



REPUBLIC OF KENYA



KENYA LAW
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**Samba t/a JO Samba & Co Advocates v Mengich (Miscellaneous Application
7 of 2022) [2023] KEHC 26997 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 26997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
MISCELLANEOUS APPLICATION 7 OF 2022
AC MRIMA, J
DECEMBER 20, 2023**

BETWEEN

JO SAMBA T/A JO SAMBA & CO ADVOCATES APPLICANT

AND

JACKLINE JELANGAT MENGICH RESPONDENT

RULING

1. This ruling relates to the application by way of Notice of Motion dated 25th October, 2022. It was taken out by Jackline Jelangat Mengich, the Original Respondent herein.
2. The application sought the following prayers: -
 - a. That this instant application be certified as extremely urgent and service of the same be dispensed with in the first instance ex-parte.
 - b. That there be stay of proceedings and/or further proceedings herein pending the hearing and determination of this application inter-parties.
 - c. That this honourable court be pleased to review, vary and/or vacate orders by setting aside and/or staying taxation order made on 17/5/2022 and certificate of costs dated 17/5/2022 in this matter in favour of the applicant against the respondent and the subsequent proceedings, execution and consequential orders.
 - d. That the costs of this application be provided for.
3. The application was premised on the grounds appearing on its face and was supported by two Affidavits both sworn by the Applicant. The Applicant also filed written submissions dated 9th June, 2023 in further support to the application.



4. The application was opposed by the Original Applicant who filed and relied on a Replying Affidavit sworn by himself. He also filed written submissions dated 5th May, 2023.
5. Having carefully considered the instant application, this Court has also taken time to peruse the record. Needless to say, the record speaks for itself.
6. The nature of the application seeks to review the taxation by the Taxing officer undertaken on 17th May, 2022. The main reason being that there was no Advocate-Client relationship between the parties. The application was brought under Article 159 of the Constitution and several provisions of the Civil Procedure Act as well as the Civil Procedure Rules.
7. The power of review in the High Court is anchored in the Civil Procedure Act, Cap. 21 of the Laws of Kenya and the Civil Procedure Rules, 2010.
8. Section 80 of the Civil Procedure Act provides as follows: -
 - Any person who considers himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
9. Order 45 Rule 1 of the Civil Procedure Rules, 2010 further provides for review in the following manner: -
 - 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.
10. Courts have severally dealt with the issue of review. The Supreme Court in Application No 8 of 2017, Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR, quoted with approval the findings of the East Africa Court of Appeal in Mbogo and another v Shah [1968] EA, upon establishing the following principles: -
 - (31) Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:
 - i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.



- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.

11. The Court of Appeal in Civil Appeal No 2111 of 1996, *National Bank of Kenya v Ndungu Njau* observed as follows in respect of reviews applications: -

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 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 proceeds on an incorrect expansion of the law.

12. The import of Section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules* was considered by the High Court in Miscellaneous Application 317 of 2018, *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR. Upon considering comparative jurisprudence, the Court crystallized the principles for consideration in reviewing its own decisions as follows:

- i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
- iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
- vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of



some subsequent event or development cannot be taken note of for declaring the initial order/ decision as vitiated by an error apparent.

- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/ tribunal earlier.
 - viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.
 - ix. Section 80 of the [Civil Procedure Code](#) provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the [Civil Procedure Code](#) does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.
 - x. The power of a civil court to review its judgment/decision is traceable in Section 80 [CPC](#). The grounds on which review can be sought are enumerated in Order 45 Rule 1.
13. Courts have also spoken to the competence of review applications in matters relating to taxations between Advocates and their clients. Given the parameters discussed in the various cases hereinabove, it is a common position that review applications cannot be entertained in matters taxation. (See the Court of Appeal in [Machira & Company Advocates v Arthur K. Magugu](#) (2012) eKLR among many other like decisions).
 14. This Court should further add its voice in this arena. Therefore, apart from the fact that the Advocates Remuneration Order provides a complete code which does not provide for appeals from the decisions of Taxing officers, but for references to a Judge in case of any further grievances, it is imperative to note that the [Advocates Remuneration Order](#) solely guides issues of legal fees and related incidentals as incurred by Advocates during legal transactions whether before a Court of law or elsewhere.
 15. The Advocates Remuneration Order does not extend its jurisdiction to matters including whether there was any Advocate-Client relationship between the parties. That was not the intent of Part IX of the [Advocates Act](#). The Order only guides the ascertainment of the legally recoverable fees and other charges. The Order is not the final tool for recovery of the legal fees and costs per se. No, its purpose is only to ascertain how much is due and recoverable. In other words, Advocates Remuneration Order is only, but part of the process.
 16. Recovery of taxed legal fees and costs only comes in after taxation. That process is guided by inter alia Section 51(2) of the [Advocates Act](#). An Advocate who has successfully taxed his/her legal fees and the Client still seems unwilling to settle such, then moves to obtain judgment under Section 51(2) of the [Advocates Act](#).
 17. The above provision also contemplates instances where the Court may decline to enter judgment under Section 51(2) of the [Advocates Act](#). In such cases, the Advocate may have to file a substantive claim to deal with the unsettled issues which may include disputed retainers, lack of instructions to act for a party, among others.
 18. Returning to the case at hand, and taking guidance from the foregoing, this Court finds that the application is misconceived. The Applicant, wrongly though, sees the taxation of the Advocates Bill



of Costs by the taxing officer as the arena to contest the issue of whether Counsel had instructions to represent her. Effectively, she is putting the cart before the horse. The application, therefore, lacks any legal leg to stand on and suffers a false start. It is for rejection.

19. Having said so and drawing from the foregoing, the following final orders do hereby issue: -
- a. The Notice of Motion dated 25th October, 2022 is hereby dismissed.
 - b. The Applicant, Jackline Jelangat Mengich, shall bear the costs of the application which costs shall be Kshs 30,000/= (Read: Kenya Shillings Thirty Thousand Only).
 - c. If need be, leave to appeal is hereby granted.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 20TH DAY OF DECEMBER, 2023.

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

N/A for Miss. Nafula, Learned Counsel for the Respondent/Original Applicant.

N/A for Mr. Bulbul, Learned Counsel for the Applicant/ Original Respondent.

