



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 121 OF 2008(O.S)**

**COLLINS STEPHEN FORD.....PLAINTIFF/RESPONDENT**

**VERSUS**

**SULTAN FADHIL**

**MAURICE M. KILONZO**

**NICANORY A. AKANGA**

**T/A FADHIL & KILONZO ADVOCATES ..... DEFENDANT/APPLICANTS**

**RULING**

By Way of a Notice of Motion application dated the 26th day of November, 2013 and which is expressed to be brought under order 40 rule 2, 45 Rule 2(1), 46, rule 1, 2 and 3 of the Civil Procedure Rules and Section 1, 1B, 3A, 63 E and 100 of the Civil Procedure Act Section 10, 11(1) 6(2) and 12(6) of the Arbitration Act the following orders:-

(a) Spent

(b) That the order of this Court made on the 20th day of June, 2013 appointing Mulwa Nduya as Sole Arbitrator be reviewed and or varied to include the names of Nyogesa Wafula, Dalmas Omondi, and Grace Okumu as Co-Arbitrators in the arbitration panel.

c. That the current Arbitration proceedings be stayed pending the hearing of this application and the same do start a fresh upon the inclusion of the Co-Arbitrators.

The grounds are that:-

1. The Court gave orders directing Mr. Mulwa Nduya to arbitrate in the matter on 20th day of June, 2013 in the absence of the Defendants and or their Counsel.
2. That the plaintiff intentionally withheld the information of the existence of such orders and had not served the Defendants with same.
3. That the subject of the proceedings is a dispute between the parties backed by an agreement dated the 20th day of April, 2005 which provided inter alia,

*“In the case of a dispute with regard to the interpretation or performance of this agreement such dispute shall be submitted to a Board of Arbitrators composed of three*

*members appointed by each party and the said members shall choose he limpire”.*

4. There was material, non-disclosure on the part of the plaintiff in regard to the number of Arbitrator required when the court gave the order of 20th April, 2005.
5. That the Courts appointed Arbitrator has instituted the Arbitration proceedings in the absence of the Applicants members to the Arbitration Board.
6. On learning of the said Arbitration proceedings we requested for inclusion of our appointed Arbitrators by Consent of the parties but he plaintiff and the Courts appointed arbitrator declined.
7. The variation of the said order of 20th June, 2013 to include these names will not prejudice the plaintiff and or delay the arbitration proceedings but in essence will lead to a fair and just finding by the Board.

Counsel for the Respondent Mr. Kipkurui Ngeno in his replying affidavit depones that the Applicant has all along frustrated the plaintiffs case by failing to co-operate with the plaintiff Counsel, in the appointment of an Arbitrator.

That on numerous occasions the Applicants were requested to forward the names of persons they proposed to act as Arbitrators but they failed and or ignored these requests.

That due to lack of co-operation, the Respondent was forced to seek redress in Court but the Applicants failed to attend Court on numerous occasions resulting to the appointment of Mr. Mulwa Nduya as the sole Arbitrator on 29th June, 2013.

Brief facts of this suit. By way of an application dated the 15th day of May, 2008 the plaintiff inter alia sought orders for the release of his chattels held by the Defendants and a taking of accounts.

In response to that application the Defendants filed there own dated the 25th day of June, 2008 seeking the stay orders and for the suit to be referred to Arbitration.

In his ruling dated 27th February, 2008 Sergon Judge referred the suit to arbitration and gave stay orders.

Being aggrieved by that ruling the plaitiff filed another application by way of a Notice of Motion dated the 16th day of March, 2012 in which he sought the release of his tracks and trailers and other chattels held by the Defendants. A preliminary objection was raised by the Defendants and Mwera Judge concurred with the Defendants in holding that the application before him was *Res Judicata* and it was struck out.

Thereafter the matter was mentioned severally before Mwongo Judge for directions on the appointment of Arbitrators.

On 6th September, 2012 Mwongo Judge after observing that the arbitration clause required each party to appoint an arbitrator and subsequently both arbitrators to appoint an umpire orders that the parties do comply with that provision within 30 days with liberty to apply in respect of default in time.

On 18th April, 2013 the matter was mentioned before me for further directions and more time was requested which prayer was granted and a further mention date was set for 3rd June, 2013.

On 3rd June, 2013 the Court was informed that the plaintiff had appointed two Arbitrators but the Defendant had not complied.

Mr. Mulandi, Counsel holding brief for the Defendants requested for two more weeks to enable the Defendant to comply. The Court made an order to the effect that it was granting the last

adjournment to the Defendant so as to comply with the earlier orders given by the Court and a further mention date was set for 20th June, 2013.

On 20th June, 2013 the plaintiff was represented by Shimaka Advocate who was holding brief for Ngeno Advocate. There was no representation for the Defendants. Counsel for the plaintiff informed the Court that the Defendant had not complied with the Court orders and that the plaintiff had appointed Mr. Mulwa Nduya as arbitrator and requested the Court to allow the appointment pursuant to Section 12 of the Arbitration Act of 1995. The Court proceeded to issue orders as prayed.

It is this order of 20th June, 2013 that the applicant seeks to have reviewed and or varies.

Order 45 rule 1 provides,

*“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”.*

Order 45 rule 2(1) provides,

*“An application for review of a decree or order of a Court upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed”.*

In the present case the main ground for review is that the Court made an order directing Mr. Mulwa to arbitrate in the matter in the absence of the Defendants and their Counsel. That in itself is a fact. The orders made were made in the absence of the Defendants and their Counsel who were well aware of the mention date.

They were aware of the mention date because on 3rd June, 2013 they were represented by Mr. Mulandi Advocate who was holding their brief. He was present when the Court granted the Defendant the last adjournment after the request for two more weeks was granted by the Court. There is no attempt made to explain non-compliance with the orders made by Mwongo Judge on 6th September, 2013. Similarly no attempt has been made to explain why the Defendants Counsel and the Defendant did not attend Court on 20th June, 2013. It is not enough to state that orders were made in their absence without explaining why they were absent when duly notified of the mention date.

The Applicant/Defendant goes onto allege that the plaintiff intentionally withheld information of the existence of the orders made by the Court. Having been well aware that they had been given the last adjournment on the issue of appointment of arbitrators and further that they had been given a specified period in which to so do, it was upon the Defendants to ensure compliance and follow-up the matter in Court but not await service of orders by the plaintiff.

The orders of the Court were made on 20th June, 2013. The application for review was filed on

26th November, 2013 (close to 4 months).

**There is no attempt made to explain the cause of the delay.**

**Order 45 of the Civil Procedure Act requires that an application for review be made without unreasonable delay. A duration of 4 months is unreasonable and there ought to be an exploitation for which is lacking.**

**Equity aids the vigilant. The orders sought are equitable remedies. The applicant was indolent and has not been forthright in explaining the reasons why they did not comply with Court orders for appointment of arbitrators. This is a very old matter which ought to have been determined long time ago.**

**I find no good reason for the review or variation of the orders as sought. The application has no merit and its dismissed with costs to the plaintiff. The orders of stay of the arbitration proceedings are hereby vacated.**

**Ruling delivered dated and signed in open Court this 4th day of November, 2014.**

**M. MUYA**

**JUDGE**

**4TH NOVEMBER, 2014**

**In the presence of:-**

**Mr. Shimaka for the Plaintiff and in the absence of the Defendant well aware of the ruling date.**

**M. MUYA - JUDGE**

**Court: Parties to be furnished with certified copies of the ruling.**

**M. MUYA**

**JUDGE**

**4TH NOVEMBER, 2014.**