



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MILIMANI COMMERCIAL & TAX DIVISION
MISC. APPLICATION NO. 130 OF 2018
IN THE MATTER OF THE TAXATION OF COSTS BETWEEN
ADVOCATES & CLIENT:

BETWEEN

MILIMO, MUTHOMI & CO. ADVOCATES.....ADVOCATE/RESPONDENT

-VERSUS-

THE REGISTERED TRUSTEES, KENYA RAILWAYS

STAFF RETIREMENT BENEFITS SCHEME.....RESPONDENT/APPLICANT

RULING

1. The ruling herein relates to a notice of motion application; dated 26th June 2020, brought pursuant to; **Section 1A, 1B, 3A, 63 and 80 of the Civil Procedure Act (cap 21) Laws of Kenya, Order 45, 50 & 51 of the Civil Procedure Rules, 2020**, and all the enabling provisions of the law. The application is based on the grounds on the face of it and a supporting affidavit sworn by; Victoria Mulwa dated 26th June 2020.
2. The Applicant prays for orders that; the Honourable court be pleased to review, vary and/or set aside, the order compelling the Applicant/Pension scheme to pay 50% of; **Kshs 411,573,757.70** or in the alternative, deposit the full amount into an escrow account or secure it through a bank guarantee and in its place; allow the Applicant/Scheme to file the Reference on such terms as are just and cognisant of its operations. That the costs of the application be awarded to the Applicant/Pension Scheme.
3. The application is based on the grounds on the face of it and an affidavit of even date sworn by, the Applicant's Trust Secretary and CEO; Victoria Mulwa. The application was opposed by a replying affidavit dated 2nd July 2020 sworn by S. J. Saenyi Advocate.
4. The background of the matter is that, the Applicant filed a notice of motion application dated 1st November 2019, seeking for orders inter alia that: -
 - a) *That the applicant be granted leave to file a Reference against the decision of the taxing officer delivered on 4th March 2019;*
 - b) *The execution of the certificate of taxation dated 19th March 2019, be stayed pending the hearing and determination of the application and the intended Reference;*
 - c) *The execution of the orders issued on 14th October 2019 and the consequential decree dated 18th October 2019, be and hereby be stayed pending the hearing of the application and the intended Reference;*
 - d) *The orders of the Honourable court made on the 14th October 2019 and the consequential decree dated 18th October 2019 be and are hereby set aside.*
5. After the hearing of the application, the court ordered inter alia that; the decision of the taxing officer be set aside, on condition the

Applicant shall;

- a) Pay the Respondent 50% of the decretal sum; within thirty (30) days of the date of the order pending the hearing and determination of the intended Reference, or;
- b) Secure the entire sum with a Bank Guarantee of the total decretal sum, within thirty (30) days of the date thereof; or
- c) Deposit the entire sum in an interest earning account in the names of the parties' counsels, within thirty (30) days of the date of the order; and

6. However, the Applicant avers in a nutshell that, it has a total of **10,097** members comprising of **8,767** pensioners and **1,330** dependants. The pensioners are elderly and vulnerable without any other source of income, and rely on the scheme to pay them their monthly pension. That, the investment properties can only fetch a sum of; **Kshs 47,000,000**, as per the schedule of the rental income produced and the audited accounts for the year ended 30th June 2019, whilst the monthly pension liability the scheme owes to its members is; **Kshs 75,000,000** per month. The Applicant could not have produced this information prior to the orders of; 28th May 2020, when it was required to give security as a condition for the stay orders.

7. Further, the scheme struggles each month to try and pay pensioners their benefits and is often unable to meet the cash flow requirements rendering the pensioners destitute. It is currently utilizing all its disposable income of; **Kshs 47,000,000** in compliance with the Retirement Benefits Authority Act, which to pay pension benefits.

8. That, currently 97.78% of the scheme's investment are in immovable property valued at; **Kshs 33,264,242,000**, incapable of meeting the decree, unless the Applicant is given time to dispose them off. That the Applicant is a public body and cannot be a flight risk. In the circumstances, the Applicant cannot lawfully and in accordance with **Public Procurement and Asset Disposal Act 2015**, raise and pay 50% of **Kshs 411,573,757.70** as ordered by the court.

9. However, the Respondent opposed the Application vide a 2nd July, 2020, and averred that, the 30 days' period given in the subject order, commenced on 28th May 2020 and lapsed on 26th June 2020 which was an official working day. At the time of filing of the application, the conditional leave granted through the orders of 28th May 2020 had lapsed. Therefore, there were no orders to extend on 29th June 2020.

10. That, the court does not have jurisdiction to extend a lapsed order and therefore, on the above ground alone, the said extension should not be granted. Despite the aforesaid, as regards the substance of the 1st prayer; the Applicants have duly acknowledged that, they have property worth; Kshs 33,264,242,000 that can cover the decretal sum. One of these property can be used as collateral to secure the total decretal sum and the Applicant's cash flow to pay the pensioners would not be affected.

11. In the alternative, even if the Applicant is unable to get funds from any financial institution, the Applicant has not acted in good faith in trying to secure the title of one of its property with the Respondent in order to act as collateral for the decretal amount. Further, the Respondents, as at 2006, already knew that a majority of their properties, were immovable property. Therefore, this is not a new fact, which was outside their knowledge as of the date of issuance of the order of 28th June 2020. That either way, the **Retirement Benefits Act** and Rules thereunder, require all pension schemes to have only 30% of their property in immovable assets. Therefore, the order of extension sought is nearly meant to delay the payment of the decretal sum and unjustly deny the Advocate the fruits of his judgment.

12. The Respondent further averred that, the court became *functus officio*, after rendering its decision of 28th May 2020. Having become *functus officio*, it does not have jurisdiction to review, vary and/or set aside any of its orders. Further the proceedings herein are made under the **Advocates (Remuneration) Amendment Order of 2014**, therefore Civil Procedure Rules are not applicable, as there is no provision for review of this court's order under the Advocates (Remuneration) Amendment Order of 2014.

13. That even if the court had jurisdiction, the Applicant has not satisfied the conditions precedent for review as it has not brought in any new material that was not within their knowledge as at the time of making the decision of 28th May 2020. That, there is no error apparent on the face of the record. Further, the allegation that, the Applicant did not appreciate the content of the ruling delivered on 28th May 2020, is crying wolf.

14. On 28th May, 2020, the court, in the Covid-19 period, accommodated the parties herein for more than one hour and read out the entire ruling line by line to the parties herein. Additionally, in as much as it has never been experienced, the court allowed parties to seek any clarifications, where they had not understood the ruling delivered.

15. That the Applicant have purported to allege that, the sufficient reason to warrant review is that, the interest of the pensioners outweighs the interest of the Advocate to earn fees. That the Advocate diligently discharged its duties from 2012 to date, without any pay from the Applicants.

16. Finally, the Respondent argues that the Applicant is seeking for orders under prayer (c) which were also sought for in the application dated 1st November 2019 and the court granted that prayer on conditions as stated herein therefore it is an abuse of court process as it is *res judicata*. Further, the court cannot sit on an appeal on its own decision.

17. However, the Applicant filed a supplementary affidavit dated 24th July 2020, in response to the Respondent's affidavit and averred that, the time for filing the application started running on the 29th May 2020, and therefore the application was filed on time.

18. This application is not meant to deny the advocate the fruits of his labour but it strives for an equilibrium that will allow the Applicant to continue its operations taking into consideration that, the amount owing to the Advocate is disputed and is colossal to the extent that it would paralyze the scheme if enforced on the terms set out in the ruling of 28th May 2020. If the court grant the orders sought for herein, the Respondent will not suffer any prejudice that cannot be covered by costs.

19. It was further averred that, the application is not *functus officio* as alleged. That **Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules, 2020**, gives the court unfettered discretion to review its judgments or orders on such terms as it deem fit. The Applicant has met the conditions for review by providing its financial statements as at 30th June 2019, depicting the cash flow and its assets prior to the orders of; 28th May 2020 which could have influenced the court in setting the conditions for security. The information provided is material and relevant in assisting the court in setting the conditions for security, which is sufficient reason contemplated by the rules of review.

20. The parties disposed of the application by filing their submissions in support of their case. The Applicant filed their submission dated 24th July 2020 and reiterated the averments in the affidavits in support of the application. That the information subsequently, provided is “sufficient reason” contemplated by; Order 45 Rule 1 of the Civil Procedure Rules, 2020, to justify the review. The Applicant relied on the case of; **Pancras T. Swai v Kenya Breweries Limited (2014)eKLR**, where the court observed that, Section 80 of the Civil Procedure Act. confers upon the court the unfettered discretion to review its orders for any sufficient reasons.

21. The Applicant also relied on the case of; **Wangechi Kimata & Another vs Charan Singh (C.A. No. 80 of 1985)** (unreported) wherein the court held that;

“any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the court by section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous”

22. It was further submitted that, based on the reasons advanced the Applicant be allowed to file the Reference without the order to furnish security. The Respondent can be compensated by an award of costs. The case of **Odera Obar & Co. Advocates v Aly Enterprises Limited & 3 others (2015)eKLR** was cited.

23. That the financial statement of the scheme as at 30th June 2019 by Deloitte & Touche depicting its cash flow and assets was not directly in issue before the court, as the application dated 1st November 2019, invoked provisions which do not make provisions for security.

24. However, the Respondent relied on the cases of **NSSF v John Ochieng Opiyo (2006)eKLR and Regina Pacis University College Through the Board of Trustees & another v William Charles Fryda (2012)eKLR** to argue that an expired order cannot be extended. That, if the court holds that, prayer (b) is merited, as soon as the application herein is determined, the said order will lapse as it sought “pending the hearing and determination of the application”.

25. Further, the Applicant has sought a second opportunity to file a Reference couched in a prayer for review under prayer (c). There must be an end to litigation as held in the case of **Independent Electorla & Boundaries Commission v Maina Kiai & 5 others (2017)eKLR and Uhuru Highway Development Limited v Central Bank of Kenya & 2 others (1996)eKLR**. Further, as held in the case of; **Raila Odinga v IEBC and Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 966 former employees of Telkom Kenya Limited) (2014) eKLR**, once the court grants a final judgment/decision the same is not to be re-opened on merits. The party aggrieved by the decision must move the court to a higher court. The Applicant should have approached the court of appeal to seek to set aside the conditions set.

26. It was further submitted that having failed to annex the order that the Applicant are seeking to review, renders the application fatal and as the application herein does not have the order sought to be reviewed. Further, **Order 45** is not applicable as the parties are at the execution stage. That the Applicant can satisfy the decree by instalments as provided for under **Order 21 rule 12** of the Civil

27. I have considered the application and the arguments and/or submission advanced and it is conceded that, the Applicant has not so far complied with the conditions set out in the ruling of the court rendered on 28th May 2020. The issue before the court is whether the Applicant has met the conditions for review of an order as provided for; under Order 45 Rule 1 of the subject Rules. These provisions states that: -

“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 review of judgement to the court which passed the decree or made the order without unreasonable delay.”

28. The grounds for review are clear from these provisions. The law limits review to the following grounds:

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, of or any other sufficient reason

And whatever the ground, there is a requirement that, the application has to be made without unreasonable delay.

29. The Applicant has raised several reasons for review. One of the reasons is that, the delay in filing the application, was due to delay in availing the ruling. I have considered all the argument on the same and whatever, informed the delay, I shall give the Applicant the benefit of doubt in view of the fact that, the matter is already fully canvassed.

30. That takes me to the prayer seeking for extension of the order of stay of execution. As rightfully submitted, the same was sought for pending the hearing and determination of this application, and therefore unavailable for consideration. That then leaves the prayer for review, The Applicant is relying on the ground of; *discovery of new and important matter or evidence which, after the exercise of due diligence, was not within its knowledge or could not be produced at the time when the impugned order or the order made. It also relies on the ground of other "sufficient reason"*.

31. In that regard, the Applicant has produced its audited by 30th June 2019. That information in my considered opinion, it is does not amount to new matters or evidence. The audited accounts of any organization is an annual requirement and therefore the same should have been available to the Applicant and the court. But even assuming the same became necessary after the orders of 28th May 2020.

32. In that case, it can only fall under the ground of; "sufficient reason". In the case of; ***Sadar Mohamed V Charan Singh and Another---*** the court held that; *"any other sufficient reason for the purposes of review refers to the grounds analogous to the other two grounds"*.

33. Further in the case of; in the case of; ***Evan Bwire vs Andrew Nginda Civil Appeal No. 103 of 2000, Kisumu, (2000) LLR 8340***, the court held that; *"an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh"*. In the same vein, i n the case of; ***Tokesi Mambili and others vs Simion Litsanga---*** where the court held that, *"if the application is based on sufficient reason, it is for the court to exercise its discretion."*

34. However, from the averments in the affidavits what the Applicant is saying is that, it struggling to pay the pensioners due to liquidity issues and therefore it cannot comply with the court order. However, ironically, they admit that they have immovable property valued at; **Kshs 33,264,242,000**, which amount is beyond the amount in issue. That, it requires time to disposal of these assets to be able to comply with the court orders. The reasons advanced in my considered opinion are not analogous to the other two grounds under **Order 45 Rule 1 of the Civil Procedure Rules, 2010**.

35. However, even if the court were to allow the Applicant time to dispose of the subject assets, or organize the finances to pay or obey the court's order as averred, it is noteworthy that, the Applicant avers that, it has previously sought to dispose of its assets to improve its liquidity but the process has been frustrated by injunctive orders in various cases.

36. It also suffices to note that, before setting the subject conditions, the court appreciated the predicament raised by the Applicant when it stated at paragraph 44 of the ruling dated; 28th May 2020, that, the decretal sum is a *"large amount of money involved and the fact that the applicant is a scheme established for the benefit of retirees and therefore generally speaking "a special category of citizens" who by nature of their interest require special consideration"*.

37. Therefore, the issues raised for review were within the court's knowledge when the conditions subject to review were given. Further the court in allowing the Applicant an opportunity to be heard on the Reference on merit, noted that, justice must be balanced on a scale and the Respondent should not be kept out of the proceeds of taxed costs for too long. Indeed, the exercise of the court's discretion in favour of one party and create an injustice to the other party. The court gave the parties time to negotiate settlement of this matter before delivering this ruling but in vain.

38. I note that the Applicant submitted that, it should be allowed to file a Reference without conditions and that, the Respondent will not suffer prejudice that cannot be compensated by cost. However, it is not just an issue of costs. It is an issue of interest of justice of both parties. This is a court of justice. It has to consider the interest of both parties.

39. I therefore find that, the Applicant has not satisfied the requirements for grant of the orders of review under Order 45 Rule 1 of the Civil Procedure Rules. In view of this finding I find that, it is not necessary to delve into the other issues raised in relation to the court being *"functus officio"*, *"res judicata"* and/or whether the civil procedure rules apply herein.

40. In conclusion, I find that, the prayer for extension of interim orders issued on 28th May 2020, was sought for pending the hearing and determination of the application. Therefore, it is spent. Having declined to grant the prayer for review, I find that, the application is unmeritorious, and I dismiss it. However, I shall not make any order as to costs.

41. It is so ordered.

Dated, delivered and signed on this 26th October, 2020.

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr Ochieng for the Applicant;

Mr Wafula holding brief for Milimo for the Respondent;

Robert: Court Assistant