REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 480 OF 2009

DYNCORP INTERNATIONAL LLC.....APPELLANT

VERSUS

TRAX CONSTRUCTION LTD.....RESPONDENT/APPLICANT

RULING

On 26th July, 2018 this court delivered a judgment in an appeal lodged by the appellant herein against the respondent/applicant following a challenge of the arbitration award made relating to the dispute between the parties. The court set aside the arbitral award and allowed the appellant's appeal and counterclaim. The proceedings leading to that judgment took place in the absence of the respondent/applicant who has now brought an application dated 16th April, and filed on 25th April, 2019.

There are two substantive orders sought by the applicant; the first being stay of the decree flowing from the judgment aforesaid and the second, that the court reviews and set aside the judgment and orders allowing the appeal and the counterclaim.

There are several reasons for seeking the said orders set out on the face of the application, alongside a supporting affidavit sworn on 16th April, 2019 by one Richard Herbert, a director of the applicant and filed on 25th April, 2019. There is a supplementary affidavit that followed sworn by the same deponent on 22nd May and filed on 24th May, 2019.

The application is opposed and there is a replying affidavit sworn by David S. Panzer, the Deputy General Counsel of the appellant sworn on 5th June, and filed on 13th June, 2019. Both parties have filed submissions in the argument of the application which I have read.

The application is brought under Articles 47 and 50 of the Constitution, Sections 1A, 1B, 3A and 3B of the Civil Procedure Act, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules.

The substantive Order that governs such applications is Order 45 (1) of the Civil Procedure Rules which states as follows;

> ***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 a review of judgment to the court which passed the decree or made the order without unreasonable delay."***

The court record shows that the applicant had a counsel on record who however filed an application to cease from acting, due to lack of instructions. That application was heard on 25th April, 2016 and allowed. That was after the counsel then appearing for applicant, informed the court that the application had been served upon the respondent/applicant herein as ordered by the court.

The court then made an order that the applicant would henceforth be served by way of registered post using the last known postal address. When the appeal was called out for hearing on 31st October, 2017 the court, being satisfied that the applicant had been served as directed, made orders that the parties file submissions within the timetable set.

The appellant complied while the applicant did not, and judgment was subsequently delivered on 26th July, 2018. The applicant must satisfy the court along the parameters set out in Order 45 Rule 1 cited above. I know it is the mandate of the court to ensure that every party to a suit should be given an opportunity to present their case, in accordance with the principles of natural justice and the court should ensure that the objective is in compliance with the Civil Procedure Act, to facilitate the just, expeditious, appropriate and affordable resolution of civil disputes. Indeed, that is the spirit of Article 50 of the Constitution on fair hearing.

A party to such proceedings has also a duty to help the court to advance the overriding objective of the Act and to participate in the processes of the court and comply with the directions and orders given thereby. It was not the intention of the court to proceed without the notice to the applicant, and that is why substituted service was ordered so that the applicant participates in the proceedings.

In the affidavits and submissions filed on behalf of the applicant, there has been emphasis on the breakdown of communication between the applicant and its then advocate. It is significant however that, no affidavit has been sworn and filed by any of the advocates in the firm that previously represented the applicant. It may be true that the applicant had full confidence in counsel, but that does not absolve a party from the duty to regularly check the progress of the case with his counsel. This is because a case belongs to a party and not counsel.

A case is a valued property, or so I think. Be it for the plaintiff or the defendant. A judgment in favour confers a benefit while one to the contrary visits a loss upon a party. It behoves any litigant therefore, to continually find out the progress of the case so as to reap the benefits therefrom, or avoid any adverse consequences.

I eco the words of Kimaru J in **Savings and Loan Limited vs. Susan Wanjiru Muritu, Nairobi HCCC No. 397 of 2002**. There is no evidence on any communication between the applicant and the then advocate who applied to be discharged from representing the applicant. The applicant has not denied the postal address, or the email address that is on record and used to communicate with.

It is also alleged that the court file could not be found even after communication had been made to the Deputy Registrar by a firm of advocates known as S S. Malonza & Company Advocates. I have looked at the annexures RH1 and RH2 to the supplementary affidavit sworn by Richard Herbert. Those letters are addressed to the Deputy Registrar of the Commercial and Tax Division not the Civil Division. They also refer to case No. 278 of 2007. This appeal is no 480 of 2009. Those letters therefore do not relate to the present file and therefore that averment cannot be correct.

I have balanced the interests of the parties herein and the right to have their day in court. Guided by the cited provisions of law cited, I am not persuaded that I should revisit the judgment by way of review as sought by the applicant. It follows therefore that, the application has not met the threshold required and is accordingly dismissed with costs to the appellant.

Dated, signed and delivered at Nairobi this 14th Day of November, 2019.

A. MBOGHOLI MSAGHA

JUDGE