REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 92 OF 2000

PETER NJOROGE GICHII.....PLAINTIFF/APPLICANT

VERSUS

1. **BERNARD THIMANGU.....1ST DEFENDANT/RESPONDENT**

2. **HON. THE ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT**

RULING

1. The applicant plaintiff in this case by his application dated 14th August 2014 seeks:

> *1. That this Honourable court be pleased to review its judgment dated 113th July 2006 to enhance the award granted thereon and take into account the medical expenses that the plaintiff/applicant has incurred since judgment arising from the accident to the tune of Kshs.342,573/50.*
>
> *2. That costs of the application be borne by the Respondent.*

2. The application is brought under the provisions of **Order 45 Rule 1** and **Order 51 of the Civil Procedure Rule 1 and Sections 1A, 1B and 3A of the Civil Procedure Act.**

The main ground upon which the application is brought is that since the judgment was delivered and decretal sum paid, the applicant has developed complications leading to surgeries to the tune of Kshs. 343,573.50/= hence the need to enhance the judgment sum by the above sum. In his supporting affidavit sworn on the 14th August 2015, the applicant depones that there are sufficient reason to review the judgment due to the further medical expenses as they flow from the injuries he sustained. He has urged the court to invoke its inherent powers donated by **Section 3A of the Civil Procedure Act**.

3. The application is opposed by grounds of opposition filed on the 25th April 2016, that the application is fatally and incurably defective, bad in law and an abuse of the court process, upon grounds that there is no basis upon which the orders sought can be granted.

4. The applicant filed written submissions. **Order 45 Rule 1** of the **Civil Procedure Rules** that:

> *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*
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> *b. By a decree or order from which no appeal 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 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 applicant relies on "any other sufficient reason" as stated in (b) above that the further expenses the applicant has continued to incur where not contemplated at the time of filing of the suit and that the court has jurisdiction to deal with the same as it arises from the same set of facts were pleaded in the plaint.

5. Citing the case the **Official Receiver and Liquidator -vs- Freight Forwarders Kenya Limited CA No 235 of 1997 and Kimita -vs- Wakiburi (1985) e KLR** he submitted that "**any other sufficient reason**" ought be a sufficient reason, not limited to the discovery of new and important matter or evidence, and may not a mistake or error on the face of the record, or analogous to the above. He further submits that the extra expenses incurred by the applicant qualify to be construed as any other sufficient reason for the judgment to be reviewed, as they were not within his knowledge, and not having been incurred at the time judgment was delivered on the 13th July 2006.

6. I have read the judgment subject of this application. It was delivered on the 13th July 2006.

One of the requirements as stated in **Order 45 Rule 1** is that an application for Review must be brought without unreasonable delay. The application was brought 10 years after the judgment. The delay of ten years has not been explained at all. No submission was made on the in ordinate delay.

7. I have seen a medical report prepared by Dr. w. Kiamba dated 20th July 2015 and an invoice dated 11th June 2015 from War Memorial Hospital Nakuru. The further expenses were incurred in the year 2015.

I have read the plaint that originated the case. It was filed in 2000. The plaintiff did not plead further medical expenses and did not prove them either.

I have read the judgment of Justice Kimaru, Judge. He ably dealt with all the issues as pleaded and awarded General damages and special damages upon consideration of the applicants medical report proved. It is trite law that a court can only consider and award what is pleaded and proved.

8. It is not in dispute that the applicants medical complications are as a result of the gunshot and injuries sustained, but his claim did not include a pleading on future medical expenses. The applicant seeks to have this element considered at this late hour.

In my considered opinion, this would be reopening the plaintiff's case and to admit new evidence. The doctor who prepared the medical report after evaluation of the injuries would have known the extent and the need for future surgeries.

The medical report of June 2015 prepared by Dr. W. Kiamba is in itself new evidence. With due diligence, that evidence could have been known to the applicants doctor during the pendency of the case.

Section 80 of the Civil Procedure Act, and Order 45 of the Rules sets the rules on Review application. "Any other sufficient reason" for purposes of review refers to grounds analogous to the other grounds, error on the face of the record and discovery of new matter or evidence.

I do not think any "other reasons" can be isolated from the other two, and considered in singular. It must be considered alongside the others for whole purpose and purport as expressed in the order.

9. **Akiwumi & O'kubasu JJA in the Official Receiver and Liquidator** (Supra) observed that these words only mean tht the reasons must be one that is sufficient to the court to which the application for review is made and they cannot without at times running to the interests of Justice be limited to the

discovery of new and important matters or evidence.

In the **Court of Appeal Tanzania** in the **Registered Trustees of the Archidiocese of Dar-es-Salaam - vs- The Chairman Bunju village Government & Others – Civil Appeal No. 147 of 2006** - , the Judges in an attempt to define what constitutes "any sufficient cause" had this to say:

*"**It is difficult to define the meaning of the words. It is generally accepted however that the words should receive a liberal construction in order to advance substantial justice, when on negligence or in action or want to bona fides, is imputed to the appellant."***

10. From the above analysis, it is evident that there was negligence on the part of the applicant and or his advocate for failure to plead to the future expenses as they could be ascertained or foreseeable.

The liberal construction of the phrase and words under consideration excludes negligence and inaction by the applicant **Section1A and 1b** of the **Civil Procedure Act** cannot come to the assistance of the applicant as no reasons were advanced to explain the inordinate delay of ten years to make the application.

See **Stephen Gathua Kimani -vs- Nancy Wanjira Wamingi t/a Providence Auctioneers, (2016) e KLR.** In this case**,** the Judge faced with similar circumstances held that though the court ought to give a liberal interpretation to the words "sufficient cause" it ought to be guided by Judicial principles and that if the appellant has a good case on merits, but is out of time and no valid excusable reasons for delay have been given, the court must guard itself against the danger of being led astray by sympathy.

11. It is trite that **Section 3A and 3B of the Act** cannot be invoked as a matter of course so as to excuse all manner of failures by parties. Rules of procedure and practice must regulate court proceedings lest the court becomes a market place where one decides what and when to go to the market.

For the court to serve Justice to all the rival interests of parties, it must be guided by the Oxygen rules of principles and substantive law to ensure fair administration of justice by weighing the prejudice that is likely to be suffered by the innocent party against the prejudice suffered by the offending party. I find that the application herein was not brought within reasonable period, as the delay of ten years was not explained at all. There would be no justice to the respondent if the court were to allow the application.

The court further finds no merit whatsoever in the substantive application. I have rendered myself sufficiently why the judgment, delivered on the 13th July 2006 should not be reviewed. The applicant has failed to meet the legal provisions upon which an order of review may be granted.

For those reasons, the application dated 14th August 2015 is dismissed with costs.

Dated, signed and delivered in open court this 15th day of September 2016

JANET MULWA

JUDGE