



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CIVIL APPEAL NO 12 OF 2014**

NYAMBU MWANYEFA.....APPELLANT

VERSUS

ALICE WALI MKOMBOLA.....RESPONDENT

**RULING**

**INTRODUCTION**

1. The Respondent's Notice of Motion application dated 17<sup>th</sup> August 2016 and filed on 23<sup>rd</sup> August 2016 was brought pursuant to the provisions of Sections 1A, 3, 3A & 80 of the Civil Procedure Act Cap 21 and Order 45 Rules 1 & 2 of the Civil Procedure Rules, 2010. It had sought for the following orders:-

**a. THAT this Honourable Court be pleased to review, vary and/or set aside the Judgment dated and delivered on 28<sup>th</sup> July 2016.**

**b. THAT the costs of this Application be provided for.**

2. The grounds on which the Respondent relied upon in support of her application were that there was a mistake and/or apparent error on the face of the record, that the Judgment was passed without affording her a chance to be heard, that there was a delay in the Appellant prosecuting his Appeal yet she was the one who was condemned, that there was no proper record of Appeal as at 28<sup>th</sup> June 2016 when the matter was heard, that she was never served with any or any proper Record of Appeal, that the consent dated 9<sup>th</sup> October 2015 had never been set aside and consequently, any proceedings outside the said consent were irregular and a nullity in law and that she had been punished for an excusable mistake on the part of her advocates.

3. Her application was also supported by the Affidavit on Godfrey Mutubia, her advocate. The same was sworn on 17<sup>th</sup> August 2016. The deponent reiterated that he was never served with a Record of Appeal which forced the Respondent to file an application dated 29<sup>th</sup> June 2015 seeking dismissal of the Appeal for want of prosecution. He contended that the said application was compromised by a consent whose terms were that the Respondent was to file a Record of Appeal within thirty (30) days from 9<sup>th</sup> October 2015 and file Written Submissions thirty (30) days thereafter. It was his averment that the Appellant did not comply with the said terms despite them writing to him to comply.

4. He also stated that the Respondent had the matter mentioned on 28<sup>th</sup> June 2016 for purposes of having the court declare the Appeal as dismissed (**sic**) but their representative arrived in court late due to delays occasioned by the construction of the Standard Gauge Railway. It was his further contention that it was

the Appellant who had caused delays in the hearing of the Appeal herein and because the Respondent had never been served with the Record of Appeal, she could not oppose the same on merit.

5. It was his further averment that as there was no Record of Appeal, the court proceeded in error rendering its Judgment that was delivered on 28<sup>th</sup> July 2016 irregular. He therefore urged this court to set aside, vary and/or issue an order dismissing the Appeal herein.

6. In response thereto, the Appellant filed Grounds of Opposition dated 24<sup>th</sup> March 2017 and filed on 27<sup>th</sup> March 2017. The grounds were as follows:-

**a. The Record of Appeal duly filed by the Appellant was on record. This was a court of record(sic).**

**b. There was no affidavit of service by one Fred Wangila to support the allegation made in paragraph 12 of the affidavit sworn in support of the application. The affidavit sworn in support if the application was defective (sic).**

**c. There were no proper grounds for review of the judgment of the court.**

**d. The Respondent's application was incompetent, frivolous and bad in law.**

7. The Respondent's Written Submissions were dated 14<sup>th</sup> November 2016 and filed on 16<sup>th</sup> November 2016 while those of the Appellant were dated 24<sup>th</sup> March 2017 and filed on 27<sup>th</sup> March 2017.

8. When the matter came up in court on 10<sup>th</sup> April 2017, counsel for the Appellant and counsel for the Respondent asked this court to rely on their respective Written Submissions in their entirety in delivering its Judgment. The Judgment herein is therefore based on the said Written Submissions.

### **LEGAL ANALYSIS**

9. The matter herein was initially filed at High Court of Kenya, Mombasa. The Memorandum of Appeal dated 13<sup>th</sup> September 2013 was filed in the said court on even date. The proceedings from Wundanyi Law Courts were certified as a true copy of the original on 6<sup>th</sup> November 2013. The matter was subsequently transferred to this court to wit to the High Court of Kenya Voi vide a letter dated 17<sup>th</sup> November 2014 that was copied to advocates for both parties. The said file was received at the High Court of Kenya, Voi on 27<sup>th</sup> November 2014.

10. In its Judgment dated 28<sup>th</sup> July 2016, this court noted that the consent dated 2<sup>nd</sup> November 2015 in which counsel for the Appellant and counsel for the Respondent filed had indicated the new time lines to file their said Written Submissions. The said consent was recorded and endorsed by the Deputy Registrar of the High Court of Kenya, Voi as an order of the court, on the same date.

11. It also observed that on 16<sup>th</sup> June 2016, the Respondent's advocateshad fixed an *ex parte* mention date for 28<sup>th</sup> June 2016 and served the Appellant herein but although the Appellant attended court on the said date, neither she nor her advocates attended court. She did not also file her Written Submissions in this matter.

12. As the Appellant had filed his Written Submissions and there was no explanation as to why the Respondent and/or her advocates failed to attend court on a date they had fixed for a mention, this court reserved its Judgment for 28<sup>th</sup> July 2016. It observed that the Respondent could not hold the Appellant herein and the court hostage by their failure to attend court or to file Written Submissions. This court was categorical in its said Judgment that it had overlooked the Appellant's delay in filing his Record of Appeal purely in the interests of justice.

13. Notably, the Appellant did not attend court when this court delivered its judgment. However, the Respondent's advocates attended. It was therefore clear to this court that the Respondent's advocates were aware of the date it had reserved for delivery of the Judgment herein.

14. The Respondent's assertions that they had fixed the matter for a mention with a view to persuading this court to have dismissed the said Appeal would have been futile. Indeed, it was not clear to this court why the Respondent's advocates did not move this court appropriately to be permitted to file their Written Submissions before it could deliver its judgment or make the necessary application seeking to have the Appellant's Appeal dismissed for consideration by this court.

15. Having said so, this court also observed in its said Judgment that it was allowing the Appellant's Appeal to remain on record purely in the interests of justice. As was rightly submitted by the Appellant, Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities.

16. A delay in filing pleadings is not a good or sufficient ground for striking out proceedings as it is a procedural technicality. It is not a substantive issue and does not go to the root of a case. Striking out proceedings is a drastic and draconian step that should only be exercised in the rarest of the cases and with a lot of caution. Indeed, no party should be denied an opportunity to present its case. In the light of the aforesaid constitutional provision, it is unlikely that this court would have been persuaded to strike out the Appeal herein as costs to the Respondent would have been an adequate remedy had the Respondent made a case to be awarded the same.

17. Going further, this court noted the Respondent's advocates' representative's reason for failing to attend court on 28<sup>th</sup> June 2016. The reason was excusable and as the Respondent rightly pointed out, she should not be condemned for the mistakes of her advocates or be locked out of the seat of justice. However, as the Appellant's advocates also correctly pointed out, the contents of Paragraph 12 of the deponent's Affidavit ought to have been supported by the Affidavit of Fred Wangila. Left as it is, the contents therein were not admissible and remained as heresy as the deponent did not disclose the source of his information.

18. Additionally, this court gave a reasoned Judgment having considered the merits of the case that was being appealed from. The only option would be to have this matter heard by another court other than this one. Indeed, allowing the said application would be tantamount to this court sitting on appeal on its own case. To determine whether the Respondent had persuaded this court to set aside, vary and/or review its Judgment herein, it therefore took into consideration the grounds under which a review can be granted.

19. Order 45 Civil Procedure Rules provides as follows:-

**“Any person considering himself aggrieved-**

**a. by a decree of 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 exercise of due diligence, was not within his 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, 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.”**

20. It was clear in this court's mind that it could only review its Judgment if it had made an error and the same was apparent from the face of the court record amongst other grounds cited therein. In other words, in allowing an application for a review, a court need not struggle to establish whether or not there was

such an error or mistake because such an error or mistake must be one which should be apparent or manifest on the face of the court record.

21. This was a position that was set out in the case of **National Bank of Kenya vs Ndung'u Njau [1995-1998] 2 EA 249** where the Court of Appeal held that:-

**“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 of review that another judge could have taken a different view...”**

22. In this case, failure by the Appellant to file his Record of Appeal within the time in the consent did not mean that there was no Record of Appeal. It only meant that it was irregularly on record but which this court sanitised by allowing the same to be on record purely in the interests of justice. This could not therefore be deemed to have been an error envisaged under Order 45 of the Civil Procedure Rules sufficient to persuade this court to exercise its powers or discretion to review its Judgment.

23. Accordingly, having considered the parties' pleadings herein, the Affidavits, the Grounds of Opposition and the Written Submissions, this court was not persuaded by the Respondent's arguments that this was a proper case for it to exercise its discretion to review, vary and/ set aside the Judgment it delivered on 28<sup>th</sup> July 2016.

24. The Respondent's assertions that she was never served with the Record of Appeal were negated by the deponent's assertions that the Appeal was to be dismissed because it had been filed out of time. Her prayer that this court issues an order dismissing the Appeal herein was not tenable as the Judgment that was delivered herein based on a valid Record of Appeal that was on the court record. The case would, however, have been different had her prayer being grounded on an assertion that she was denied an opportunity to present her case.

### **DISPOSITION**

25. The upshot of this court's ruling therefore was that the Respondent's Notice of Motion application dated 17<sup>th</sup> August 2016 and filed on 23<sup>rd</sup> August 2016 was not merited and the same is hereby dismissed with costs to the Appellant.

26. It is so ordered.

**DATED and DELIVERED at VOI this 15<sup>th</sup> day of June 2017**

**J. KAMAU**

**JUDGE**