



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 109 OF 2015 (O.S)

FARID AHMED SWALEH.....1ST PLAINTIFF/CLIENT

HANS JURGEN ZAHLTEN.....2ND PLAINTIFF/CLIENT

-VERSUS-

MOHAMED FAKI KHATIB *Practicing as*

KHATIB & CO ADVOCATES.....DEFENDANT/ADVOCATE

RULING

1. There are two applications and one **Preliminary Objection** before the court for determination.
2. The main application is dated **27th April, 2020** by the Defendant/ Advocate and the pending prayer therein seeks for orders of review on the issue of interests as awarded in the Judgment delivered herein on the grounds that the **Originating Summons** never had a prayer for interest.
3. Part of the prayers which are already spent in that application relate to a prayer of stay of execution of the decree issued in this matter which was granted by this court at an ex-parte stage on **28th April, 2021**. This prompted the second application dated **4th May, 2021** by the Plaintiffs which seeks that the court be pleased to set-aside the ex-parte orders or in the alternative, the court varies those orders and directs the Defendant to
4. deposit a security of Kshs.2,770,738/= plus costs.
5. In my view, the second application by the Plaintiffs will be spend on determination of the Defendant's application since the interim stay orders were issued to subsist pending the determination of that application. Thus, whatever decision the court will have on the Defendant's Application will dispense with the stay orders.
6. With that state of affairs, I do not see the point of belaboring on the Plaintiffs' application dated **4th May, 2021**. I will therefore proceed on the basis of the Defendant's application dated **27th April, 2021** and the Plaintiffs' **Notice of Preliminary Objection** dated **4th May, 2021**.

The Defendant/Advocate's application dated 27th April, 2020

7. The application dated **27th April, 2020** is brought under the provisions of **Section 3A & 80** both of the **Civil Procedure Act** and **Order 45(1)** of the **Civil Procedure Rules, 2010**. As earlier pointed out, the prayers in that application are as follows;

a) Spent;

b) Spent;

c) That the court do review the Judgment issued herein as relates to the issue of interest on grounds that there was no prayer for payment of interest in the Originating Summons dated 5th August, 2015;

d) That the costs of this application be provided for

8. The grounds adduced in support of the application are *inter-alia* that the Plaintiffs/Clients approached the court vide **Originating Summons** dated **5th August, 2015** seeking among other prayers that the Defendant/ Advocate renders cash accounts for monies received on their behalf; that a declaration be issued that the advocate was holding monies due to them and lastly, that the advocate be ordered to pay to the Respondent a sum of Kshs.6,799,000/= being proceeds from the sale of property in Kilifi.

9. It is also averred that in the said **Originating Summons**, there was no prayer for payment of interest but in the Judgment delivered by this court on **16th February, 2018**, the court directed the Defendant/Advocate to pay a sum of Kshs.2,415,760/= plus interest at the rate of 14% P.A as from **1st February, 2011**. That as such, there was an error on part of the court in awarding a prayer which was never sought and the court should correct the error on the face of the record by reviewing the orders on interest.

10. The affidavit is further supported by the **affidavit of Mohamed Faki Khatib** where he has expounded the grounds on the face of the application with an addition that he has already paid a sum of Kshs.2,415,760/= in terms of the Judgment delivered by this court and the Plaintiffs' may proceed with the attachment on basis of **Proclamation Notice** dated **16th April, 2021** when there is an error apparent on the face of the record.

The Preliminary Objection

11. The Plaintiffs/Clients have opposed the Advocate's application through a **Preliminary Objection** dated **4th May, 2021**. It was contended that the court lacks jurisdiction to determine the Defendant/Advocate's application and the following grounds were adduced;

a) That the Applicant cannot ask a court to review a Judgment where he has already filed an appeal, which appeal has been heard and determined.

b) That the court lacks jurisdiction to hear and determine a matter after the court of appeal has dismissed an appeal filed by the same party.

c) That the court is functus officio and has no jurisdiction to revisit a Judgment that was delivered on merit, in any event, more than four years, after it was delivered.

12. Directions were issued that the application and the **Notice of Preliminary Objection** be canvassed by way of written submissions. The record shows that both parties have dutifully complied with the Defendant/Advocate filing his on **13th May, 2021** while the Plaintiffs/Clients filed theirs on **10th May, 2021**. I have read through the respective submissions and they replicate the disposition made by the parties in their pleadings.

Analysis and Determination

13. I have carefully considered the Application at hand, the Notice of

Preliminary Objection, depositions of the parties and submissions (both written and oral) made on behalf of the parties. I find that there are three issues for determination, two of which point to the jurisdiction of the court and merit of the application. The issues are as follows:-

a) Whether the Defendant/Advocate has a recourse for review having opted to appeal against the same Ruling in this matter.

b) Whether the court is functus officio in the matter.

c) Whether the Defendant/Advocate has made a case for review of the Judgment delivered on 16th February, 2018 as sought.

a) Whether the Defendant/Advocate has recourse for review having opted to appeal against the same Ruling delivered on 16th February, 2018

14. The first two issues I have pointed out for determination were raised in the **Notice of Preliminary Objection** dated and filed on the **4th May, 2021**. I wish to start with the issues arising in the **Preliminary Objection** since if successful, it would dispose off all the other pending issues. This of course weighs the issues raised in the Plaintiffs/Clients' **Preliminary Objection** against the legal scales set in law, that a **Preliminary Objection** should only consist points of law which if argued as a preliminary point may dispose of the suit.

15. The circumstances surrounding the dispute in this matter are not controverted. First, it is not denied that this court delivered its final decision in this matter vide a **Ruling** dated **16th February, 2018**. In that Ruling, the Defendant/Advocate was directed to render true, accurate and authentic accounts to the Plaintiffs/Clients within 30 days thereof and in default, the Defendant/Advocate was to pay to the Clients a sum of Kshs.2,415,760/= together with 14% interests as from **1st February, 2011** until payment in full.

16. There is no indication that the Defendant/Advocate has ever rendered as directed in the ruling but what is clear is that the Advocate was aggrieved by the entire decision and opted to appeal against it vide **Mombasa Appeal No.93 of 2019**. The Appeal was heard and determined vide a **Judgment** delivered on **29th January, 2021**, wherein the Court of Appeal affirmed the Judgment of this court. What is in dispute now, is whether the Advocate can seek for review of the Judgment as regards the award of interest since it was allegedly not among the prayers sought.

17. To justify the application for review, the Advocate submits that the issue of interest on the decretal sum was not subject of the Appeal while the client on the other hand holds the view that the Advocate having opted to file an appeal, cannot seek for a review of the same Judgment now.

18. In my view and my understanding of the law is that if a party chooses to proceed by way of an Appeal, he automatically loses the right to ask for a review of the decision to be appealed against. This position has also been echoed by various courts such as the court in the case of **Karani & 47 Others –vs- Kijana & 2 Others [1987] KLR 557**, where it was held that:

“...once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

19. Similarly, in the case of **V. Chokaa & Co. Advocates –vs- County Government of Mombasa as Successor of Municipal Council of Mombasa [2017]eKLR**, it was held: -

“For purposes of an appeal of the Court of Appeal is instituted by filing a Notice of Appeal. It is not denied that Advocate prior to filing the application for review had filed and served a Notice of Appeal. He had thus opted to appeal and therefore relinquished his option to seek review. That to me is to clear and undeniable interpretation I give to Order 45 Rule 1(2). Therefore, even beyond the merits as stated above, this application would not lie for being barred by the rule.”

20. Lastly, my brother, Mutungi J. discussed the provisions of **Order 45 Rule 1(a) and (b) and Section 80(a) and (b)** in the case of **Serephen Nyasani Menge –vs- Rispah Onsare [2018]eKLR** and held that;

"Order 45 rule 1(a) and (b) in addition to setting out the conditions that an applicant for review must satisfy in order to get the application granted, reiterates the proviso of Section 80 (a) and (b) which in my view makes it plainly clear that the options of a review and an appeal are not simultaneously available to an aggrieved party. Once a party has opted for a review, the option of an appeal cannot at the same time be available to the party. "

"In my view, a proper reading of Section 80 of the Act and Order 45 rules 1 and 2 make it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of review up to appeal and wishes to go back to the same order she sought review of and failed and to try her luck with an appeal. The applicant wants a second bite at the cherry. She cannot be permitted to do so. Her instant application constitutes an abuse of the court process and the same must surely fail. The applicant had her day in court when she chose to seek review of the order that she now wishes to appeal against. Litigation somehow must come to an end and for the applicant, the end came when she applied for review and appealed the decision made in the review application. Litigation cannot be conducted on the basis of trial and error.”

21. Taking a cue from the above cited decisions, and having regard to the fact that the Defendant/Advocate opted to file an appeal against the impugned **Ruling** dated **16th February, 2018**, I find that it is not open for the Defendant/Advocate to subsequently file an application for review. The Defendant/Advocate had his day in court when he chose to appeal against the ruling which he now wishes to seek review on. He is thus expected to have appealed on all issues he was aggrieved of once he filed the appeal and can therefore not seek to have a second bite on the cherry.

22. It follows that Defendant's/Advocate's application dated **27th April, 2021** for review is not only misconceived but also that this court does not have jurisdiction to grant the orders sought under **Section 80** of the **Civil Procedure Act** and **Order 45** of the **Civil Procedure Rules**.

23. In any event, my view is that the award of interest on decretal sum is in the discretion of the court and need not necessarily be among the reliefs sought by the claimant. The justification for an award of such interest would be on the strictest sense be compensation to a plaintiff for the deprivation of any money or something money worth through the wrong act of a Defendant. I take guidance in the former East African Court of Appeal finding in the case of **Later –vs- Mbiyu [1965] EA 592**, where it was held thus;

“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest”.

24. Consequently, it cannot be gain said that the award of interest was an error apparent on the face of the record as was intimated by the Defendant/Advocate and the application for review would nonetheless have been unsuccessful on account of the fact that no sufficient cause has been demonstrated in the three grounds for exercise of review as set out under **Order 45** of the **Civil Procedure Rules, 2010**.

25. The above findings dispense with the first and third issues that have been pointed out for determination and the upshot of my discussion is that this court finds no merit in the application for review dated **27th April, 2021**, hence the **Preliminary Objection** be and is hereby upheld.

26. Consequently, the Application dated **27th April, 2021** is hereby dismissed with costs to the Plaintiffs/Clients and all consequential orders thereof set aside.

27. Having held as such, it then follows that the stay orders the Plaintiffs/ Clients sought to set aside through the application dated **4th May, 2021** have already been dispensed with and there is nothing more to say with regard to that application save for the fact that each party bears its own costs on this application.

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF SEPTEMBER , 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Khatib counsel for Defendant

No appearance for and by Plaintiff

Court Assistant - Winny