REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 261 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF *CERTIORARI* & *MANDAMUS*

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT NO. 27 OF 2012

AND

IN THE MATTER OF KENYA SCHOOL OF LAW ACT, NO. 26 OF 2012

BETWEEN

REPUBLIC.....APPLICANT

AND

COUNCIL OF LEGAL EDUCATION.....1ST RESPONDENT

KENYA SCHOOL OF LAW.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

AND

***EX PARTE* APPLICANT.....MITCHELLE NJERI THIONGO NDUATI**

RULING

Introduction

1. On 23rdJuly 2019, this court dismissed the applicant's application for judicial review orders of *certiorari* and *Mandamus*. The applicant had sought to quash the first Respondent's decision declining to recognize or approve her Bachelors of Arts Degree in Law from Keel University, United Kingdom for purposes of admission to the Advocates Training Programme. She also sought to compel the first Respondent to recognize or approve the said degree and admit her to the Advocates Training Programme at the Kenya School of Law.

2. The Respondents' refusal to admit her to the Advocates Training Programme was premised on the fact that her degree course did not cover all the core subjects to satisfy admission requirements to the Advocates Training Programme. In support of her application, the applicant exhibited a letter dated 7thSeptember 2015 addressed to her by the first Respondent referenced "Recognition and approval of Foreign Qualifications." It reads:-

> *"Reference is made to your application for recognition and approval of foreign qualification which we acknowledge receipt. After reviewing your qualifications and examining the course content covered, Council recommends that you attend the Remedial Programme in order to satisfy the provision of Part 11 of the Second Schedule to the Legal Education Act, 2012. Kindly attend the Remedial Programme in the following Units:-*
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> *a) Labour Law.*

b) Public International Law.

c) Jurisprudence.

d) Law of Business Associations (including insolvency).

e) Commercial Law.

f) Family Law & Succession.

3. The applicant attended the remedial courses at Riara University and submitted her results. However, the first Respondent declined her application stating that the subjected she studied did not include Public International Law. Therefore, the contestation was whether the applicant had studied all the core subjects required to qualify for admission to the Advocates Training Programme as provided in Regulation 16(2) of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations.

4. The Academic Transcripts presented by the applicant from Riara University confirmed that she completed the Pre-Kenya School of Law Programme, and, that, she undertook the following subjects-Constitutional Law 11, Commercial Law, Law of Business Associations 1, Labour Law, Insolvency Law, Jurisprudence, Law of Business Associations 11, Family Law, Law of Succession, Legal Research & Writing 11.

5. After retiring to write the judgment, I noted that the transcripts submitted did not show that she studied Public International Law. Worse still, one of the annexures was illegible. Faced with an illegible annexure and the omission to include documents referred to in the supporting Affidavits, and, more significant, propelled by the constitutional dictate in Article 159, which requires courts to determine cases without undue regard to technicalities, I scheduled the matter for mention on 11thJuly 2019 to seek clarification from the parties.

6. On the scheduled day, by consent of all the parties, counsel for the applicant was allowed to file a further affidavit limited to introducing a letter from Riara University confirming that the applicant attended the said University and the subjects covered. The matter was mentioned again on 15thJuly 2019 when the applicant's counsel confirmed that she had filed a further affidavit dated 12th July 2019 annexing the said documents.

7. However, upon retiring again to write the judgment, I noted that the annexures provided did not show that the applicant had studied and passed Public International Law, a core subject to satisfy the requirements for admission to the Advocates Training Programme.

8. In the judgment, the subject of this review application, I noted the said omission, and, pointed out that there was nothing to show that the applicant studied Public International Law. More fundamental is the fact that Public International Law is among the core subjects listed in Regulation 16(2) of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations.

9. In the judgment, I was emphatic that the above Regulation lists the core units, which must be covered in the undergraduate programme in law. I observed that the word "shall," which in legal parlance is construed to import a mandatory prescription appears in the said provision. In view of the omission, I dismissed the applicant's suit, and noted that the applicant did not demonstrate that she sat for Public International Law. I found that she did not satisfy the tests to qualify for an order of *Mandamus* and *Certiorari.*

The application for Review

10. On 24thJuly 2019, just one day after the delivery of the judgment, the applicant moved this court by way of a Notice of Motion dated 23rd July 2019, seeking to review, vary or set aside the said judgment on ground is that the omission to exhibit the evidence of having undertaken a course in Public International Law was inadvertent. In addition, she states that she will be prejudiced if the Review is declined and, that, it is in the interests of justice that the review be permitted.

11. In the affidavit in support of the application, Judith Guserwa, advocate deposed that she inadvertently omitted to include the transcript for Public International Law. She stated that the omission was not intentional or deliberate and annexed a copy to her affidavit.

The First Respondent's Grounds of Opposition

12. The first Respondent stated that the application offends order 45 Rule 1 of the Civil Procedure Rules, 2010. In addition, it stated that the applicant was accorded an opportunity by the court to supply any evidence indicating that she studied Public International Law; hence, she cannot now claim that the failure was a mistake, omission or sufficient cause. Lastly, it stated that the application has the effect of re-opening the entire case.

The second and third Respondents

13. The second and third Respondents did not file any papers in response to the application nor did they participate or attend the hearing of the application.

Determination

14. M/s Judith Guserwa, the applicant's counsel argued that the omission was inadvertent. She also stated that the failure was an omission as opposed to negligence as alluded by the first Respondent's counsel.

15. Mr. Oduor, the first Respondent's counsel argued that the applicant has not demonstrated sufficient reason, but, rather, an omission based on negligence. He stated that the court called the applicant's counsel to provide the omitted documents, and, that; he consented to them being allowed to provide the documents. He argued that in the circumstances of this case, the failure cannot be an omission. To buttress his argument, he relied on *Auto Selection (Kenya) Limited v Ann Cherono Cheruiyot & 2 Others*[1] and argued that there is a distinction between an omission and negligence. He argued that the effect of the order is to re-open the case.

16. 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."*

17. Section **80** of the Civil Procedure Act 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.*

18. The High Court has a power of review, but the said power must be exercised within the framework of section **80** Civil Procedure Act[2] and Order **45** Rule 1.[3] Section **80** gives the power of review and Order **45** sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review limiting it to three grounds. These are:-

> *i. Discovery of new and important matter or evidence which after due 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;*
>
> *ii. On account of some mistake or error apparent on the face of the record, or*
>
> *iii. For any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay.*

19. The grounds enumerated in the above provisions are specific. The principles for interference in exercise of review jurisdiction are well settled. The court passing the order is entitled to review the order, if any of the grounds specified in the previously mentioned provisions are satisfied. The Right of Review is a remedy to be sought for and applied under special circumstances and conditions. The objective of this right is to correct the error or any mistake made in the decision of the court.

20. Whatever reasons or grounds an applicant invokes, the application must be made without unreasonable delay. The instant application is dated the same day the judgment was delivered and was filed in court the following day. Though no contest was raised relating to delay, I find that the application was filed at the earliest opportunity possible.

21. The applicant's counsel concedes that she omitted filing the documents in question. She attributes this to an inadvertent error or omission on her part. She states that the omission was not intentional but a serious omission on her part as an advocate. She states that the said omission and the circumstances of this case constitute sufficient cause, which is a ground for review.

22. Mr. Odour described the circumstances of this case as negligence as opposed to an omission. He pointed out that after the conclusion of the hearing and before delivery of the judgment, the court summoned all the parties and drew to their attention the omission in question. He pointed out that he consented to the applicant's counsel to file a further affidavit introducing the missing document. He pointed out that the affidavit was filed but minus the required document. He described this as negligence as opposed to an omission. As stated above, he placed reliance on *Auto Selection (Kenya) Limited v Ann Cherono Cheruiyot & 2 Others*[4] in support of his argument that the circumstances of this case reveal negligence on the part of the advocate which cannot be a basis for judicial review.

23. In order to appreciate Mr. Oduor's line of argument and reasoning, I find it necessary to examine the facts and circumstances of the decision he cited to determine its relevancy to the present case. Cases are context sensitive. It is settled law that a case is only an authority for what it decides, a position correctly captured in the following passage:-[5]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of

the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..." (Emphasis added)

24. The ratio of any decision must be understood in the background of the facts of the particular case.[6] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[7] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[8]

25. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[9]In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[10] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[11]

26. The court in *Auto Selection (Kenya) Limited v Ann Cherono Cheruiyot & 2 Others*[12] cited by Mr. Oduor enumerated the history of the case and reviewed numerous authorities and the law before arriving at his conclusions. He summarized the history as follows:-

> *1. …*
>
> *2. The history of the case is as follows. The Applicant herein was a defendant in Nakuru CMCC No. 863 of 2010. This was a personal injury claim arising out of a road traffic accident involving Motor Vehicle Registration No. KAW346A (Tuktuk). The Applicant claims that the 3rd Respondent had purchased the Subject Motor Vehicle and that he had handed over possession to him.*
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> *3. The Subject Motor Vehicle was involved in a Road Traffic Accident on 31/10/2007. The 1st Respondent instituted Nakuru CMCC No. 863 of 2010 seeking damages for the injuries she suffered in the accident. The Applicant filed a Memorandum of Appearance and defence. However, during the scheduled hearing of the personal injury case, the lawyers for the Applicant apparently failed to turn up. Hence, the suit proceeded ex parte. Judgement was duly entered in favour of the 1st Respondent.*
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> *4. The Applicant responded by filing an application to set aside the ex parte judgment and seeking for temporary stay of execution. That Application was dismissed prompting the Applicant to seek another application seeking review of the orders to dismiss the application. That, too, was dismissed.*
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> *5. The Applicant, then, proceeded to file an appeal at the High Court being Nakuru HCCA No. 163 of 2013 against the judgment and decree of the lower court. It also sought a stay of execution pending the hearing and determination of the appeal. Both applications were dismissed.*
>
> *6. Undeterred, the Applicant has filed a petition in the High Court. That, too, was dismissed on the grounds that there was a pending appeal before the Court. The Applicant responded by filing a Notice of withdrawal of the Appeal. They then proceeded to file the current application seeking for review of the orders of 10th October 2017 dismissing the Petition.*
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> *7. The application is based on the ground that the judgment delivered on 10th October 2017 was based on the impression that there was an appeal pending in court addressing the same matter as per the petition and the appeal has since been withdrawn.*
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> *8. In the supporting affidavit the advocate for the Applicant states his client's case is a clear demonstration on how the arm of the court as failed to address it as his client is being condemned unheard due to the negligence of his previous advocate. He further urges the court to give the applicant a chance to ventilate his case as he was held liable while he had already sold the vehicle to 3rd Respondent a fact that was admitted by the 2nd respondent and h being denied an opportunity to be heard is an indication there is not justice in our courts.*
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> *9. The applicant also seeks stay of execution of both the lower court and the high court judgment.*
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> *10. The 1st Respondent strongly opposes the application through a Replying affidavit deponed on 16th November 2017 on the grounds that the application is misconceived, frivolous, oppressive, an afterthought, incompetent and it lacks merit for the supporting affidavit being sworn by an advocate there being contentious issues of facts and it is an abuse of the process of the court. The application does not satisfy the threshold set out in order 45 of the Civil Procedure Rules for review.*
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> *11. The Respondent states that no material has been placed before the Honourable Court to show that the appeal has been withdrawn other the notice of withdrawal of appeal dated 31st October 2017 which was filed in court bur not adopted as order of the court, she therefore concludes that the applicant is employing all mechanisms available to deny her the chance to enjoy the fruits of her judgment which was delivered back in 2013.*
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> *12. The Application is grounded on Order 45 (1) of the Civil Procedure Rules. It provides as follows:…*
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> *13. The question for determination is whether the Applicant can persuade the Court to review its decision. They cite Eunice Wangui Kiragu v Mary Adhera Adhaya (Nakuru ELC No. 330 of 2012) for the proposition that Order 45 Rule 1 is not confined only to situations where there is a discovery of new matter. They also cite an Indian Supreme Court case: Parimal v Veena [2011] 3 SCC 545 to explain that the words "sufficient reason" in Order 45 cover their situation. The main argument the Applicants advance is that the Court's judgment ought to be reviewed because the Applicant's case has never seen the light of day. They insist that the right to be heard must be protected at all costs and the only just course of action is for the Court to grant the orders they seek so that they can present their evidence to Court. Their evidence is that it had sold the Motor Vehicle at the time of the accident.*

14. It is true that the right to be heard is a cardinal rule in our justice system. It is true that the Courts will always, whenever possible, do everything just in their power to ensure that cases are decided on their merits and after hearing all the parties. However, it is also true that litigation must come to an end. That, too, is a cardinal rule of justice. A party cannot be permitted to vex another party with the same litigation in various mutations only on the basis of the fact that the party has a right to be heard. This is one reason why the doctrine of review as stipulated in Order 45, Rule 1 is so circumscribed. It is not meant to re-open the floodgates of litigation and allow parties to re-litigate issues already determined between them.

15. In the present case, the Applicant's real complaint is that it was through the mistake of counsel that it failed to present its case in the lower Court. If that be true and it is left saddled with a judgment debt it must satisfy, it has a remedy: sue the advocate concerned for negligence.

16. –

17. –

18. Our decisional law is consistent that negligent or culpable conduct by Counsel does not constitute sufficient reason to review Court orders absent exceptional circumstances. Our case law holds that pure and simple inaction or mistakes by an advocate does not amount to a mistake such as to attract the positive exercise of discretion by the Courts. Indeed, our jurisprudence draws a distinction between mistakes/errors and negligence. See, for example, Mawji v Lalji [1992] LLR 2778 (CAK) and Kinuthia v Mwangi [1996] LLR 505 (CAK).

19. This is a case which has a long and torturous history. At every step on the way, the Applicant has claimed that a mistake of Counsel or misapprehension of his Counsel it to an unfavourable decision by the Court. In its most recent iteration, the Applicant filed both an Appeal and a self-standing Petition. The Court dismissed the Petition because an appeal from the lower Court was still active. To correct that error and get a second bite at the cherry, the Applicant withdrew that appeal and then brought the present application.

20. This is as close to an abuse of the process of the Court as one can get. When a party brings these kinds of numerous applications on the same issue, its opponent is entitled to feel vexed by the litigation. Right to a fair trial does not extend to a right to endlessly vex a party over the same matter. Litigation must come to an end at some point. In my view, this should be the end of this litigation.

21. Re-opening this matter which is based on a road traffic accident which occurred on 31/10/2007 – more than thirteen years ago – on the basis of advocate's failure to act is, in my view, otiose. Matters should lie where they are.

27. The history of the above case speaks for itself. The learned judge fell short of describing it as abuse of court process. Form the above excerpts; it is clear that the advocate made successive mistakes to the detriment of his client including filing multiplicity of suits. The applicant had filed an appeal in the high court. His application for stay of execution was dismissed. He filed a constitutional Petition, which was dismissed, on grounds that there was a pending appeal. He filed a Notice of Withdrawal of the said appeal then instituted the application to review the order dismissing his Petition, the subject of the ruling cited by Mr. Oduor. The circumstances of the said case are significantly different from the instant case.

28. The next question is whether in the circumstances of this case, the applicant's counsel was negligent as claimed by Mr. Odour. The Concise Oxford English Dictionary[13] defines Negligence as failure to take proper care over something, breach of duty of care, which results in damage.

29. The Black's Law Dictionary[14]defines negligence as the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. It also defines it as any conduct that falls below the legal standard established to protect others against unreasonable risk harm, except for conduct that is intuitionally, wantonly or willfully disregardful of others rights. In addition, it defines it as the doing of what a reasonable and prudent person would not do under the particular circumstances, or the failure to do what such a person would do under the circumstances.

30. There are several types of negligence, but in the circumstances of this case the negligence cited is referred to as *malpractice*, an instance of negligence or incompetence on the part of a professional.[15]To be precise, the nature of the malpractice is defined as *"legal malpractice"* which is defined as a lawyer's failure to render professional services with skill, prudence and diligence that an ordinary and reasonable lawyer would use under similar circumstances.[16]

31. The Black's Law Dictionary defines omission as a failure to do something or the act of leaving something out, or something that is left out or left undone or otherwise neglected. The point of convergence between the two words is that there is an element of neglect.

32. Negligence is a failure to exercise appropriate and or ethical care expected to be exercised amongst specified circumstances.[17]The core concept of negligence is that people should exercise reasonable care in their actions.

33. By definition, a person has acted negligently if they have departed from the conduct expected of a reasonably prudent person acting under similar circumstances. The hypothetical reasonable person provides an objective by which the conduct of others is judged. This standard of conduct is ordinarily measured by what the reasonably prudent man would do under the circumstances. In law, a reasonable person, or the man on the Clapham omnibus[18] is a hypothetical person of legal fiction crafted by the courts and communicated through case law and jury instructions.[19]

34. The reasonable person has been called an "excellent but odious character."[20]

> *"He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen ... [he] invariably looks where he is going, ... is careful to examine the immediate foreground before he executes a leap or bound; ... neither stargazes nor is lost in meditation when approaching trapdoors or the margins of a dock; ... never mounts a moving [bus] and does not alight from any car while the train is in motion, ... uses nothing except in moderation, and even flogs his child in meditating only on the golden mean.**[21]***

35. The applicant's counsel admits that there was an inadvertent omission on her part. She states that the omission was an error, not intentional. I have carefully addressed my mind to the explanation and circumstances of this case. I am not persuaded that the applicant's counsel was negligent in the circumstances of this case. On the contrary, I have concluded that the failure to include the said documents was an error or omission as opposed to an act of negligence.

36. The next question to address is whether the omission, error or mistake constitutes sufficient reason to qualify as a ground for review.The term sufficient cause has received extensive adjudication on its meaning. The court in *The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others**[22]*** quoted in *Gideon Mosa Onchwati vs Kenya Oil Co. Ltd & Another**[23]*** discussing *sufficient cause* had this to say:-

> *"It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant."*

37. The Supreme Court of India in *Parimal v Veena**[24]*** observed that:-

> *"sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or" remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."*

38. Discussing what constitutes sufficient reason for purposes of review, the Supreme Court of India in the case of *Ajit Kumar Rath vs State of Orisa & Others*[25] stated that the expression "any other sufficient reason"… means a reason sufficiently analogous to those specified in the rule." A similar position was stated in *Sadar Mohamed vs Charan Signh and Another*[26] which 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).

39. The Privy Council in *Chhajju Ram v. Neki*,[27] (Viscount Haldane) held that the expression "any other sufficient reason" … should be interpreted to mean "a reason sufficient on grounds at least analogous to those specified immediately previously in the rule. In exercise of this power, the court is empowered to review an order in civil proceedings on grounds analogous to Order 45 Rule 1 of the Civil Procedure Rules.

40. The normal principle is that a judgment pronounced by the court is final, and departure from that principle is justified only when circumstances of a substantial and compelling character make it necessary to do so. The court may also reopen its judgment if a manifest wrong has been done and it is necessary to pass an order to do full and effective justice. However, whatever the nature of the proceeding, it is beyond dispute that a review proceeding cannot be equated with the original hearing of the case, and the finality of the judgment delivered by the court will not be reconsidered except where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility.

41. Discussing what constitutes sufficient reason for purposes of review, the Court of Appeal in in *The official Receiver and Liquidator vs Freight Forwarders Kenya Limited*[28] stated that:-

> *"these words only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice 'be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record."*

42. Decisional law suggests that the words (i.e. sufficient reason) mean that the reason must be one sufficient to the court to which the application for review is made and they cannot be held to be limited to the discovery of new and important matter or evidence, or the occurring of a mistake or an error apparent on record.[29]

43. In *Daphene Parry vs Murray Alexander Carson*[30] the court had the following to say:-

> *'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time barred, even at the risk of injustice and hardship to the appellant"(Emphasis added)*

44. The Court of Appeal in *Tokesi Mambili and others vs Simion Litsanga*[31] stated that where the application is based on sufficient reason it is for the court to exercise its discretion. Discretion vested in the court is dependent upon various circumstances, which the court has to

consider among them the need to do real and substantial justice to the parties to the suit.[32] Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case*[33] stated as follows:-

> *"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

45. Writing on judicial power, Chief Justice John Marshall wrote the following on the subject:-

> *"Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.**[34]***

46. The courts have nevertheless laid down certain general principles for themselves to guide them in the exercise of their discretion. To this end, and broadly speaking, the exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before the court.

47. The requirement of "sufficient cause," is synonymous with the requirement of "good cause." In this regard what an applicant is required to show, in essence, is a reasonable explanation for his default (it has also sometimes been described as an "acceptable" explanation). It is now trite that review cannot be had for the mere asking. A party seeking review must make out a case entitling him to the court's discretion. It must show sufficient cause. This requires a party to give a full explanation for the reasons cited. Of great significance, the explanation must be reasonable enough to excuse the default. In this regard, the court in *Evan Bwire vs Andrew Nginda*[35] 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.*

48. Here is a case where the applicant's advocate admits her mistake. She says that she prepared the further Affidavit as directed by the court but by sheer mistake, she omitted to annex the transcript from Riara University. Counsel was candid and truthful to the court as an officer of the court. I am persuaded that the mistake was genuine. I find that the explanation given is reasonable enough to excuse the default. I find no basis to conclude that she was negligent. This is a matter where the court should exercise its discretion and allow the review sought. I am alive to the fact that the discretion donated to the court under section 80 of the Civil Procedure Act is unfettered.

49. However, at the risk of repeating myself, I must point out that when I noted the said omission, I notified the parties and the Respondent's counsel consented to the applicant's counsel to introduce the missing annextures. The applicant's counsel filed the further affidavit dated 12th July 2019. When I retired to write the judgment for the second time, I again noted that the annexures were missing. I dismissed the suit on grounds that there was no evidence that the applicant studied Public International Law. The omission forms the basis for the present application and the applicant's candid admission stated above. Despite this clear sequence of events and the said admission, at the time of writing this ruling, I noted that the same annexures have mysteriously been introduced into the court file and annexed to the further affidavit filed on 12th July 2019. The Deputy Registrar is directed to seek an explanation from the Registry staff in order to curb such infractions to safeguard the integrity and sanctity of court records, and the integrity of the entire system of administration of justice.

50. Having concluded that the omission as admitted by the applicant's counsel was not intentional, but an excusable mistake, I find that the circumstances of this case do disclose sufficient reason, one of the permissible grounds for review under order 45 Rule 1 of the Civil Procedure Rules. Accordingly, I allow the application dated 24th July 2019 and review the judgment delivered on 23rd July 2019. To this extent, the final orders in the judgment/decree dated 23rd July 2019 are reviewed/varied and substituted with the following orders:-

> *a. An order of **Certiorari** be and is hereby issued quashing the first Respondent's decision contained in the letter dated 18thDecember 2016 declining to recognize or approve the applicant's Bachelors of Arts Degree in Law from Keel University, United Kingdom for purposes of admission to the Advocates Training Programme at the Kenya School of Law.*
>
> *b. An order of **Mandamus** be and is hereby issued compelling the first Respondent to recognize and approve the applicant's Bachelor of Arts Degree in Law for purposes of the Advocates Training Programme at the second Respondent.*
>
> *c. An order of Mandamus be and is hereby issued compelling the Respondents jointly and severally to forthwith admit the applicant **Mitchelle Njeri Thiongo Nduati** to the Advocates Training Programme at the Kenya School of Law.*
>
> *d. No orders as to costs.*

Signed, Dated and Delivered at Nairobi this 1st day of October, 2019

John M. Mativo

Judge

[1] {2019} e KLR.

[2] Cap 21, Laws of Kenya.

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

[4] {2019} e KLR.

[5] As observed *in State of Orissa vs. Sudhansu Sekhar Misra* MANU/SC/0047/1967.

[6] *Ambica Quarry Works vs. State of Gujarat and Ors*. MANU/SC/0049/1986.

[7] Ibid.

[8] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[9] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[10] Ibid.

[11] Ibid.

[12] {2019} e KLR.

[13] Twelfth Edition, Oxford University Press.

[14] Black's Law Dictionary, Tenth Edition.

[15] Ibid.

[16] Ibid.

[17] *Encyclopædia Britannica*. Merriam Webster.

[18] *Healthcare at Home Limited v. The Common Services Agency*, [2014] UKSC 49

[19] *Regina v Smith*, 4 AER 289 (2000) ("[sub-citing Camplin and Bedder:] the concept of the "reasonable man" has never been more than a way of explaining the law to a jury; an anthropomorphic image to convey to them, with a suitable degree of vividness, the legal principle that even under provocation, people must conform to an objective standard of behaviour that society is entitled to expect").

[20] Herbert, A.P. (1932). "Misleading Cases in the Common Law" (7th ed.), page 12.

[21] Ibid, page pp. 9-11.

[22] Appeal No. 147 of 2006 (Munuo JA, Msoffe JA and Kileo JJA).

[23] {2017} e KLR.

[24] {2011} 3 SCC 545.

[25] 9 Supreme Court Cases 596 at Page 608.

[26] {1963}EA 557.

[27] {1922} 49 LA. 144,

[28]Civil Appeal No. 235 of 1997; {1997} LLR 7356

[29] Supra note 9 above

[30] {1963} E.A. 546

[31] Civil Appeal 90 of 2001 – Kisumu.

[32] See Sir Dinshah F. Mulla, Code of Civil Procedure, at page 1381.

[33] [77 ER 209; (1597) 5 Co.Rep.99]

[34]*Osborn V. Bank of the United States*, 22 U. S. 738 {1824}.

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