



**REPUBLIC OF KENYA**

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

**MISC. APPLICATION NO. 3 OF 2019**

**AMELI INYANGU & PARTNERS ADVOCATES.....APPLICANT**

**VERSUS**

**MILLENIUM MANAGEMENT LIMITED.....RESPONDENT**

**CORAM: Hon. Justice R. Nyakundi**

**Ms. Ameli Inyangu for the Applicant**

**Mr. Githara for the Respondent**

**RULING**

By notice of application dated 16.9.2019, the applicant named to the action applied for:

- 1. An order to set aside and/or review the Ruling of the court determined on 10.9.2019.***
- 2. That this honorable court be pleased to adopt the consent dated 12.3.2019 between the parties as an order of the Honorable court.***

The grounds of this application were that the parties entered into a consent on an aggregate sum of Kshs.5,000,000/= to be paid by the applicant. That the terms of the agreement were that costs be liquidated by way of instalments.

That the respondent issued four cheques postdated 21.3.2019, 21.4.2019, 21.5.2019 and 21.6.2019. That soon after entering the consent one Singh developed health complications which made it difficult to have the instalments settled. In the summary judgment the court failed to consider the said consent agreement dated 12.3.2019.

That in awarding the decretal sum, the court failed to consider the said consent entered into 12.3.2019. Further **Sanargar Singh** filed an affidavit in support of the application in with several averments and annexures attached for court's consideration to review the order of the court dated 10.9.2019.

On the part of the respondent Fred Adhoch counsel filed a replying affidavit opposing the application in which he deposes:

- 1. That the applicant has not satisfied the grounds for grant of orders on review to set aside the Judgment of the court.***
- 2. That the firm of Aoko Githara & Co. Advocates have no locus to file the application post Judgment without leave of the court.***
- 3. That the consent being referred to was a gentleman's agreement which is not enforceable for reasons of breach of the terms by the applicant.***
- 4. That any payments made by the applicant have been acknowledged on a without prejudice basis in the latest computation of the money due and owing as the bill of costs.***
- 5. That the applicant issued some cheques towards settlement of the claim but on presentation they were all dishonored. The said cheques have been annexed to the affidavit marked as F.D. Exhibit A.***

The question which must be posed here is whether the applicant has discharged the burden for this court to exercise discretion under Section 80 of the Act and Order 45 of the Civil Procedure Rules.

## The Law and discussion

The power of this court to review an order or Judgment is provided for Under Section 80 of the Civil Procedure Act and Order 45 (1) of the Civil Procedure Rules. It is now well settled under Order 45 Rule (1) that for this court to interfere with an existing Ruling or Judgment an applicant must satisfy the following criterion.

1. That he is aggrieved with an order, Ruling or Judgment from which no appeal has been preferred.
2. That by the decree or order which no appeal is hereby allowed and who from the discovery of new and important matter of evidence which after the exercise of due diligence was not within the knowledge or could not be procured 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.

There is a direct authority in the case of **Nyamogo & Nyamogo Advocates v Kago [2001] EA 170** the Court of Appeal rendered the following decision on Order 45 Rule (1) of the Civil Procedure Rules:

*“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element in definitiveness, inherent in its very nature and it must be determined judicially on the facts of each case.”*

In addition the Court of Appeal in another determination on the same principle in **Stephen Githua Kimani v Nancy Wanjira Warungi T/A Providence Auctioneers [2016] eKLR** held as follows:

*“An application for review will only be allowed on strong grounds particularly if its effect will amount to re-opening the application or case a fresh. In other words I find its material before me to demonstrate that the applicant has demonstrated the existence of new evidence which he would not get even after exercising due diligence.”*

Besides the above principle to be considered in terms of Order 45 Rule 1 of the Civil Procedure Rules a Ruling or Judgment or order of the court can be reviewed for any sufficient reasons. For the purpose of this rule, the use of the words in Order 45 makes it very clear that Order 45 has prescribed is an exception residual jurisdiction for the court to review its own decisions specifically to meet the interest of justice of the matter. The persuasive authority from Tanzania in **Somanis v ShirmKhami [1971] EA 79 S E Nyalali CJ** Sums it as follows:

*“The Court of Appeal for Eastern Africa had recognized that, it had limited inherent jurisdiction to review its own decisions in circumstances where a party was wrongly deprived of the opportunity to be heard or where for reasons of fraud or otherwise, the decision of that court was anulity. In addition, the Court of Appeal of Tanzania also enjoyed inherent jurisdiction to review its own decisions where such decisions have been on a manifest error on the face of the record resulting in miscarriage of justice.”*

The strength or the weakness of the applicant’s notice of motion will be tested with these principles. The tenor of the applicant submissions concerns the terms of the consent agreement entered into with the respondent counsel on 12.3.2019 for payment of an aggregate sum of five million. On that ground the respondent admits existence of ‘**a gentleman’s agreement**’ that which was conditional to the applicant fulfilling his part of bargain as set out in the agreement. Yet as, a result of the aforesaid agreement the applicant repudiated it by drawing cheques which were dishonored for reason of insufficient funds.

Given the inferential pleadings and evidence presented to the court on 10.9.2019 summary Judgment for Kshs.10,000,000/= was entered on the basis of the certificate of costs by the Deputy Registrar.

Apart from the averments in the affidavit and extracts on the purported consent the evidence on record which determined the entry of Judgment on 10.9.2019 was party and party bill of costs and subsequent certificate of costs issued on 3.1.2019.

In essence there was no error or mistake apparent on the face of the record in the decision by Mativo J to warrant this court to exercise discretion to subject it for review.

A further impediment to the applicant’s motion is the courts power and jurisdiction to adopt the gentleman’s agreement which has been overtaken by the chain of events after the entry of summary Judgment by the court.

According to the courts established case Law on the principle linked to consents guidance in **Flora Wasike v Destimo Wamboko [1988] eKLR** where the court held that :

*“It is now well settled, Law that a consent Judgment or an order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled which are not carried out prima facie any order made in the presence and with the consent by counsels is binding on all parties to the proceedings or action and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in general for a reason which could enable the court to set aside an agreement.”*

Applying these principles the court takes judicial notice that parties or their counsels never reduced the gentleman’s agreement into a consent which was to be adopted by the court which as it was necessary to compromise the dispute. It has not been shown that the parties intended to seek the protection of the court for it to be an enforceable consent. The jurisdiction of the court was left out from being involved with the terms of the gentleman’s agreement.

One thing is certain in this claim, the respondent filed the bill of costs with the Deputy Registrar which is now a formal Judgment of the court. In my view once the court was seized of the matter, any other agreements or consents made are there without the knowledge of the court are not binding if there is a correlation between the Certificate of costs and the purported agreement. The applicant has not yet the legal threshold under Order 45 Rule (1) of the Civil Procedure Rules.

I have no doubt whatsoever that the dishonored cheques issued in favor of the respondents brought about the total collapse of the gentleman's agreement. The applicant ought not to have misapplied the money by satisfying extraneous interests. What he did was contrary to the arrangement with the respondent.

So far as this review is concerned the contention that this court adopts the agreement as a court order or Judgment to oust the entry of Judgment by motion on 10.9.2019 has no legal basis.

In any event it must be borne in mind that the applicant has not brought himself within the provisions of Section 80 of the Act and Order 45 Rule 1 of the Civil Procedure Rules.

It is quite a leap to suggest that this court exercises jurisdiction to vary entry of Judgment dated 10.9.2019 made by my brother Judge that the decision reached was on the basis of an error, mistake apparent on the face of the record or existence of discovery of new matter or evidence or that it was reached on wrong evidential basis. Applying the test laid down in the case cited and the provisions in the Civil Procedure Act and Rules on review jurisdiction, I have come to the conclusion that there was insufficient material for the applicant to succeed in this notice of motion.

In the result, I decline to grant the application for lack of merit. Accordingly, its hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF OCTOBER 2019.**

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**R. NYAKUNDI**

**JUDGE**