Kibuchi & Company Advocates v Kenindia Assurance Company Limited (Miscellaneous Application 705 of 2018) [2023] KEHC 19659 (KLR) (Civ) (29 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19659 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS APPLICATION 705 OF 2018

CW MEOLI, J

JUNE 29, 2023

BETWEEN

KIBUCHI & COMPANY ADVOCATES ..... APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED ..... RESPONDENT

RULING

1. For determination is the motion dated May 17, 2022. The events preceding the application are as follows. Kibuchi & Co Advocates (the Applicant) filed a Bill of Costs dated December 14, 2018 against Kenindia Assurance Company Limited (the Respondent). When the bill of costs came up for taxation, the Respondent raised a preliminary objection on grounds among others that the bill was statute-barred, the same having been filed outside the limitation period stipulated in Section 4(1) of the *Limitation of Actions Act*. The preliminary objection was disposed of by way of written submissions and vide a ruling delivered on May 5, 2022 this court found merit to the said preliminary objection, upheld the same, and as a consequence struck out with costs, the Applicant's bill of costs.

2. Dissatisfied with the said decision, the Applicant has moved this court vide the present motion seeking inter alia that the decision of the court dated May 5, 2022 be reviewed and set aside and the Applicant's bill of costs dated December 14, 2018 be reinstated as competent for taxation. The motion is expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 45 Rules 1, 2 & 3 and Order 51 Rule 1 of the *Civil Procedure Rules* among others. On grounds on the face of the motion as amplified in the supporting affidavit sworn by Patrick Kibuchi who cites being competent and authorized to depose.

3. To the effect that this court delivered a ruling on May 5, 2022 upholding the Respondent's notice of preliminary objection whilst dismissing the Applicant's bill of costs dated December 14, 2018 as being incompetent for being filed outside the statutory limits. That the ruling was obtained through a deliberate concealment and or inconsideration of the fact, that the Applicant had sent a final reminder

on legal fees to the Respondent on March 2013 which led to a fresh accrual of rights that had earlier on accrued in October 2008 when the primary suit was concluded.

4. He asserts that the final reminder which was duly acknowledged by the Respondent as an admission of being indebted to the Applicant proving beyond doubt that there was a fresh accrual of the Applicant's right hence the statutory limitation period started running from December 2, 2013 and would thus lapse on December 2, 2019. Therefore, the bill of costs filed on December 14, 2018, it was well within the limitation of action period of six (6) years and not warranting a preliminary objection. That pursuant to Section 23 (3) of the *Limitation of Actions Act*, the upholding of the preliminary objection by this court in its ruling delivered on May 5, 2023, permitted the Respondent to unfairly deprive the Applicant of its lawful earned legal fees.

5. He asserts that on account of the foregoing there was a mistake or error apparent on the face of the record and the court ought to review it decision to avert a miscarriage of justice. In conclusion, it was stated that motion was filed without undue delay and it is only fair and just that the same be allowed.

6. In response, the Respondent filed grounds of opposition dated June 13, 2022 and contended that the motion for review is fatally defective, untenable and incompetent and contrary to Order 45 Rule 1 of the Civil Procedure Rules in that the orders against which the review is sought have not been specifically quoted or brought; that the Applicant in ground 9 and also paragraph 20 of their supporting affidavit depose that 'there has been miscarriage of justice in the matter which will be sanctioned in the decision which grievance can only be ventilated on appeal as this court cannot address its own miscarriage by sitting on appeal in its own decision; that the Applicant is misleading this court and distorting facts in his ground 8b in the motion and paragraph 11 of their supporting affidavit by implying and/or stating that 'the ruling was obtained through a deliberate concealment and/or inconsideration of fact that the Applicant has sent a final reminder on legal fees to the Respondent in December 2013'.

7. Besides, that the court never had an opportunity to look at the contents of the alleged letter since the same was never produced by the Applicant before court for due consideration despite the Applicant having had ample time to do so; that the Applicant does not specifically plead or allege any error apparent on the face of the record, nor does he disclose any sufficient cause or reason to justify a review and the motion is only intended at defeating the process of justice; and the motion should be dismissed with costs to the Respondent.

8. The motion was canvassed by way of written submissions. Restating the history of the matter, counsel for the Applicant cited the provision of Section 80 of the *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and the decision in *Robert Tom Martins Kibisu v Republic [2013] eKLR* to contend that there was an error apparent on the face of the record. In that the court failed to consider the final demand letter dated December 2, 2013 issued by the Applicant to the Respondent. That the foregoing was a serious error in light of the provisions of Section 23 of the Limitation of Action Act, on the fresh accrual of rights from which the Respondent ought to have been estopped from escaping.

9. In response to the Respondent's position that the motion lacks merit, while calling to aid the decision in *Thomas Owen Ondieki v National Bank of Kenya [2011] eKLR* counsel argued that the ruling sought to be reviewed was made by this court and the motion was filed in good faith arising from a dissatisfaction with the said ruling. Therefore, the motion is not fatally defective as posited by the Respondent and the court ought to review its decision.

10. Submitting on whether it is just to grant the motion, it was asserted that the motion was filed timeously upon delivery of the ruling and on the basis that the final reminder was sent to and duly acknowledged by the Respondent on December 2, 2013, a fresh accrual of rights resulted and hence the court ought to be guided by Section 23 of the Limitation of Action Act. The decisions in *Kibuchi & Co Advocates*

v Kenindia Assurance High Court Misc Appl No 709 & 711 of 2019 (unreported) were called to aid in respect of the afore-stated.

11. Addressing the question whether the court ought to address its own miscarriage of justice, counsel placing reliance on the Indian decision in Ajit Kumar Rath v State of Orisa & Others, 9 Supreme Court Cases 596 at page 608, *Nuh Nassir Abdi v Ali Wario & 2 Others [2013] eKLR* and *Pancras T Swai v Kenya Breweries Limited [2014] eKLR* submitted that the grounds for review cited here fall within the ambit of the provisions of Order 45 of the Civil Procedure Rules, namely, error on the face of the record on account of the court's non-consideration of the fresh accrual of rights from 2013. In conclusion, the court was urged to allow the motion as prayed.

12. On the part of the Respondent, counsel anchored his submissions on the decisions in Ajit Kumar Rath (supra) and *Nasibwa Wakenya Moses v University of Nairobi & Another [2019] eKLR* to contend that firstly that there is no new discovery as the final reminder letter referred to was in the possession of the Applicant for over five (5) years whereas the said letter has not been presented before this court for its benefit. Secondly, it was argued that the Applicant's contention that there was an error apparent on the face of the record due to the court overlooking the existence of a final reminder is a ground for appeal and not review. That the matter raised would require extraneous re-appraisal of evidence to show its correctness, which can only be done by an appellate court and not through review.

13. Thirdly, counsel stated that no sufficient grounds for review have been advanced as the courts misconstruing of law or facts cannot be a ground for review. In conclusion, calling to aid Section 4(1) the Limitations of Actions Act and the decision in *Abincha & Company Advocates v Trident Insurance Company Limited [2013] eKLR* counsel reiterated that the subject bill of costs is time barred and therefore the Applicant's motion lacks merit and ought to be dismissed with costs.

14. The court has considered the material canvassed in respect of the motion. The Applicant's motion before this court is anchored on the provisions of Order 45 (1) of the Civil Procedure Rules which provides 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 (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.'

15. A perfunctory review of the grounds and issues raised in the Applicant's review motion, reveals that the instant motion is primarily premised on the ground of error or mistake apparent on the face of the record, also alluding to any other sufficient reason. The asserted error is confined to the singular issue that this court's ruling was obtained through a deliberate concealment and or non-consideration of the fact that Applicant had sent a final reminder on legal fees to the Respondent on December 2013 which led to a fresh accrual of rights under Section 23 of the *Limitation of Actions Act*.

16. To contextualize the Applicant's contestation, the court in its ruling rendered on May 5, 2022 expressed itself as hereunder in respect of the Respondent's preliminary objection:-

> ' 12. The judgment in the primary suit in respect of which the Applicant had received instructions from the Respondent to defend having been entered on October 23, 2008 the Applicant only filed the bill of costs on December 20, 2018, some ten years after the primary suit was concluded. Sections 23 (3) and 24 (1) of the Limitations Act which the Applicant has called to his aid are of no avail in this case. An acknowledgement of debt as envisaged in the sections and pursuant to the provisions of 25(5) is the equivalent of an admission of debt. According to Black's Law Dictionary, Tenth Edition an acknowledgement of debt is:
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> 'Recognition by a debtor of the existence of a debt. An acknowledgement of debt interrupts the running of prescription'.
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> 13. The Applicant's submission in this regard was that by the fact of the Respondent 'acknowledging the receipt of the letter dated above (i.e letter dated 30th January 2018), there was a fresh accrual of the right of action against the Respondent'. This proposition is contrary to the clear provisions of sections 23, 24 and 25 of the *Limitation of Actions Act* which do not contemplate an act of acknowledgement of receipt of a demand letter as an acknowledgement of the debt claimed by such letter. In my view, the proposition conjures absurd outcomes where a mere acknowledgement of receipt of a demand letter would be construed as synonymous with an acknowledgment of the debt claimed by such letter, and to provide a defence against the plea of limitation.
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> 14. The facts in the case of Shah & Parekh v Kenindia Assurance Company Limited cited by the Applicant are distinguishable from those in the instant matter, in that in the former case, an acknowledgement of debt in keeping with section 23(3) and 24(1) and (2) of the *Limitation of Actions Act* had been communicated in writing by the client to the Advocate and payment made on the acknowledged debt. The Applicant cannot rely on that decision in this instance and the argument that a fresh cause of action had accrued in 2018 therefore falls flat on its face.
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> 15. In the result, the court finds that the preliminary objection raised by the Respondent has merit and it is hereby upheld.' (sic)

17. In *Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited [2020] eKLR* the Court of Appeal stated that an application for review, involves exercise of judicial discretion. There is a long line of authorities on the principles that govern a motion brought under Order 45 (1) of the Civil Procedure Rules. Okwengu JA in *Associated Insurance Brokers v Kenindia Assurance Co Ltd [2018] eKLR*, the Court of Appeal pronounced itself as follows: -

> ' It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu

Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:

'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.'

In *Nyamogo and Nyamogo Advocates v Kogo [2001]1 EA 173* this Court further explained an error apparent on the face of the record as follows:

' An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.'

18. Further, in *Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR* the Court of Appeal held that:

' It bears emphasizing that the phrase 'mistake or error apparent' by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

'The courts in India have for many years had to consider what is constituted by 'an error apparent on the face of the record' in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions 'manifest' and 'apparent'. The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error 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 reasoning on points on which there may conceivably be two opinions [State of Gujarat v Consumer Education & Research Centre (1981) AIR Guj 223]. But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v Neki (1922) 3 Lah. 127].'

19. That said, the expressly stipulated grounds for review under Order 45 Rule 1 are to be read disjunctively with the limb providing for review 'for any other sufficient reason'. The Court of Appeal in *Wangechi Kimita & Another v Mutahi Wakibiru (1982-88) 1 KAR 977* stated with regard to the words 'for any other sufficient reason' per Nyarangi JA as follows:-

> ' I see no reason why any other sufficient reason need be analogous with the other grounds in the Order because clearly S.80 of the *Civil Procedure Act* confers unfettered right to apply for a review and so the words 'for any other sufficient reason' need not be analogous with the other grounds specified in the Order: See Sadar Mohamed v Charan Singh (1959) EA 793'.

20. Hancox JA (as he then was) in agreeing with Nyarangi JA said at page 981 states;-

> ' I would add that I also agree with the reasoning of Nyarangi JA that the third head under Ord 44 r. 1(1), enabling a party to apply for a review namely 'or for any other sufficient reason' is not necessarily confined to the kind of reason stated in the two proceeding heads in that sub-rule, which do not themselves form a 'genus or class of things with which the third general head could be said to be analogous'.

21. Later, Gicheru JA in The *Official Receiver and Liquidator v Freight Forwarders Kenya Limited [2000] eKLR* while reiterating the dicta in Wangechi Kimita (supra) stated that:-

> ' These words ('for any other sufficient reason') only mean that the reason must be one that is sufficient to the court to which the application for review is made and they cannot without at times running counter to the interests of justice be limited to the discovery of new and important matters or evidence, or occurring of a mistake or error apparent on the face of the record.'

See also Tokesi Mambili & Others v Simion Litsanga Sabwa, Civil Appeal 90 of 2001.

22. Has the Applicant demonstrated an error or mistake apparent on the face of the record or any other sufficient ground to warrant the review of this court's earlier decision? Drawing guidance from the dicta in National Bank of Kenya Ltd (supra), it is evident that this court elaborately addressed the Applicant's contestation when it pronounced itself that 'in my view, the proposition conjures absurd outcomes where a mere acknowledgement of receipt of a demand letter would be construed as synonymous with an acknowledgment of the debt claimed by such letter, and to provide a defence against the plea of limitation'.

23. Hence error apparent on the face of the record alleged here by the Applicant, does meet the muster the requirements of Order 45 Rule 1 of the Civil Procedure Rules. Secondly, and as rightly argued by the Respondent, the letter dated December 2, 2013 that purportedly led to a fresh accrual of rights was not produced for this court's perusal in the motion even though it formed part of the claim supporting documents to the bill of costs. Despite the latter this court is not convinced that an error apparent on the face of the record or a sufficient reason for review has been advanced by the Applicant.

24. This court having substantively rendered itself on issues of fact and law with respect to the Applicant's ostensible argument that a fresh accrual arose upon receipt of the letter dated December 2, 2013, agrees with the Respondent's submissions that the Applicant's objection belongs to an appeal rather than a review motion. Recently, the Court of Appeal in *Solacher v Romantic Hotels Limited & another (Civil*

Appeal 167 of 2019) [2022] KECA 771 (KLR) cited with approval the decision of Bennett J in Abasi *Belinda v Frederick Kangwamu and Another [1963] EA p.557* to the effect that:

> ' A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal.'

25. It is therefore the Court's unreserved opinion that the Applicant's motion is without merit. The motion is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Nambirige h/b for Mr. Kibuchi

For the Respondent: Ms. Odhiambo

C/A: Carol