



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**

**HCC. NO. 276 OF 2005**

**ARTHUR NGIGI NDUNG’U.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**PETER MBURU KIBINDA.....2<sup>ND</sup> PLAINTIFF/REPOENDENT**

**REUBEN MBURU NDUNG’U.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**JEPHERS NDUNG’U NJOROGE.....DEFENDANT/APPLICANT**

**RULING**

1. The Notice of Motion dated 9<sup>th</sup> September 2016 seeks the following substantive Orders:-

2. THAT the Honourable Court be pleased to stay execution of the orders of the Hon. Justice F. Tuiyot made on July 21<sup>st</sup> 2016 pending the hearing and determination of this Application.

3. THAT the orders made by the Hon. Justice F. Tuiyott on July 21<sup>st</sup> 2016 be reviewed and set aside.

2. The Motion which is brought under the provisions of Order 45 Rule 1 of the Civil Procedure Rules is grounded on the reason that the Orders made by Court on 21<sup>st</sup> July, 2016 are erroneous from the face of the Record. Two errors are said to be apparent.

3. First, that this Honorable Court inferred that the Notice of Taxation dated 9<sup>th</sup> April, 2014 was served before 8<sup>th</sup> July 2014 when in fact the Defendant became aware of the said Taxation on 2<sup>nd</sup> June 2015.

4. Then, that in the said Ruling the Judge stated that he was unable to exercise his discretion in favour of the Applicant because he had not accounted for the delay from 22<sup>nd</sup> October 2010 upto the time when he learnt of the Judgment. The Applicant is of the view that this conclusion is erroneous because the Applicant accounted for that period in the Affidavit filed herein on 3<sup>rd</sup> November 2015.

5. The Application is opposed by the 3<sup>rd</sup> Plaintiff who swore a Replying Affidavit on 24<sup>th</sup> October 2016.

6. There is a Plethora of decisions that have set out the scope of Review on the reason that there is a mistake or error apparent o the face of the Record. In the case of **NATIONAL BANK OF KENYA LIMITED VS. NDUNGU NJAU** [1997] eKLR the Court of Appeal restated this as follows:-

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review”.

7. In addition an erroneous conclusion of evidence is not a ground for a Review but may be a good ground for Appeal (See **FRANCIS ORIGO & ANOTHER VS. JACOB KUMALI MUNGATA** [2013] eKLR.

8. In both the Application and the Submissions before Court, the Applicant argues that this Court misapprehended the evidence before it and thereby reached a wrong Decision. If that were so then the Applicant should have preferred an Appeal against the impugned Decision instead of filing this misadvised Application for Review as the Application is essentially a challenge to the manner in which the Court understood the evidence. Being of that view I would have dismissed the Application at this stage without saying more.

9. However if I am wrong, then let me consider whether the Court misunderstood the evidence before it. And I must confess that this is an embarrassing path to walk because I will, in a sense, be defending the impugned Decision. One of the obvious reasons why the Decision should have been challenged by way of Appeal!

10. In paragraph 18 and 19 of the said Decision I stated as follows:-

“18. The Plaintiffs have also pointed out that there has been inordinate delay in the Defendant’s bringing the current Application. It is true that the Application was filed about 5 years after the Judgement was delivered. How does the Defendant explain the delay? The Defendant says that he learnt of the Judgement only after being served with a Hearing Notice of the Bill of Costs.

19. Curiously, the Defendant is silent about when he was served with that Hearing Notice. However the Notice itself (annexture JNN 1 to the Defendant’s affidavit of 15<sup>th</sup> September 2015) shows that the Bill of Costs was scheduled for taxation on 8<sup>th</sup> July 2014. It can be inferred that the Notice was served before that date. If the Defendant has blamed his inaction from 2010 to 2014 on bad health, he has not explained why it took him from July 2014 to 18<sup>th</sup> September 2015 to file the present Notice of Motion. This is about 14 months later”.

11. The Court reached that conclusion because in paragraph 4 of his Affidavit in Support of the Motion of 15<sup>th</sup> September 2015 the Applicant averred:-

“THAT I was not made aware of the judgment or served with a hearing notice until I was served with a Bill of Costs from the Advocates on record acting on behalf of the Plaintiffs in the matter here( I annex hereto and mark as exhibit ‘JNN 1’ the Notice of Taxation/Accounts)”.

Annexed as JNNI is a Notice of Taxation dated 9<sup>th</sup> April 2014.

12. The Applicant now states that he annexed the wrong Taxation Notice and then proceeds to argue that the error was remedied by the Applicant’s further Affidavit of 25<sup>th</sup> January 2016.

13. That further Affidavit has these two substantive Statements:-

“2. THAT under paragraph 5 of the Supporting Affidavit filed on the 18<sup>th</sup> September 2015, there was an inadvertent error made in which a different affidavit was annexed to the one mentioned under the said paragraph. The Affidavit annexed referred to one sworn by Nelson Mwangi Maina

instead of one sworn by Godfrey Paul Okutoyi which was sworn on 6<sup>th</sup> October 2014.

3. THAT I now wish to state that the correct Affidavit of service I will rely on was sworn on the 6<sup>th</sup> October 2014. (I annex and mark as 'JNN 5' the Affidavit of Service sworn by Godfrey Paul Okutoyi)"

14. As would be clear from the contents the Affidavit it corrects an error said to be in paragraph 5 of the Supporting Affidavit of 15<sup>th</sup>(not 18<sup>th</sup>)September 2015 but says nothing of paragraph 4 thereof or the Notice of Taxation of 9<sup>th</sup> April, 2014 and its date of service.

15. And for the first time, the Applicant talks of a Taxation Notice dated 2<sup>nd</sup> June 2015 in paragraph 5 of his Supporting Affidavit to the Current Application in which he states:-

“THAT I was served with the taxation notice dated 2<sup>nd</sup> June 2015 by the firm of Waweru Gatonye. This was the time that I learnt about the Judgement that was delivered on 22<sup>nd</sup> October 2010 by Honourable Justice L. Kimaru ( I annex hereto and mark as exhibit “JNN1” Taxation Notice dated 2<sup>nd</sup> June 2015)”.

16. This evidence and taxation Notice were not availed to Court when it was asked to consider and determine the Application of 15<sup>th</sup> September 2015 and no reason has been profferedas to why that was not done.

17. Given the material before me then, I would not have reached a different Decision. For the Applicant to now shift the blame of his Counsel’s indulgence to Court is lack of Condour that is both puzzling and vexing.

18. In respect to the grievance that this Court did not give due regard to the Applicant’s explanation of delay on account of illness, I fully agree with the Respondent’s Counsel that paragraph 17 of the impugned Ruling fully addressed this matter. The Court held:-

“17. From the Medical documents shown to Court, it is not in doubt that the Plaintiff suffered poor health between 2007 and 2014. The Court is not insensitive to this. However, there is no evidence that the ill health prevented the Defendant from attending Court for the hearing on 16<sup>th</sup> March, 2009 or for the Judgment on 22<sup>nd</sup> October, 2010”.

19. The Notice of Motion dated 9<sup>th</sup> September 2016 lacks merit and is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 10<sup>th</sup> day of February, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Kiplum h/b for Kounah for Defendant/Applicant

Mutua h/b for Gathoni for Plaintiff/Respondent

Alex - Court Clerk