that at the time application was filed, the applicant's status had changed.

10. Miss Muchoma, appearing for the Respondenr relied on the grounds of opposition and argued that at the hearing of the application the applicant's counsel admitted that he did not file an affidavit of means. She maintained that the matter was within the applicant's knowledge, and relied on *Francis & another v Jacob Kumali Mungala*[1] for the proposition that discovery of new matter has not been established.

Determination

11. The Court has a power of review its judgment/ruling, but the said power must be exercised within the framework of Section **80** Civil Procedure Act[2] and Order **45** Rule **1**.[3]

12. Section **80** of the Civil Procedure Act[4] provides as follows:-

***80.** 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 judgement to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.*

13. Order **45** Rule **1** of the Civil Procedure Rules, 2010 provides as follows:-

***45** Rule **1** **(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 review of judgement to the court which passed the decree or made the order without unreasonable delay."

14. Section **80** gives the power of review while Order **45** sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; ***(a)*** *discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;* ***(b)*** *on account of some mistake or error apparent on the face of the record, or* ***(c)*** *for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

15. Discussing the scope of review, the Supreme Court of India in *Ajit Kumar Rath vs State of Orisa& Others*[5] had this to say:-

"the power can be exercised on the application of a person on 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 order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

16. A similar view was held in the case of *Sadar Mohamed vs Charan Signh and Another*[6] that:-

"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."

17. In *Tokesi Mambili and others vs Simion Litsanga*[7]the Court of Appeal held:-

i. In order to obtain a review an applicant has to show to the satisfaction of the court that there has been discovery of new and important matter or evidence which was not within his knowledge or could not be produced at the time when the order to be reviewed was made. An applicant may have to show that there was a mistake or error apparent on the face of the record or for any other sufficient reason.(Emphasis added)

ii. Where the application is based on sufficient reason it is for the Court to exercise its discretion.

18. It is well settled that the review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 45, Rule 1. Any other attempt, except on grounds falling within the ambit of the above rule, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement or order.

19. A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial.

20. The requirement for a decree holder, in a money decree in opposition to an application for stay pending an appeal to demonstrate that he is not a person of straw is basic to our law. He is required to establish that in the event the decretal sum is paid to him, should the appeal against the judgment succeed, he would be in a position to reimburse the money. This is usually achieved by filing an affidavit of means. This is not the kind of information or material the applicant can claim that it was not available to him at the time of responding to the application. It was for his advocate to advise him at the time of responding to the application.

21. The alleged "change of status" cannot be said to amount to discovery of new and important evidence, which was not within the applicant's knowledge at the material time. The clear wording of Order 45 Rule 1 is that there must be discovery of new and important matter or evidence, which after the exercise of due diligence, was not within his or her knowledge or could not be produced at the time when the decree was passed or the order made.

22. To qualify to be new evidence so as to fall within the ambit of order 45 Rule 1 of the Civil Procedure Rules, the new evidence must be of such a nature that it could not have been within the knowledge of the applicant despite the exercise of due diligence. The advocate knew the nature of the application confronting his client and the legal grounds to challenge it. He filed grounds of opposition and appeared in court. This being a matter of law, it was for the lawyer to guide his client. It cannot be said he did not know what he was responding to. His lawyer fiercely opposed the application in court. It cannot be said he did not understand the nature of the application confronting his client and the law and jurisprudence on the subject. The allegation that he had lost contact with his client cannot suffice.

23. In his affidavit in support of the application, the applicant deposed that the court over looked the fact that the Respondents did not prove that they have an arguable appeal. In all fairness, this is a ground of appeal as opposed to a ground for review. I say no more about it.

24. In his oral arguments in court, the applicant's counsel argued that there is an error on the record and even suggested that there is an error on the part of the court. This argument falls on two grounds. *First*, the court determined the application on the basis on the material presented before it.

25. *Second,* the alleged information cannot amount to "an error on the face of the record." The power of **review** is available only when there is an **error apparent** on the **face** of the **record.** The ruling the subject of this application does not suffer any such **error apparent** on the **face** of the **record**. **Review** proceedings are not an appeal. The **review** must be confined to **error apparent** on the **face** of the **record** and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.[8]

26. In *Nyamogo & Nyamogo v Kogo*[9] discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

> *"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."*

27. The Indian Supreme Court[10] made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions. In *Attorney General & O'rs v Boniface Byanyima*,[11] the court citing *Levi Outa v Uganda Transport Company*,[12] held that the expression "mistake or error apparent on the face of record" refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment."

28. An application for review may be allowed on any other "sufficient reason." The phrase '*sufficient reason'* within the meaning of the above rule means *analogous* or *ejusdem generis* to the other reasons stipulated in Order **45** Rule **1.** This position was illuminated in *Sadar Mohamed vs Charan Signh and Another*[13] where the court held that:-

> *"Any other sufficient reason for the purposes of review refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter)."*

29. **Mulla** in the *Code of Civil Procedure*[14] (writing on Order **47** Rule **1** of the Civil Procedure Code of India), (the equivalent of our Order **45** Rule **1**), states that *the expression 'any other sufficient reason'...*means *a reason sufficiently analogous to those specified in the rule*. Any other attempt, except an attempt to correct an apparent error or an attempt not based on any ground set out in the rules, would amount to an abuse of the liberty given to the tribunal under the Act to review its judgement.

30. Perhaps it is worth citing *Evan Bwire vs Andrew Nginda*[15]where the court held that '*an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh.* I find no grounds at all to warrant the orders sought. The reasons offered do not fall within the scope for review as contemplated under Order 45 Rule 1 of the Civil Procedure Rules.

31. Accordingly, the applicant's application dated fails on the above grounds. Consequently, the application dated 5th March 2019 be and is hereby dismissed with no orders as to costs.

Signed, Dated and Delivered at Nairobi this 9th day of July 2019

John M. Mativo

Judge

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[1] Civil Appeal No. 149 of 2001.

[2] Ibid.

[3] See *Sinha J in Union of India vs B. Valluvan*, AIR 2007 SC 210; (2006) 8 SCC 686

[4] Supra.

[5] 9 Supreme Court Cases 596 at Page 608.

[6] {1963}EA 557.

[7]{2004} eKLR.

[8] See *Meera Bhanja v. Nirmala Kumari Choudhury*, (1995) 1 SCC 170.

[9] {2001} EA 170.

[10]In the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047.

[11] HCMA No. 1789 of 2000.

[12] {1995} HCB 340.

[13] {1963}EA 55.7

[14] Sir DinshahFardunjiMulla, *The Code of Civil Procedure*, 18th Edition, Reprint 2012, at Page 1147, paragraph 10 Civil Appeal No. 90 of 2001; {2001} LLR 6937 (CAK).

[15] Civil Appeal No. 103 of 2000, Kisumu ; {2000} LLR 8340.