



**Lubullelah & Company Advocates v Zadok Furniture Systems Limited (Miscellaneous Application E082 of 2021) [2023] KEHC 21293 (KLR) (Commercial and Tax) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21293 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS APPLICATION E082 OF 2021  
FG MUGAMBI, J  
JULY 31, 2023**

**BETWEEN**

**LUBULLELAH & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**ZADOK FURNITURE SYSTEMS LIMITED ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The applicant moved this court by way of a Notice of Motion application dated March 28, 2023. It was brought under Section 1A, 1B, 83A of the *Civil Procedure Act*, Order 9 Rule 9 and Rule 10, Order 45 Rule 1, 2 & 3 and Order 51 Rule 1 of the *Civil Procedure Rules*, and all other enabling provisions of law.
2. The application arises from the taxation of a bill of costs filed by the respondent, following which the applicant filed a reference to the High Court dated the February 7, 2022. A ruling was delivered on February 10, 2023 dismissing the reference.
3. The application before the Court seeks the following orders:
  - i. Spent
  - ii. THAT this Honourable court grants leave to the firm of Swanya & Company Advocates, to come on record for the Applicant in place of MAO Advocates LLP.
  - iii. Spent
  - iv. Spent



- v. THAT this Honourable Court be pleased to review, vary, set aside, and / or discharge the order/ decree and ruling of Lady Justice A Mshila delivered on February 10, 2023.
  - vi. THAT this honourable court be pleased to grant any other order it deems fit.
  - vii. THAT the costs of this application be in the cause.
4. The application is supported by the affidavit sworn on March 28, 2023 by Peter Kuria, an Advocate of the High Court of Kenya, and Counsel for the applicant as well as the written submissions dated June 13, 2023. The prayers in the application are spent save for the prayer for the firm of Swanya and Company Advocates to come on record and the ground seeking review of this Court’s ruling of February 10, 2023.
  5. The gravamen of the application is that the Learned Judge made a grave error in her ruling, by acknowledging that some monies had been paid to the respondent by the applicant and finding that there was evidence on the same but failed to factor this amount into the final computation of the amount payable to the advocate by the client.
  6. The applicant also filed a further affidavit dated May 3, 2023 reiterating the jurisdiction of this court to entertain the application for review under section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules. The applicant denied that there was delay in bringing the application.
  7. The application is opposed through a replying affidavit sworn by Eugene Lubale Lubulellah, a Partner at Lubulellah & Associates, the decree-holder in the matter. The respondent’s case is that this court was rendered functus officio upon the entry of judgment on the Certificate of Taxation on the February 10, 2023. He warns that entertaining this application for review after the entry of judgment on the Certificate of Taxation would be tantamount to this court sitting on an appeal against its own decision as the same has been overtaken by events.
  8. The respondent further states that this Court lacks jurisdiction to entertain and determine any review application from a decision made under Order 11 (2) of the *Advocates Remuneration Order*. The application was therefore incompetent and apt for striking out. Counsel submits that the *Advocates Act* is a self-contained Act which does not make provision for review of the decision of a Judge upon a reference under Paragraph 11 (2) of the Advocates Remuneration Order.
  9. In any case, it was stated that the application for review does not meet the threshold as required under the *Civil Procedure Act*. The respondent avers that the observation of the Learned Judge should be read as a whole because despite having made the observation on the monies, the Court made an explicit and final dismissal of the application.

### **Analysis**

10. In addition to the pleadings, the application was canvassed by way of written submissions which I have equally considered.
11. Before I move any further, I must first dispense with the prayer for the applicant’s advocate to come on record first. Order 9 Rule 9 of the Civil Procedure Rules, relates to representation of a party after judgment has been passed. It provides that:

‘ When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—



- a. Upon an application with notice to all the parties; or
  - b. Upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.'
12. The provision encapsulates a situation where Counsel may agree by consent to such change or a situation where Counsel may have to apply to Court for leave to come on record. In the latter situation such as appears to be the case here, the Rules further envisage a situation where an advocate while seeking to come on record may still make substantive prayers simultaneously to his application. More particularly, Order 9 Rule 9 provides in this regard that:
- ' An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.'
13. It has been submitted by the applicants that the former firm on record for the applicants, which was MAO Advocates LLP, was served with the present application. This is evidenced by an affidavit of service dated the May 17, 2023. No response has been presented before the court from the said firm of advocates. Instead, the applicants have brought to the attention of this Court, a taxation suit to wit HCCOMM MISC/E071/2023 Mwit Abdizak Odero Advocates (MAO Advocates) V Zadock Funitures Limited, filed by MAO Advocates LLP for services rendered to the applicants in the suit before the court.
14. To this, the respondents argued that the application should be struck out as the firm of Swanya Company Advocates were not on record for the applicant having not obtained leave of the court to come on record after entry of judgment on February 10, 2023. The respondent further states that the firm of MAO Advocates LLP, which is the firm of Advocates on record for the applicant herein has not ceased acting. The respondent takes issue with the unsubstantiated allegation that the firm refused to file a review against the reference, as such evidence has not been provided.
15. The respondent further submitted that since the deponent of the supporting affidavit, Peter Kuria was neither a director nor an officer of the applicant, he was not competent to depone on matters pertaining to the substantive issues in dispute between the parties. As such, the respondent invites this Court to find that the application remains unsupported with any evidence and ought to be struck out in limine.

**Analysis:**

16. Starting with the issue of swearing the affidavit, I must concur with the respondent that ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (see *Salama Beach Ltd V Mario Rossi, Ca No 10 Of 2015*). This caution was re-emphasized in *Magnolia Pot Limited V Synermed Pharmaceuticals (K) Ltd, (2018)eKLR* to the extent that advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed.
17. Having stated this, I do however note that it is not in all cases where affidavits sworn by advocates are automatically defective. In the situation currently before this Court, I note that the affidavit by Counsel contains mainly averments on the history of this matter with inferences from the Court record as well as facts strictly within Counsel's knowledge as regards the issues giving rise to the application to come on record. These are facts that would be within the deponent's knowledge and which would be verifiable through evidence attached to the affidavit. I am therefore inclined to find that the application is not defective.



18. I move on to address the second issue regarding the prayer to come on record. I note that the respondent has not proved any prejudice which they stand to suffer if the change of the advocates is allowed. Further, if the firm of MAO Advocates LLP had any objection, they ought to have filed a response to the application. None has been brought to the attention of the Court. The existence of a suit by the said MAO Advocates LLP against the applicant for work done has also not been controverted by the applicant. By this suit it would appear that the interest of the outgoing advocate have been taken care of as enunciated in *Simon Barasa Obiero V Jackson Onyango Obiero, [2016] eKLR*.
19. Likewise, in *Eseuri ole Katulele V Shankwa Nkai Lemomo [2018] eKLR*, the Court again echoed that order 9 Rule 9 & 10 of the Civil Procedure Rules should not extinguish rights to a fair hearing of a party who desires to approach the court on appeal or review.
20. For the reasons I have laid out and based on the further support of the decisions I have mentioned, I am convinced that the justice of this case points towards allowing the application for leave to the firm of Swanya & Co Advocates to come on record as advocates for the applicant.
21. The third issue relates to the prayer for review of the reference herein. The respondent argues that this Court lacks the requisite jurisdiction to entertain a review application under paragraph 11 of the *Advocates Act*. Order 11 (3) of the Advocates (Remuneration) Order states that:
- ' Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.'
22. The applicant does not deny the wording in the *Advocates Act* and in particular the fact that there is no provision for a review of a reference. Instead, the applicant invites this Court to be persuaded by a number of post 2010 decisions in which the Court has exercised its discretion and allowed review. Some of these decisions as cited by the applicant include *Nairobi Jr Misc Application No 455 of 2016 Paul Mwaniki V National Hospital Insurance Fund Board of Management*; and *Machakos Misc Application No E21 of 2020; DK Law Advocates V Zhong Gang Building Material Co Ltd & Another*.
23. This Court is however bound by the finding of the Court of Appeal in *Machira & Company Advocate V Arthur K Magugu, (2012) eKLR* whereby the Court sought to explain the justification behind leaving out the power of review from the jurisdiction of the High Court in reference proceedings. From the enunciation, it is clear that this move was not coincidental but deliberate and justifiable because:
- ' Appeals require the typing of proceedings compiling of records of appeal and hearing of the same in open court. Reviews, however, would require provisions akin to those of Section 80 of the *Civil Procedure Act*, of discovery of new and important matters, errors on the face of the record and so on. In our view, the Rules committee intended to avoid all that and provide for a simple and expeditious mode of dealing with the decisions on advocates bill of costs through references under Rule 11 to a judge in chambers.'
24. The Learned Judges of the Appellate court further went on to elucidate that:
- ' The appellate jurisdiction of any court is a creature of the statute and has to be exercised in accordance with the provisions of the statute creating it. With regard to the advocates bills of costs, we agree with the decision of Ringera J (as he then was) in *Machira V Magugu (1)* that the Advocates Remuneration Order is a complete code ... The effect may be viewed as



an appeal or a review but these being legal terms in respect of which different considerations apply, they should not be loosely used.'

25. Needless to say, this reasoning applies with equal strength to the circumstances before the Court. I am persuaded that the jurisdiction of this Court under paragraph 11 of the *Advocates Act* is conferred by statute and is specific as it relates to reference applications and appeals to the Court of Appeal. If the legislature had intended to clothe this Court with powers of review, in addition to appeal, nothing would have been easier than to so state. In light of the authority cited, I am enjoined by the doctrine of precedence and I therefore have no option but to dismiss the application on this ground.
26. As stated earlier, I have noted the sentiments by the applicant of decisions where Courts have exercised discretion in allowing review in references filed at the High Court. I further find guidance on this question in the case of *Abok James Odera T/A AJ Odera & Associates V John Patrick Machira T/A Machira & Company Advocates (2013) eKLR*. Once again, the Court of Appeal, while deliberating on the parameters within which to import the oxygen principle and provisions of Article 159 (2) (d) of the *Constitution* so as to achieve a fair, just, speedy, and cost saving disposal of cases before it, was faced with a similar question. The Court had to decide whether to breathe life into an otherwise incurably defective appeal. The Court cited with approval the decision of *Karuturu Networks Ltd & Aanother V Dally Figgis Advocates, Nairobi Court of Appeal CA No 293/2009* where it was held that:
- ' The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals.'
27. Applying the reasoning above to the circumstances before me, I am satisfied that this is not an application that this Court can breathe life to save where the jurisdiction of this court to determine an application was filed under the Civil Procedure Rules when there are clear procedures under the *Advocates Act*, and is therefore incompetent in limine and suitable for striking out.

#### **Determination and orders**

- i. In conclusion therefore, the application dated March 28, 2023 is successful to the extent that leave is granted to the firm of Swanya & Co Advocates to come on record as advocates for the applicants herein in place of the firm of MAO Advocates LLP.
- ii. I find no merit in the application for review and the same is dismissed.
- iii. The respondents shall therefore be entitled to half of the costs of this application.

**DATED, SIGNED AND DELIVERED IN NAIROBI 31<sup>ST</sup> DAY OF JULY, 2023.**

**F. MUGAMBI**

**JUDGE**

**COURT ASSISTANT: MS. LUCY WANDIRI.**

