



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 468 OF 2017**

**REPUBLIC.....APPLICANT**

**VERSUS**

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD.....RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION...1<sup>ST</sup> INTERESTED PARTY**

**SCANAD KENYA LIMITED.....2<sup>ND</sup> INTERESTED PARTY**

**EX- PARTE**

**TRANSCEND MEDIA GROUP LIMITED**

**RULING**

1. On 28<sup>th</sup> July, 2017, I granted the applicant leave to apply for orders in the nature of certiorari to quash the decision of the Respondent which was in respect of Request for Review No. 63/2017 with regard to Request for Proposals for Provision of Strategic Communication and Integrated Media Campaign Consultancy Services. In the same application the ex parte applicant also sought for an order of remission of the matter for reconsideration and re-evaluation of the proposals by the interested party.

2. When the matter came for directions before me on 25<sup>th</sup> September, 2017 I directed the ex parte applicant to file and serve submissions within 14 days of service on it of the responses by the Respondent and the interested party and listed the matter for mention for judgement date on 14<sup>th</sup> November, 2017.

3. On 14<sup>th</sup> November, 2017, when the matter was called out, only the interested parties were represented and **Mr Lubullelah**, Learned Counsel for the 1<sup>st</sup> interested party informed the Court that they had not been served with the applicant's submissions as directed by the Court. A similar view was expressed by **Miss Ngunjiri** for the 2<sup>nd</sup> interested party.

4. As the applicant had not complied with the Court's directions and as there was no representation on its part, this Court proceeded to dismiss the application.

The ex parte applicant is now back before me via a Notice of Motion dated 8<sup>th</sup> December, 2017 seeking the following orders:

- 1) The application be certified urgent and be heard *ex-parte* in the first instance.**
- 2) There be stay of the dismissal order of 14<sup>th</sup> November, 2017 pending hearing and determination of this application.**
- 3) The dismissal order of 14<sup>th</sup> November, 2017 be set aside and the application be reinstated.**
- 4) Costs of the application be provided for.**

**Applicant's Case**

6. According to the applicant, when the matter came up for directions on 25<sup>th</sup> September, 2017, its counsel was engaged in CMEP No. 1 of

2017 between **Patrick Ngari Njeru vs. IEBC & 2 Others at Embu**. He averred that whereas his pupil **Angela Merichi** sought help of counsel in court who held his brief and whereas directions were issued, the said pupil inadvertently failed to diarise the next mention date in either the office diary or in the personal diary. It was contended that the failure to do so was a genuine mistake on the part of the said pupil.

7. As a result of the foregoing learned counsel for the ex parte applicant was unaware of the mention on 14<sup>th</sup> November, 2017 as the matter did not appear in any of the diaries in his office. However, on 14<sup>th</sup> November, 2017 he was once again engaged in the same matter at Embu and only became aware of the dismissal of the matter on 6<sup>th</sup> December, 2017 upon perusing a request from KTK Advocates to approve the draft Decree.

8. In the applicant's view, since the order has not been perfected, the court is still seized of the matter. Learned counsel for the ex parte applicant expressed remorse on the matter and undertook to comply with the directions of 25<sup>th</sup> September, 2017 and assist his client to ventilate its grievance against the Respondent's Ruling. It was his view that this application raises triable issues that merit full trial. To him, the *Ex Parte* Applicant ought not to suffer for the excusable inadvertence on the part of its advocate.

9. It was contended that this Court has unlimited inherent and residual jurisdiction to set aside the dismissal order and enlarge time within to comply with the directions of 25<sup>th</sup> September, 2017 or any other directions that the court may issue. It was the applicant's case that it will suffer injustice and prejudice if it is denied access to justice and that the application was filed without undue delay.

### **Interested Parties' Case**

10. Whereas the application was not opposed by the 2<sup>nd</sup> interested party it was however opposed by the 1<sup>st</sup> interested party who filed the following grounds of opposition:

- 1. The application is an abuse of court process as the ex parte applicant has to date failed, without reason to comply with this court's orders and directions of 25<sup>th</sup> September, 2017, even after learning of the same.**
- 2. The application lacks merits as the same has been made after undue and inordinate delay.**
- 3. The application is contrary to public policy on expeditious and efficient disposition of justice, and that there must be an end to litigation**
- 4. The Court's decision to dismiss the suit was made within its discretionary jurisdiction and such discretion can only be challenged on appeal.**
- 5. Contrary to averments in the affidavit sworn by Angela Merich Wakhungu, there was no representation by or for the ex parte applicant on the 25<sup>th</sup> September, 2017 and the court record is clear that no advocate was present or held brief for the ex parte applicant's advocates and further, the name of such advocate who held brief has not been disclosed.**
- 6. The judicial review has been overtaken by the events and is no longer sustainable as the 1<sup>st</sup> interested party has already entered into the subject matter of the contract with the 2<sup>nd</sup> interested party following the Respondent's decision.**
- 7. The application lacks legal merit and ought to be dismissed.**

### **Determinations**

11. I have considered the application.

12. It is clear from the foregoing that the basis of this application is that the applicants were let down by their erstwhile advocates. The law is however now that it is not every case that a mistake committed by an advocate would be a ground for setting aside orders of the Court. In **John Ongeri Mariaria & 2 Others vs. Paul Matundura Civil Application No. Nai. 301 of 2003 [2004] 2 EA 163** it was held that:

**"Legal business can no longer be handled in such sloppy and careless manner. Some clients must learn at their costs that the consequences of careless and leisurely approach to work by the advocates must fall on their shoulders...Whenever a solicitor by his inexcusable delay deprives a client of his cause of action, his client can claim damages against him...Whereas it is true that the Court has unfettered discretion, like all judicial discretion must be exercised upon reason not capriciously or sympathy alone...Justice must look both ways as the rules of procedure are meant to regulate administration of justice and they are not meant to assist the indolent"**

13. In **Savings and Loans Limited vs. Susan Wanjiru Muritu Nairobi (Milimani) HCCS NO. 397 of 2002** Kimaru, J expressed himself as follows:

**"Whereas it would constitute a valid excuse for the defendant to claim that she had been let down by her former advocate's failure to attend court on the date the application was fixed for hearing, it is trite that a case belongs to a litigant and not to her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside dismissal of a suit on the sole ground of a mistake by counsel of the litigant on account of such advocate's failure to attend court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present case, it is apparent that if the**

defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the defendant to be prompted to action by the plaintiff's determination to execute the decree issued in its favour, is an indictment of the defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgement that was dismissed by the court, it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant.

14. That notwithstanding the decision to set aside an order is undoubtedly an exercise of discretion. The principles guiding the setting aside *ex parte* orders are trite that the court has wide powers to set aside such *ex parte* orders save that where the discretion is exercised the Court will do so on terms that are just. In CMC Holdings Limited vs. Nzioki [2004] 1 KLR 173 it was held as follows:

“That discretion must be exercised upon reasons and must be exercised judiciously...In law the discretion that a court of law has, in deciding whether or not to set aside *ex parte* order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle...The answer to that weighty matter was not to advise the appellant of the recourse open to it as the learned magistrate did here. In doing so she drove the appellant out of the seat of justice empty handed when it had what it might have well amounted to an excusable mistake visited upon the appellant by its advocate”.

15. In Branco Arabe Espanol vs. Bank of Uganda [1999] 2 EA 22, Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered”.

16. In Waljee's (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188, it was held that:

“There is no injustice if the other side can be compensated by costs... There is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine.”

17. As to whether this Court has the power to reinstate a dismissed application, the Court of Appeal in Nakumatt Holdings Limited vs. Commissioner of Value Added Tax [2011] eKLR held that the superior court in the matter before the court has the residual power to correct its own mistake. Accordingly, where a mistake is shown to have been committed which is remediable by the Court the same ought to be corrected by the Court in the exercise of its inherent jurisdiction and not necessarily under section 3A of the *Civil Procedure Act* which strictly speaking does not apply to judicial review proceedings. That section in any case does not confer inherent jurisdiction on the Court but only reserves the same.

18. Having considered the foregoing I am satisfied that this is a matter where the Court in exercising its discretion ought to balance the interests of both parties. The Respondent and interested parties have not shown that any serious prejudice will be occasioned to it if these proceedings are reinstated.

19. Therefore balancing the interests of the parties herein, I grant the Notice of Motion dated 8<sup>th</sup> December, 2017 and I set aside the order dismissing these proceedings, reinstate the same to hearing and enlarge the time within which the submissions are to be filed and served with a further period of 3 days from the date hereof. The Respondents and interested parties will file and serve theirs within 14 days of service thereof.

20. For avoidance of doubt, in default, these proceedings will stand dismissed with costs to the Respondent and the interested parties.

21. The costs of this application are awarded to the interested parties in any event.

22. It is so ordered.

Dated at Nairobi this 5<sup>th</sup> day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr. Gachuba for the applicant

Mr. Simiyu for Mr. Lubullelah for the 1<sup>st</sup> interested party

