REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROB1

MISC. CRIMINAL APLICATION. NO. 65 OF 2019

(FORMERLY HIGH COURT MISC. APPLICATION CAUSE NO. 308 OF 2018)

MOHAMED AND SAMNAKEY...APPLICANT/ADVOCATE

VERSUS

DILSHAD MOHAMED..RESPONDENT/CLIENT

RULING

1. By a notice of motion application dated; 12th October 2020, brought under the provisions of; Sections 1A, 3A and 80 of the Civil Procedure Act, (cap 21) Laws of Kenya, Orders; 45 Rule 1; and 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of the law, the applicant is seeking for the following orders: -

> *a) That, this Honourable Court be pleased to review the ruling it delivered dated 22nd July 2020; striking out the applicant's bill of costs dated; 25th May 2018;*
>
> *b) That, this Honourable Court do review and set aside, and/or vacate its ruling, orders and/or all consequential orders therein;*
>
> *c) That, the court hear afresh the bill of costs dated, 25th May 2018;*
>
> *d) That, costs of the application be provided for.*

2. The application is supported by the grounds on the face of it and a supporting affidavit of the even date, sworn by Zul Mohamed, an advocate in the applicant's law firm. He averred that, there is an apparent error on the face of the record, which if reviewed, will alter outcome of bill of costs.

3. That, upon securing a copy of the subject ruling herein, he realized that, there are items in the bundle of documents which perhaps, may have escaped the Honourable Court's attention. He lists these documents as here below reproduced: -

> *a) Letter dated 7th April 2016 and enclosure (Page 64 A and Page 63 A) from Applicant to Respondent confirming Respondent's instructions to the Applicant for preparation of an urgent Applicant to Court.*
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> *b) Email dated 10th April 2016 and attached (Pages 66 and 107) from Respondent to Applicant explaining that the sum of Kshs.2,246,000 was bona fide proceeds of rent, and that there was nothing unlawful about the same. This explanation would not have been necessary had the Applicant no instruction to act in the matter.*
>
> *c) Bank Statements (Pages108 – 135) pertaining to the affected account as provided by the Respondent to the Applicant to enable the Applicant to make appropriate application to Court. The Applicant could not have accessed the said Bank Statements without being given by the Account Holder, namely, the Respondent. The Respondent would not have given the said statements to the Applicant had she not given instructions to the Applicant to act in the matter. For avoidance of doubt, attached is a copy of an email dated 10th April 2016 (marked "ZM 2") which I have accessed from my computer whereby the Respondent forwarded the said Bank Statements to the Applicant.*
>
> *d) Tenancy Agreement (Pages 136-141) in support of the Respondent's contention that the amount received in her Bank Account was in fact bona fide payment of rent in terms of the said Tenancy Agreement. The Respondent would have had no reason to provide this evidence to the Applicant had she not instructed the Applicant to prepare appropriate application for filing in Court.*

e) Guarantee and Indemnity (Page 142) as signed by the Respondent's Tenants' guarontors as further proof of existence of the bona fide tenancy as between the Respondent and the main suspect, Quorandum Limited.

f) Email dated 14th April 2016 (Page 143) from the Applicant to the Respondent requesting the Respondent to call at the Applicant's office by prior appointment to sign the affidavit supporting the material application.

g) Email dated the 15th April 2016(Page 144) confirming telephone conversations between me and the Respondent when she instructed me to hold on to the said application until further instructions from her. At the last paragraphs of the said email the Respondent was specifically warned by the Applicant in the following terms:

> *i. "further note that costs have already been incurred in preparation of the Application irrespective of whether or not you opt to utilize the same.*

h) Letter dated 10th May 2016(Page 145) from Applicant to Respondent confirming the Respondent's undertaking to settle costs arising from preparation of the said unutilized Application. It is instructive to note that, the Respondent has not exhibited even one email or letter in support of her allegation of not having instructed the Applicant to act in the matter.

4. The application was served upon the Respondent's counsel M/S Agnes W. Njoroge & Company Advocates who responded by stating that, the Respondent passed on, on 28th March 2020, and the law firm had served the Applicant with an affidavit informing him, of the death and therefore, they have no instructions in the matter. The learned counsel, Ms Njoroge told the Court that, she could not be able to secure the death certificate and only learnt of her client's death through the obituary. That, in view of the death, the proceedings had abated.

5. However, the learned counsel, Mr. Mohammed for the applicant argued that, although he had received the affidavit and copy of the obituary, it was not conclusive evidence of death. That, the death certificate had to be filed for the matter to be withdrawn. The Respondent was given more time from 8th to 29th March, 2021 for the necessary action. However, there was no further communication from the Respondent.

6. The application was disposed of by the Applicant filing submissions thereto. Apparently, the submissions from pages 1 to 4 generally reiterates, verbatively the contents of the application and the affidavit in support thereof, save to add that, as held in the case of; *Otieono Ragot & Company Advocates vs National Bank of Kenya Limited [2021] eKLR*, matters arising under the Advocates Act could be reviewed under; Order 45 Rule 1 of the Civil Procedure Rules, 2010, notwithstanding the non-applicability of the Rules. In conclusion, the Applicant submitted that, there are sufficient reasons to review its ruling, in the interests of justice.

7. I have considered the application in the light of the materials placed before the court and the first issue I wish to address is, the provisions under which the application is premised. In the instant matter, the Applicant cites the provisions of; Order 45 Rule 1 of the Civil Procedure Rules, 2010. These provisions prima facie, relates to a civil matter. The matter herein is filed as, Miscellaneous Criminal Application. It is not clear why it was filed in the Criminal Division of the High Court.

8. However, it does appear that, the subject application herein arises out of a decision of; Hon. Justice L. Kimaru, which he rendered while in the Criminal Division of the High Court. I note from the impugned ruling that, the subject thereof was the Advocate/Clients bill of costs, filed before the Deputy Registrar, vide Miscellaneous Cause No. 308 of 2018, for taxation. Apparently, the Deputy Registrar referred the matter to the High Court for hearing and determination, on the issue of existence of Advocate/Client relationship and/or retainer.

9. I further note that, by the subject ruling dated, 22nd July, 2020, the court struck out the bill of costs on the ground that, the Applicant had failed to establish the existence of retainer.

10. The Applicant now wants that decision reviewed. Although I have already questioned the jurisdiction of the court, taking into account the ruling was delivered by a judge in this division, I shall venture into the merits of the application. In that regard the provisions invoked in this matter of; Order 45 Rule, 1 of the Rules states: -

> *(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"*

11. The question is; has the Applicant met the threshold of these provisions? The Black Law's Dictionary, states that, to review a decision is; "*to re-examine it judicially, a re-consideration; second view of examination; revision; consideration for purposes of correction."* The main object of which is to enable the courts to correct errors, in the decisions pronounced by them. If the decree or an order made on the basis of some record and there has been some mistake or error apparent on the face of record, or some new and important matter or evidence is discovered after the passage of decree, or order or another such sufficient reasons, the application of review, may be made by the aggrieved party. The court cannot review *suo motu* nor can a superior court direct an inferior court to review its previous decision.

12. However, the grounds for review are settled by the aforesaid provisions that;

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

13. The Applicant in this matter is relying on ground (a) above, however, the Applicant does not cite and/or refer to any single issue in the ruling, that amounts to an error apparent on the face of the record. It simply states at ground (a) that; "*there is an obvious mistake and/or error apparent on the face of the record which if reviewed and looked at afresh will alter the outcome of the said bill of costs*"

14. At paragraph 9 of the affidavit, he Applicant merely lists documents that allegedly the Court did not consider. The question is; does the ground that, "*the court did not consider certain documents*" amount to an error apparent on the face of the record? Is it a matter of review or appeal? I have read through the impugned decision and note that, the court evaluated the material before it, as indicted under page 3 paragraph 2 the court indicates that, it has evaluated the bundle of documents presented to it, by the applicant and arrived at the conclusion that, it was evident that, the Respondent did not give the Applicant written instructions. In fact, the court proceeds to make reference to some of the documents presented.

15. It therefore follows that, if the alleged documents were presented to the court then, they were considered. In conclusion, I find that, the Applicant having failed to point out, the subject mistake and/or error herein, the court cannot evaluate the applicant on merit. Furthermore, from the content of the application, the applicant seems to be challenging the merit of the decision of the court. If that is so, then the cause of action available to the Applicant is to appeal against that decision and not seek for review as herein.

16. In the given circumstances, I find that, the application lacks merit and I hereby dismiss it with no orders as to costs.

It is so ordered

DATED, DELIVERED AND SIGNED ON THIS 30TH DAY OF NOVEMBER, 2021.

GRACE L NZIOKA

JUDGE

In the presence of;

Mr Zul Mohamed for the Applicant

Ms Kariuki for the Respondent

Edwin Ombuna; Court Assistant