



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Civil Application 111 of 2012**

**MURAGE & MWANGI ADVOCATES. .... RESPONDENT/APPLICANT**

**VERSUS**

**JOSEPH KAMAU MWANGI. .... APPLICANT/RESPONDENT**

**R U L I N G**

The application before this court is the Notice of Motion dated 15<sup>th</sup> August, 2012. It was filed by the Respondent against whom a kind of summary judgment had been entered after the applicant therein had obtained a Certificate of Taxation against the applicant herein, whom the applicant advocates, had earlier represented.

The record would show that the Respondent herein filed a claim through a Notice of Motion in this court to recover their costs certified at Kshs.367,600/-. There appears to be a dispute as to whether the said Notice of Motion to recover the above sum was properly served or not. The applicant herein stated that he was not served. The respondent on the contrary, says he was properly served, attended court during the hearing and cannot therefore argue that the proceedings were ex-parte: -

The application before the court, however, mainly sought the following orders: -

- a) That the court grants a stay of execution of the judgment and decree and all consequential orders made thereto pending the hearing and final determination of this application.**
- b) That this court grants orders to review, vary and/or set aside the order of 22<sup>nd</sup> March 2012 which entered judgment for the Respondent herein for Ksh.367,603/-.**

It is not, therefore, clear whether the applicant herein seeks a stay of execution of the existing decree, which execution he argued, is in progress or not. At the hearing of this application the applicant barely paid any attention to the issue of stay except merely mentioning it in passing. I notice, however, that the applicant in his written submission, devoted much space on the issue of stay of execution. He argued at length that on 22<sup>nd</sup> March 2012 when the impugned judgment was entered against him by Khaminwa, J, he was denied the right to be heard since his advocate had not attended court and his request for adjournment to engage another advocate was rejected. He argued further that even if he was present when the judgment was entered, those orders for entry of judgment were and should be regarded by this court, as ex parte and be set aside.

What is not clear, however, is that the applicant was raising the issue of the right to be heard to support his quest to obtain a stay of execution. He totally failed to refer to the principles for granting stay of execution and failed to attempt to convince this court that he had demonstrated them to be in his favour

and that the court should grant him the stay.

At the end of the day, this court is not convinced that there are good reasons for granting a stay of execution as sought by the applicant.

There is however, another reason why the grant of stay of execution will not be appropriate. A careful reading of the application before the court will confirm that the stay of execution sought was, if granted to last until this application is heard and finally determined and not until any pending suit is determined. That means that if any stay is granted it comes to an end at of the reading of this ruling. This court finds little logic in such an order of stay, if this court were to grant it, keeping in mind the principle that the court will only grant a party only those orders sought.

Moving to the next prayer, the applicant seeks an order to review, vary and/or set aside the order entering judgment for the Respondent herein as aforesaid. The record shows clearly that the applicant herein, Joseph Kamau Mwangi was present before Khaminwa, J when the application entering the Judgment for the Respondent was being prosecuted. The court clearly refused to grant more time to enable the applicant to find out why his lawyer did not appear. The court felt that the applicant was buying for more time to delay the main proceedings, notwithstanding the fact that the court had granted him maximum opportunity earlier to get his advocate. The court also noted that although it had granted the applicant more time to file any possible opposing documents to the application before the court the Respondent therein (applicant here), had not done so. In those circumstances, the court proceeded to treat the application as unopposed and entered judgment in favour of the Respondent. That is the judgment that, among other prayers, this application seeks to have reviewed.

It is the view and finding of this court accordingly, that the proceedings before Khaminwa, J on 22<sup>nd</sup> March, 2012 were not ex parte. The applicant was present and he participated in the proceedings notwithstanding the fact that the court declined to grant an adjournment for him to look for his advocate. The judgment Khaminwa, J entered against the applicant was also in my view, not ex parte but an inter partes one. In those circumstances the only way to revisit it, is either through an appeal or through a review under Order 45 of the Civil Procedure Act, Cap 21 of the Laws of Kenya. In my view, accordingly, the applicant although a little mixed up, was right in seeking a review of the judgment.

I have however, carefully perused the application. I observe that the kind of review the applicant has in mind was not that provided for under Order 45 of the Civil Procedure Rules. I say so because the applicant did not raise or invoke such kind of review which is based on specific principles provided under the said order. He did not either demonstrate material upon which a review can be granted. In those circumstances a review is not available to the applicant.

The end result is that the application by the Applicant dated 15<sup>th</sup> August, 2012 has no merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 7th day of March 2013.

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**D A ONYANCHA**  
**JUDGE**