



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 347 OF 2011

JOSEPH MATANO HAMISI..... 1ST APPELLANT

KHAMISI VINCENT FRANCIS2ND APPELLANT

Versus

TITUS SHIKOKOTI ONYANGO.....RESPONDENT

RULING

1. The applicants; **Joseph Matano Hamisi and Khamisi Vincent Francis** took out the motion dated 29th June 2015 in which they sought for the following orders:

1. ***THAT on the grounds more specifically set out in the Certificate of urgency filed the application be certified as urgent and service thereof be dispensed with in the first instance.***
2. ***THAT pending interpartes hearing of the application this Honorable court be pleased to issue an order of stay of execution of orders of the Honorable Onyancha J. issued on 24th June, 2015.***
3. ***THAT pending the hearing and determination of the application this Honourable court be pleased to order a stay of execution of orders of the Honorable Onyancha J. issued on 24th June, 2015..***
4. ***THAT this honorable court be pleased to review, vary and/or set aside the orders of the Honorable Onyancha J. issued on 8th July, 2014 and 24th June, 2015 dismissing High Court Civil Appeal No. 347 of 2011 together with all other consequential orders.***
5. ***THAT the appeal filed herein on 19th December 2014 be reinstated and set down for hearing.***
6. ***THAT this honorable court be pleased to make such orders as it deems fit and just.***
7. ***THAT the costs of application be provided for.***

2. The motion is supported by the affidavit of **Osamba Otieno**. When served **Titus Shikokoti Onyango**, the Respondent, filed a replying affidavit he swore to oppose the motion. When the motion came up for interpartes hearing before **Onyancha J.** learned counsels appearing in the matter recorded a consent order to have the motion disposed of by written submissions.

3. I have considered the grounds stated on the face of the motion together with the facts deponed in the supporting affidavit filed in support of the motion and the replying affidavit. Unfortunately, only the respondent filed his submissions which I have taken into consideration.

4. It is the respondent's submissions that this court cannot assist an indolent litigant. He argued that the applicant treated this matter in a casual manner seeing that they obtained the decree on 28th October 2014

and filed record of appeal nearly two months later on 19th December 2014. He averred that, the claims by the applicants that the delay was occasioned by the exit of an advocate who handled the matter from the firm is an afterthought which took the firm almost 6 months to hand over the file to another advocate. He argued further that, the applicants' advocate should have been vigilant since no good reasons have been advanced to warrant reinstatement of the appeal. He pointed out that after the appeal expired on 8th March 2015, the applicants never bothered to apply for time extension even after the advocates were served with a mention notice on 22nd May 2015 clearly indicating the purpose of the mention scheduled for 24th June 2015. On the issue of stay, the respondent concluded that there is no appeal in place to warrant stay of execution and that the respondent will be greatly prejudiced if the appeal is reinstated.

5. As it appears on the face of the motion, the Applicants are basically asking to be given two orders. First, is an order for stay of execution pending interpartes hearing and determination of the application and secondly, review of the orders of **Onyancha J.** issued on 8th July, 2014 and 24th June, 2015 dismissing the current appeal.

6. On the first issue of review. The application, the subject of this ruling has been brought under section 80 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules. Section 80 provides for review of a Ruling or Judgment and Order 45 of the CPR, expounds further on the grounds under which review orders can be granted. Order 45 requires that, before a court reviews orders of another Judge, some conditions must be met. Firstly, there should be discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicants knowledge or could not be produced by him at the time when the decree was passed or the order made. Secondly, there should be some mistake or error apparent on the face of the record. Thirdly, where there is any other sufficient reason, then review of the decree or order may apply

7. The question arising is whether this court has the jurisdiction to review the orders of **Onyancha J.** The Court of Appeal in the case of **Pancras T. Swai v Kenya Breweries Limited [2014] eKLR**, the judges referred to the case of **National Bank of Kenya Limited v. Ndungu Njau** (Civil Appeal No. 211 of 1996 (unreported) where they stated that:

" This Court, with respect, correctly held: 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. More 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 ground for review."

8. I have perused the court record in the current case. The parties appeared before **Onyancha J.** on 8th July 2014 for the hearing of the respondents application for dismissal of the appeal for want of prosecution upon invoking Order 42 of the CPR. I wish to state at this point that the reasons advanced to the court by the respondent at that time for their indolence was that the advocate handling the matter had left the firm and that they were served on March 2014. The honorable Judge upon hearing the application was lenient on the applicants and ordered that they prosecute the appeal within 8 months. When the matter came up before the Judge on 24th June 2015, the applicants only sought extension of time to prosecute upon admitting that they had not filed an application of extension of time. The honorable judge, heard the parties and delivered a ruling to the effect that the appeal is dismissed for want of prosecution.

9. The applicants aggrieved by the ruling of the honorable Judge have now filed this review. The applicants now claim that the reason they were not in a position to prosecute the appeal was because the advocate handling the matter left the firm. They further aver that they have sought for a copy of the decree from the Executive Officer vide a letter dated 12th August 2014 which they eventually obtained. They further claim that the delay was occasioned by failure to acquire a mention date for the purposes of taking directions from the court, to this end they annexed a letter dated 18th November, 2014 . I note that though the letter was addressed to the Deputy Registrar, it lacks a receipt stamp that would authenticate

its receipt by the Registrar. I further note that all the material placed before me, was material that could have been comfortably placed before **Onyancha J.** before he delivered his ruling but for some reason beyond my comprehension, the applicants chose not to do so and only sought extension of time at the time, without explaining to the court the reasons behind the delay in prosecuting the suit. Without such reasons the Judge exercised his jurisdiction and dismissed the appeal.

10. Therefore, from the foregoing it is clear that the applicants have not satisfied the conditions that necessitate a review. Evidently, they have not shown they have discovered any new and important evidence which was not within their knowledge or which could not be produced by them at the time when the order was made, since like I said the material was well within their reach and could have been produced in court before it ruled on the matter. Moreover, I do not see any mistake or error apparent on the face of the record, as far as the Ruling by the Honorable Judge is concerned. The judge carefully tackled the matter by consideration the arguments of the parties in arriving at the conclusion he did.

In conclusion, there is also no other sufficient reason provided by the applicant that necessitates a review of the orders. I am convinced that, this is not a matter deserving of an order of review. It is not enough as stated in the **National Bank of Kenya case** *supra*, that I would have applied my mind differently in the matter. If the applicants are aggrieved, their remedy lies with the Court of Appeal.

11. On the second matter of stay of execution, I believe that given that there is no appeal in place, then the orders for stay cannot issue.

12. Consequently, I hereby dismiss the application and order that the decretal sum be released to the respondents as ordered by **Onyancha J.** in his Ruling dated 24th June 2015. The respondent to have costs of the appeal.

Dated, Signed and Delivered in open court this 3rd day of March, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicants.

..... for the Respondent.