

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION
HIGH COURT COMMERCIAL SUIT NO. 431 OF 2014

**BAMBURI SPECIAL PRODUCTS LIMITED DECREE HOLDER /
RESPONDENT**

VERSUS

**REMAX CONSTRUCTION LIMITED
JUDGMENT DEBTOR**

AND

BULENT GULBAHAR APPLICANT

RULING

Introduction

1. Before this Court are two applications by the Applicant, **Bulent Gulbahar**, namely:
 - i. the **Notice of Motion dated 15th February 2023**, seeking to cite the Respondents and named persons for contempt of court on allegations of forgery, fabrication of evidence, perjury, and interference with the administration of justice; and
 - ii. the **Notice of Motion dated 18th September 2023**, seeking review and setting aside of the ruling delivered on **15th May 2023**, principally on the ground that the said ruling was allegedly obtained through fraud, false evidence, and perjury.

Notice of Motion dated 15th February 2023 (Contempt Application)

2. Regarding the contempt application, the Applicant seeks declarations and punitive orders against the 1st, 2nd, and 3rd Contemnors: **Eric Wampamba Kironde, Seddiq Hassani, and Joy Justine Impano**, respectively, for alleged fabrication of evidence, perjury, and contempt of court.
3. In particular, the Applicant alleges that the Contemnors (directors and advocate for the Respondent) willfully fabricated a newspaper advertisement used for substituted service. Specifically, the Applicant claims that an original advertisement in the Daily Nation dated 15th March 2022 cited a court date of 10th March 2022, while the version filed in court as **Exhibit "JI-1"** was altered to read 10th May 2022.
4. The Applicant argued that the alterations were executed deliberately, jointly, and with intent to mislead the Court into believing service had been properly effected, enabling the Respondents to proceed *ex parte* on 10th May 2022.
5. The Applicant further contends that the 3rd Respondent, acting on behalf of the Decree Holder, committed perjury by swearing affidavits containing false statements about compliance with the Court's service orders. He relies on, among others, **Bia Tosha Distributors v Kenya Breweries and Chandra Shashi v Anil Kumar Verma**, which condemned fabrication of evidence as contempt.
6. He maintains that the Respondents' conduct constitutes contempt in the face of the Court, necessitating severe punitive action to maintain the authority of the judiciary.

7. The application is opposed vide the Replying Affidavit dated **9th February 2024** by the 3rd Contemnor (**Joy Justine Impano**), who is also the Respondent's Advocate. **Ms. Impano** contended *inter alia* that the Application for contempt is misconceived and unsupported by evidence. She asserted that the allegations of forgery and fabrication are unsupported, vague, and lacking forensic or documentary corroboration.
8. **Ms. Impano** maintained that the substituted service was properly affected and that if there were any irregularities, then such irregularities were cured when the Applicant appeared, participated, and contested the proceedings.
9. The Respondent views the instant application as an abuse of the Court process, intended to frustrate lawful execution. Citing ***Muchangi Industries Ltd v Safaris Unlimited***, they urged the Court to impose punitive costs.
10. Additionally, the Respondents challenged the validity of the Applicant's affidavit in support of the application, arguing that the affidavit was improperly sworn before a Commissioner for Oaths and thus inadmissible.
11. The Application was canvassed by way of written submissions. The Applicant's submissions are dated 10th March 2025, whilst the Respondents filed their joint submissions dated 25th March 2025.

Notice of Motion dated 18th September 2023 (Review Application)

12. This application seeks review and setting aside of the Ruling delivered on 15th May 2023 (Hon. A. Mshila, J.) which, *inter alia*,

dismissed the Applicant's preliminary objection, and allowed the Decree Holder's application dated 12th July 2021 partly, and directed that the Applicant (a director of the Judgment Debtor) be summoned for oral examination before the Deputy Registrar and to produce specified financial documents for the period 2017-2021.

13. The Application is premised on Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. In the main, the Applicant contends that the impugned ruling was procured through fraud, perjury, and reliance on forged or fabricated material (evidence of substituted service), and therefore ought to be reviewed and set aside.
14. The Decree Holder/Respondent opposed the application, terming it unmeritorious and an abuse of process. It is argued that the statutory threshold for review is not met, and that the supporting affidavit is incurably defective for having been sworn before a Commissioner for Oaths outside the jurisdiction rather than a Notary Public. It is further the Respondent's position that the application is marked by delay and a pattern of litigation principally designed to derail execution of a 2018 judgment.
15. In support of the application, the Applicant filed his submissions dated 11th March 2025, whilst the Respondents filed submissions dated 25th March 2025, which I have duly considered.

Analysis and Determination

16. Having duly considered the parties' pleadings and respective submissions, I find the following issues requiring determination:
 - i. Whether the threshold for contempt of court has been met in respect of the application dated 15th February 2023;

- ii. Whether the application for review is merited.
 - iii. Whether the affidavits sworn outside Kenya are defective for want of notarization;
 - iv. Who should bear the costs of the applications.
17. Before proceeding on the above-identified issues, the Court finds it critical to first set out the background of the present dispute.
18. This matter stems from the judgment entered on 3rd May 2018 against the Judgment Debtor for KES 3,144,298, which had risen to KES 5,426,061.08 by July 2021 due to interest.
19. In the course of execution, the Decree Holder moved the Court for orders to examine the directors of the Judgment Debtor. Upon difficulties in effecting personal service, the Court on 14th December 2021 authorized substituted service by newspaper advertisement, which advertisement was published on 15th March 2022.
20. The Respondents assert that the advertisement was duly published on 15th March 2022, and thereafter the Applicant appeared in Court on 10th May 2022, acknowledged the proceedings, and sought time to respond.
21. The Applicant, however, disputed service and filed a Preliminary Objection and Grounds of Opposition, which were dismissed in the ruling of 15th May 2023. It is this Ruling that the Applicant now seeks to be reviewed and set aside on the basis that it was procured by fraudulent service (Application dated 18th September 2023). The Applicant also seeks, in the application dated 15th February 2023, to cite the Respondent (including its directors and Advocate) for

contempt on account of forgery and perjury in the process of undertaking the substituted service.

22. The Applicant contends, principally, that the impugned ruling was procured through fraud, perjury, and reliance on forged or fabricated material, and therefore ought to be reviewed and set aside; he also answers a competency objection taken to his supporting affidavit.

23. With the procedural history outlined, I now return to consider each of the issues as identified above.

Whether the threshold for contempt of court has been met

24. The Applicant contends that the Respondents altered the newspaper advertisement of 15th March 2022 to mislead the Court, particularly by changing the hearing date from **10th March 2022** to **10th May 2022** and appending a false signature and date.

25. The Respondent argued otherwise, asserting that service was properly effected, the Applicant appeared in Court on 10 May 2022, and filed pleadings in response. They submit that any alleged irregularity in service was cured by participation.

26. It is settled that contempt proceedings are quasi-criminal in nature. The standard of proof is higher than on a balance of probabilities, though not as high as beyond reasonable doubt. The Court of Appeal in Mutitika v Baharini Farm Ltd [1985] KECA 60 (KLR), stated that: -

“In our view the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt.”

27. It therefore follows that in this case for the Court to find (and probably punish) contempt, the applicant must demonstrate to a standard higher than mere balance of probabilities (but below the criminal standard of proof) that there existed a clear and unambiguous court order, that the Respondent had knowledge of that order, but willfully and deliberately obeyed the same.
28. Here, the Applicant simply alleges that the Respondent altered the newspaper advertisement of 15th March 2022 to forge service. While this is a grave allegation, the Applicant did not produce any independent verification of the “original” advertisement from the newspaper publisher. Further, no forensic document examination, and no expert testimony reconciling the competing versions.
29. This Court is of the view that, absent independent corroboration tying the respondents to a deliberate falsification, the Applicant has failed to discharge the elevated evidentiary burden to prove forgery or fabrication on the part of the Respondent.
30. Further, while the Applicant points to discrepancies in the advertisement dates, the Court notes that the Applicant became aware of the proceedings and appeared in court on 10th May 2022, and even participated in the proceedings by filing an Objection.
31. The Court agrees with the Respondent’s submissions that service is merely intended to notify a party of the existence of a suit or proceedings against them. Once a party appears and participates in the proceedings, it will be deemed to have had knowledge of the suit

and cannot thereafter challenge service. It is settled that entering appearance or participating in proceedings without protest amounts to submission to the court's jurisdiction, and by that action, a party waives the right to challenge defective or irregular service.

32. In Republic v Tools for Humanity Corporation (US) & 8 others; Katiba Institute & 4 others (Ex parte Applicants); Data Privacy & Governance Society of Kenya (Interested Party) [2025] KEHC 5629 (KLR), the Court stated that:

"It is trite law that a party who voluntarily submits to the jurisdiction of the Court by participating in proceedings without promptly raising objections as to service of court process is deemed to have waived any such irregularities."

33. The Court of Appeal in the case Diamond Trust Bank Kenya Limited v Maingi & another [2023] KECA 712 (KLR), while addressing the same question of service of court process, observed as follows:

"In *Industrial and Commercial Development Corporation v Sum Model Industries Limited* [2007] eKLR, the court held: "...whether or not a valid summons to enter appearance was served on the appellant does not, on the facts and circumstances of this case, vitiate the proceedings subsequent to such service. The appellant without any hesitation or protestation filed a written statement of defence and participated in the proceedings of the case without any complaint."

....It is our considered view that, where a defendant has entered appearance or appointed counsel, and has proceeded to file a defence to the suit without protest, the purpose of the summons is spent or considerably diminished, and that any defect in the summons must be considered as having been waived or acquiesced by the defendant.

Subsequently, the defendant cannot be heard to complain about delay

or failure by the plaintiff to serve summons to enter appearance. It is vain pedantry to do so. [emphasis added].

34. In any event, the Court notes that when the Applicant appeared in court on 10th May 2022, the issue of service was raised, argued, and determined in the ruling of **15th May 2023**. It cannot be reintroduced through contempt proceedings under the guise of protecting the authority of the Court.

35. From the foregoing, the Court therefore finds no merit in the Applicant's argument. The Applicant, having participated in the proceedings, cannot now turn around and complain that he was not properly served.

36. The allegations of fraud and forgery regarding the service advertisement do not override the fact that the Applicant received notice and participated in the subsequent proceedings.

37. Further, the question of service having been determined by the Ruling of 15th May 2023, which dismissed the Applicant's Preliminary Objection on the issue, the same cannot be brought again at this stage.

Whether the application for review is merited

38. The Applicant seeks a review of the Ruling dated 15th May 2023, which ordered him to attend court for oral examination and produce financial records. He argues the ruling was obtained through forgery, fraud, and perjury related to the aforementioned advertisement.

39. The Respondent argued that the application does not meet the legal threshold under Order 45 Rule 1 of the Civil Procedure Rules, and is simply an attempt to re-litigate matters already determined.

40. The jurisdiction of this Court to review its decisions is circumscribed by **section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules**. A review may only be granted on the discovery of new and important matter or evidence which, despite due diligence, was not within the applicant's knowledge or could not be produced at the time; mistake or error apparent on the face of the record; or any other sufficient reason.

41. In Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR), the Court stated that:

"A clear reading of the above provisions shows that Section **80** gives the power of review while Order **45** sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- **(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, or **(c)** for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay."

42. In the present case, whereas the Applicant contends that the ruling of 15th May 2023 was obtained through fraud and perjury, no allegations of fraud have been proved. A review is only permissible where there is a discovery of new matter, an error apparent on the

record, or for any other sufficient reason. The issues regarding service were addressed during the hearing of the Preliminary Objection that led to the 15th May 2023 Ruling.

43. The Applicant has failed to demonstrate a qualifying error or new evidence that was not available at that time. What emerges instead is dissatisfaction with the conclusions reached by the Court. That is a matter for appeal, not review.

44. In **Republic -vs- Advocates Disciplinary Tribunal Ex parte Apollo Mboya** (supra), the Court emphasized that review proceedings are not an appeal. The Court stated that:

“...I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record, and re-appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible.”

45. Accordingly, the Court finds and holds that the Applicant’s application does not meet the requisite threshold to warrant review of the Court’s Ruling 15th May 2023, which ordered the Applicant to attend court for oral examination and produce financial records. The Ruling therefore stands.

Whether the Supporting Affidavit is defective for want of notarization

46. The Respondents raised a preliminary objection that the Applicant’s supporting affidavits were sworn before a Commissioner for Oaths instead of a Notary Public, despite the Applicant being in Turkey. While this may be a procedural irregularity, the Court is of the view that the determination of this question, one way or the other, is not in any way likely to change the overall outcome of the two applications.

47. The Court notes that even if the objection were to succeed, it would not cure the substantive deficiencies in the applications before Court. Conversely, even assuming the affidavits were valid, the applications would still fail on merit.

Who should bear the costs of the applications

48. The award of costs is governed by Section 27(1) of the Civil Procedure Act, which vests this Court with full discretion to determine by whom and to what extent costs are to be paid. The provision states:

“The costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid...”

49. In **Satya Bhamu Gandhi v Director of Public Prosecutions & 3 Others [2018] eKLR**, the Court stated:

“Costs are not merely meant to compensate the successful party, but may also be used to penalise a party whose conduct amounts to an abuse of the court process.”

50. Further, the Supreme Court in **Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others [2014] eKLR** underscored that:

“Costs follow the event, but the Court may depart from that principle where the conduct of a party justifies a punitive approach.”

51. In the present matter, the Applications having been dismissed, costs are therefore awardable to the Respondent.

52. Accordingly, the Court issues the following Orders:

- i. The Applicant's Notice of Motion dated 15th February 2023 is hereby dismissed.
- ii. The Applicant's Notice of Motion dated 18th September 2023 is hereby dismissed.
- iii. Costs of the two applications are hereby awarded to the Respondent.

53. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH JANUARY 2026.



HON. JUSTICE MOSES ADO
JUDGE

In the presence of: -

C/A - Moses

Bullent (In Person)for the Applicant

Ms. Impano..... for the Respondent