REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPLICATION NO. 57 OF 2016

ZABLON MOKUA……………………........……………..……….PLAINTIFF

VERSUS

SOLOMON M. CHOTI…………………......……………..1ST RESPONDENT

JOSEPH NYAGAKA BWANA…………......………………2ND RESPONDENT

NYAMACHE TEA FACTORY LIMITED…….............………3RD RESPONDENT

KENYA TEA DEVELOPMENT AGENCY LIMITED………4TH RESPONDENT

RULING

Background

1. The applicant herein, ZABLON MOKUA is an advocate by profession. He acted for the 1st Respondent herein SOLOMON M. CHOTI in Kisii CMCC NO. 3 of 2015. On 12th March 2015 this court (differently constituted) found that the suit had been filed before a court that lacked jurisdiction whereupon the court ordered that he said suit be withdrawn and that the applicant herein, who had filed it in the wrong court personally pays the costs due to the defendant.

2. The defendants are reported to have already taxed their bill of costs in respect to the said awarded costs to the tune of Kshs. 416, 840/= and are now threatening to execute for the said costs. It is the respondents' intended execution for the costs awarded in their favour following the withdrawal of the earlier suit that has triggered the instant miscellaneous application before the court.

Application

3. Through the said miscellaneous application dated 10th June 2016, brought under Order 45 Rule 1 of the Civil Procedure Rules, the applicant seeks the following orders.

i) Spent

ii) That pending the hearing inter parties of this application the Honorable Court be pleased to grant a temporary order of stay of the execution of its decree/orders made on the 12th day of March 2015 and all consequential orders thereof.

iii) That the honorable court be pleased to call for KISII CMCC CASE FILE NUMBER 3 OF

2015 and bring it to the high court and review the orders/decree made on the 12th day of March 2016 and set the same aside with all consequential orders.

iv) That costs of this application be provided for.

Applicant's affidavit

4. The application is supported by the applicant's affidavit dated 10th June 2016 in which he states that the court order made on 12th March 2015 condemned him to personally pay costs in a matter that he was no longer acting for any of the parties as the plaintiff/1st Respondent for whom he had previously acted was at the time of the said withdrawal of the suit represented by another firm of advocates being Koina Onyancha & Advocates.

5. The applicant further depones that he was not personally given instructions by the plaintiff/1st respondent to file the initial suit No. 3 of 2015 before the lower court and that the said case was handled by one David Okachi Advocate and that since a new firm had already taken over the conduct of the case, he should not have been condemned to pay the costs.

6. The applicant states that had the court looked at the history of the case before the lower court and the fact that several other pleadings had been filed in the said case long after his law firm had ceased from acting in the matter, the court could not have condemned him to personally pay the costs of the withdrawn suit.

7. The applicant further contends that he was not called upon to explain his side of the story before the initial suit was withdrawn or before he was ordered to personally pay costs and therefore he was condemned unheard.

8. He further states that the respondents' bill of costs was never served upon him personally but was served on Koina Onyancha & Co. Advocates who equally did not attend court.

9. In the applicant's grounds in support of the application, he states that the honourable judge made orders irregularly in a lower court file as no file was opened in the High Court and as a result of the said orders, the lower court has already issued warrants of attachment against his movable property.

Respondents' replying affidavit

10. The respondents' opposed the application through the replying affidavit of FLORENCE MITEY, the 4th respondent's manager, legal and regulatory affairs in which she states that indeed, the court made an order that the applicant personally pays the costs of the initial suit that he had wrongly filed before the lower court. She attached a copy of the order of 12th March, 2016 as annexture "FMI" to the said affidavit.

11. She further depones that following the said order for costs against the applicant, the 4th respondent assessed its bill of costs to the tune of Kshs. 416,840/= which amount the 4th respondent had already demanded from the applicant as shown in an attached letter dated 31st July 2016 marked as annexture **"FM2"** to the replying affidavit**.**

12. The 4th respondents' deponent states that they have already applied for warrants of attachment against the applicant which warrants have already been executed by M/s Belgif Auctioneers who have proclaimed the applicant's movable assets.

13. It is the respondents' case that the High Court delivered its ruling of 12th March 2015 while exercising its supervisory jurisdiction over subordinate courts as provided for under **Article 165 (6) and (7)** of the Constitution and that the applicant's application did not meet the threshold for the grant of

orders for review.

14. She further states that the applicant has not preferred an appeal against the ruling of 12th March 2015 or the taxation done on 6th July 2015 even though he was all along fully aware of the said proceedings.

15. When the application came up for hearing on 15th August 2016, parties agreed to canvass their arguments by way of written submissions.

Applicant's Submissions

16. In his written submissions filed on 13th September 2016, the applicant identifies his main prayer in the instant application to be the prayer that this court calls for Kisii CMCC Case File No. 3 of 2015 and brings it to the High Court and review the orders/decree made on 12th March 2015 and set aside the same together with all consequential orders.

17. The applicant has highlighted and reiterated the grounds upon which the application was brought as stated in the affidavit in support of the application.

18. The applicant cited the case of **Isaac Oerri Abiri vs Samuel Nyangau Nyanchama CA NO. 25 of 2014** among many other cases to support his argument that advocates are generally not condemned to pay costs personally where cases are dismissed, withdrawn or struck out.

19. In a nutshell, the applicant argues that he was wrongly condemned to pay costs and therefore this court should review, vary or set aside the orders of Justice Wakiaga made in the subordinate court file.

2nd, 3rd and 4th Respondents' Submissions

20. The respondents highlighted the law on review as contained in **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure** and summarized the circumstances/conditions under which orders for review may be made to be:

> **(a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;**
>
> **(b) on account of some mistake or error apparent on the face of the record,**
>
> **(c) 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.**

21. The respondents cited numerous authorities in which the rules and scope of orders for review were discussed extensively. The respondents' case was that the applicant had not met any of the conditions for the grant of orders of review and that the more than one year delay by the applicant in bringing the instant application was not explained thereby making the said application a mere afterthought that should not excite the leniency of the court.

Analysis and determination

22. I have carefully considered the grounds in support of and against the application together with the submissions by both parties and the relevant law and authorities cited. The following issues present themselves for determination:-

a) Whether the applicant has made out a good case to justify the grant of orders for review.

b) Whether the circumstances of this case are of such a nature that would warrant this courts exercise of its inherent jurisdiction by invoking the overriding objective as stipulated under section 1A and 1B of the Civil Procedure Act.

23. On the first issue, **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules** provides as follows:-

> **Section 80. Review**
>
> **"Any person who considers himself aggrieved—**
>
> **(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
>
> **(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."**
>
> **[Order 45, rule 1.] Application for review of decree or order.**
>
> **"1. (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**
>
> **(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 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 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.**
>
> **(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"**

24. From the above provisions, it is clear that while **Section 80 f the Civil Procedure Act** grants the court the power to make orders for review, **Order 45** sets out the jurisdiction and scope of review by hinging review to discovery of new and important matters or evidence, mistake or error on the face of the record and any other sufficient reason.

25. In the instant case, the applicant advanced several reasons for seeking orders for review, however, the ground I find most applicable in this case was that the orders sought to be reviewed were irregularly issued by a High Court Judge in a subordinate court file and that this was an error or a mistake on the face of the record thus falling under orders for review. The respondent, on the other hand argued that there was no error or mistake on the face of the record because **Article 165 (6) and (7) of the Constitution** and **Section 19 (1) of the Civil Procedure Act** grants High Court supervisory jurisdiction over the subordinate courts and empowers the High Court to call for the record of any proceeding before any subordinate court or person, body or authority and that the High Court may make any order or give any directions it considers appropriate to ensure fair administration of justice.

26. According to the respondents, there was therefore no error apparent on the face of the record by

reason of the judge making orders inside the lower court file, in view of the fact that the High Court was exercising its powers as provided for under the constitution and statute and if the applicant was not satisfied with the judge's decision, then he had the right to file an appeal and not seek a review.

27. The above position taken by the respondents bring me to the next level of this ruling, which is, whether the applicant should have appealed against the impugned order that is the now the subject of this application.

28. I have carefully perused the impugned court order shown in annexture **"FMI"** of the respondents' replying affidavit. The said order is signed by J. Wakiaga but is made inside Kisii Chief Magistrates Court file No. 3 of 2015. At this point, **Article 165 (6) and (7) of the Constitution** stipulates as follows:-

> **"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.**
>
> **(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."**

29. **Section 18 (1) of the Civil Procedure Act** on the other hand provides as follows:

> **Section 18 (1)- Power of High Court to withdraw and transfer case instituted in subordinate court**
>
> **"(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such**
>
> **notice, the High Court may at any stage—**
>
> **(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**
>
> **(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—**
>
> **(i) try or dispose of the same; or**
>
> **(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**
>
> **(iii) retransfer the same for trial or disposal to the court from which it was withdrawn."**

30. I find if necessary to reproduce the impugned order in its entirety as follows:-

12/3/2015

Before J. Wakiaga J

Bibu- CC

Mr. Onyancha for the plaintiff

Mr. Millimo for the Defendants

<u>Mr. Onyancha</u>: The Law says that the court means High Court. I have agreed that the suit be withdrawn with no orders as to cost.

<u>Mr. Millimo</u>: Cost should follow the cause.

<u>RULING</u>

This suit is filed in a wrong court. The Companies Act defines the court as High Court and therefore the Resident Magistrate Court does not have jurisdiction over the issues herein.

The plaintiff's suit herein is therefore marked as withdrawn with costs to the defendants. Mr. Mokua Advocates who filed this suit in the wrong court to pay the cost personally to the Defendants.

Dated and signed at Kisii this 12th day of March, 2015.

J. WAKIAGA

JUDGE

12/3/215

31. I find that even to a casual observer, a cursory glance of the above order immediately shows that something is amiss with it. To my mind, while it is not disputed that the High Court has supervisory jurisdiction over subordinate matters, such jurisdiction has to be exercised in a structured manner. This means that it is not open for a High Court Judge to preside over matters before the subordinate court. In the event that a High Court calls for a subordinate court's file or transfers the same from the subordinate court to the High Court, the most logical thing to do would be to open a file in the High Court in which the orders of the Judge would be made.

32. In the instant case, orders were made in the lower court file itself and this creates an obvious challenge to anyone seeking to challenge the said order on appeal because the question and dilemma then arises as to which court such an appeal should be filed. Assuming that the appeal is filed in the High Court, then the orders appealed from are orders of a Judge and clearly another High Court Judge cannot preside over an appeal from the orders of a Judge with concurrent jurisdiction. In the same breath, if the appeal is filed in the Court of Appeal, the court file, oin which the impugned order was made is the subordinate court and appeals from subordinate courts ought to be filed in the High Court as is provided for under Section

33. From the above analysis, it is clear to me that there was an error of omission in failing to open a High Court file as soon as the lower court file was called by the High Court Judge and similarly, there was an error/mistake of commission when the Judge made the impugned orders inside the lower court file. The error is apparent on the face of the record and my view is that it is this same court that can correct the said error through the orders for review sought.

34. The Court of Appeal had the following to say in an application for review in the case of **National Bank of Kenya Ltd vs Ndungu Njau**.

> ***"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."**

35. As I have already stated in this ruling, the statutory grounds upon which orders for review can be obtained are; firstly, there ought to exist an error or mistake apparent on the face of the record. Secondly, that the applicant has discovered a new and important matter in 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 order was made. Thirdly, that there is sufficient reason to occasion the review.

36. To the statutory grounds, may also be added instances where the applicant was wrongly deprived of an opportunity to be heard or where the impugned decision or order was procured illegally or by fraud or perjury: see **Serengeti Road Services -v- CRBD Bank Limited [2011] 2 EA 395**. Also to be included as part of sufficient reason is where the impugned order if reviewed, would lead the court in promoting public interest and enhancing public confidence in the rule of law and the system of justice: see **Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited (*supra*)**.

37. It is practically impossible to itemize what would be ‘sufficient reason’ for purposes of review under the courts' ‘’residual jurisdiction’’ or inherent powers. The exceptional instances when obvious injustice would be worked by a strict adherence to the terms of the order or decree as originally passed are copious.

38. However, given that a review application is not an appeal and neither must it be allowed to be an appeal in disguise where the merit is revisited, ‘sufficient reason’ ought to include, in my view, the statutory grounds for review as outlined in the Civil Procedure Rules. That ought to be the starting point and a fine guideline.

> 32. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal described an error apparent on the face of the record as follows:
>
> > ***“ In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, <u>and it must be left to be determined judicially on the facts of each case</u>. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”*** *(emphasis mine)*

39.In **Chandrakhant Joshibhai Patel -v- R [2004] TLR, 218 it** had been held that an error stated to be apparent on the face of the record:

> ***"...must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reading on points on which may be conceivably be two opinions."***

40. In the instant case, the error is self-evident on the face of the record itself as shown in the extract of the order. The error is not one that can be the subject of an appeal because, as I have already stated in this ruling, the applicant will be at a loss on which court to present his appeal.

41. The respondent also raised the issue of apparent delay on the part of the applicant in presenting his application for review before the court. According to the respondent, the applicant took more than a year to present his application and this went against the provisions of **Order 45 Rule (1) (b)** which states; **“… may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

42. The respondent contended that the applicant did not explain his apparent delay in filing the application. In my view, the determination of whether or not a delay is unreasonable should not only be measured in terms of the time it took a litigant to file the application but should also factor in the circumstances and facts of the case at hand, and the explanation given for the delay.

43. In the instant case, it is not disputed that the impugned orders were made in the absence of the applicant who had ceased from acting for the plaintiff in the case. The respondent has not shown that the applicant was served with the said order or any of the court processes that preceded the entry of the impugned orders or thereafter so as to show that indeed the applicant remained indolent for over a year after the orders were made and is therefore not entitled to a review.

44. Furthermore the impugned orders were made ex-parte, in the absence of the applicant even though the said orders affected him directly. Under those circumstances one cannot say that the applicant is guilty of laches or unreasonable delay because it could not have been possible for him to challenge orders that did not know about. My humble view is that the issue of unreasonable delay does not arise in this case.

45. I align myself to the Court of Appeals decision in the case of **Richard Nchapai Leiyang vs IEBC & 2 others Civil Appeal 18 of 2013** in which it was observed as follows:

> ***"We agree with the noble principles which go further to establish that the courts' discretion to set aside ex parte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or excusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice" (Emphasis added)***

46. I find that the applicant has established that he was neither aware of the impugned proceeding and neither did he participate in the same and therefore he cannot be said to be deliberately seeking to delay or obstruct the course of justice by filing the instant application.

47. Having found that the applicant has satisfied this court that there was an error apparent on the face of the record and having found that adverse orders were made against the applicant in his absence without notice to him, the order that commends itself to me is the order to allow the applicant's application dated 10th June 2016 in the following terms: The orders made in Kisii CMCC 3 of 2015 are hereby reviewed and set` aside together with all other consequential orders. Each party shall bear its own costs of the application in view of the fact that the error that gave rise to the instant application was a mistake/error made by the court itself in omitting to open a High court file upon calling for the subordinate court file.

Dated, signed and delivered in open court this 5th day of December, 2016

HON. W. A OKWANY

JUDGE

In the presence of:

N/A for Applicant

Mr. Wafula for the Respondent

Omwoyo: court clerk