



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI COMMERCIAL AND TAX DIVISION

IN THE (CONSOLIDATED) MATTERS OF HCCC. NO 543 OF 2007

HOUSING COMPANY OF EAST AFRICA LIMITED.....PLAINTIFF

VERSUS

BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY FUND.....1ST DEFENDANT

KISIMA MANAGEMENT LIMITED.....2ND DEFENDANT

AND

MISC APP. NO 276 OF 2016

KAJWANG & KAJWANG CO. ADVOCATES.....ADVOCATE

VERSUS

BOARD OF TRUSTEE, NATIONAL SOCIAL SECURITY FUND.....CLIENT

AND

MISC APP. NO 182 OF 2017

KINYANJUI, NJUGUAN CO. ADVOCATES.....ADVOCATE

VERSUS

BOARD OF TRUSTEE, NATIONAL SOCIAL SECURITY FUND.....CLIENT

RULING

1. The ruling herein relates to a notice of motion application dated 26th May 2020, brought under the provisions of; Order 45 Rule 1 and Rule 2, Order 51 Rule 1 of the Civil Procedure Rules; Sections 1A, 1B of Civil Procedure Act, Articles 25, 159 (2) of the Constitution of Kenya, the inherent jurisdiction of the court and all other enabling provisions of the law.

2. The Applicant is seeking for orders that:

- a. The Honorable court be pleased to review and thereafter set aside and/or vacate only that part of the ruling made the court on; 29th April 2020, in so far as it was directing the Applicant to pay a sum of; Kshs 5,000,000, to the firm of Kajwang & Kajwang Co. Advocates, and in default of compliance, the court's own order setting aside the erroneous taxation decision of; Hon. Nancy Makau (DR) made on 9th January 2017, in favour of M/s Kajwang & Kajwang Co. Advocates for the sum of; Kshs 32,646,562 and referring the matter back to the taxing officer for fresh taxation; stand vacated without any recourse to court;

b. That pending the hearing and determination of this review motion, there be a stay of paragraphs 135 of the ruling made by the High court on 29th April 2020, in its entirety;

c. That the court be at liberty to make any such further or alternative orders as the interests of justice may require;

d. That the costs of this application be in the cause.

3. This application is based on the grounds on the face of it and an affidavit of even date, sworn by the Applicants Acting General Manager Corporate Affairs/Corporate Secretary Austin Ouko It is averred that, by a ruling dated 29th April 2020, the court set aside a decision by the taxing officer awarding the firm of; Kajwang & Kajwang Advocates in relation Advocates/Clients bill of costs (herein “the bill”). Upon setting aside the decisions and the resultant certificates of taxation, the court further ordered that, the Applicant pay the firm a sum of; Kshs 5,000,000, in default, the order setting aside the certificate of taxation be deemed vacated forth with.

4. The Applicant argues that, the subject order at paragraph 135 of the ruling; involves a serious error of law apparent upon the face of the record, as it relates to a substantive matter. It is made in excess of jurisdiction and unless vacated, being a public body mandated by law to provide social protection to all workers; it stands to be irreparably harmed financially.

5. Further, the impugned order also amounts to an impermissible fetter on the wide discretion given to the taxing officer, should they find that, the law firm was entitled to reasonable fees that are much less than Kshs 5,000,000, but are forced into taxing the bill at a maximum of the subject sum to avoid disregarding paragraph 135 of the ruling.

6. That, the court became “*functus officio*” upon the bill reverting to the new taxing officer to ascertain the sums due and payable to the firm. Further, paragraph 135, is erroneous in law, as it amounts to the court sitting on appeal over its own findings; in paragraphs 126 to 131 of the decision and setting the same aside without hearing the other parties.

7. Finally, the order compelling the Applicant to make payments prior to a fresh taxation has no basis, as the Applicant’s officers would commit an illegality by making payments out of public funds not only without a legally enforceable certificate of taxation but also a judgement on costs as required under section 51(1) & (2) of the Advocates Act.

8. However, the application was opposed by; Kajwang and Kajwang Advocates, vide a replying affidavit dated 8th June 2020, sworn by T.J. Kajwang Advocate and by the firm of; Kinyanjui Njuguna & Co. Advocates, vide a replying affidavit dated 8th June 2020, sworn by Kinyanjui Theuri Advocate.

9. The Learned counsel Mr Kajwang deposed that, he represented the Applicant herein in this matter and subsequently filed a bill of costs which has given rise to this matter. That, the subject ruling herein was made pursuant to the Applicant’s application which sought for a raft of orders. Those orders are discretionary in nature. The Honorable court in exercise of its discretionary jurisdiction, has unfettered powers and may make such decisions as to give justice to parties, so long the reasons for same is advanced.

10. That a disagreement with a ruling, cannot be a basis of review but an appeal. That, the exercise of the power of review is limited to the correction of an error apparent or an obvious omission on the part of the court or to allow a party upon the discovery of a new and important matter or evidence. That none of these conditions have been met in the instant application.

11. Further, the period of making the subject payment has since lapsed without compliance with the express. Therefore, the application is an attempt by the Applicant to avoid making payment of legal fees as ordered by the court. Having failed to make payments as ordered, the Applicant is in contempt of court and the court should not entertain the application unless and until the terms of the court order are satisfied.

12. The Learned counsel Mr Kinyanjui Theuri deposed that, the Application does not fall within the parameters of review for reasons that; the order sought to be reviewed has not been annexed, and there is nothing seeking correction as specified by section 100 of the Civil Procedure Act, (cap 21) laws of Kenya.

13. He also reiterated that, the order of the court was to be complied with within 21 days that lapsed on 20th May 2020. The Applicant ought to have stayed the orders before expiry or complied with them within the timeline set out. Having not complied, the Applicant is acting in contempt of the court. Further the setting aside order stands vacated.

14. Finally, the Applicant seeks to challenge the ruling on unsubstantial issues of facts and of law, which issues can only be addressed on appeal. This application is turning the court into an appellate court. The principle of equity and ends of justice demand that litigation must come to an end.

15. However, the Applicant responded through a further affidavit and stated that, upon the delivery of the ruling, the parties recorded a consent allowing for a stay for thirty days which lapsed on 29th May 2020 and the application was filed three days before the lapse of the order. The application has merit and the orders sought to be reviewed do not affect the firm of; Kinyanjui Njuguna Advocates.

16. The parties disposed of the application by filing submissions which I have considered herein. The Applicant filed submissions dated 19th June 2020, and argued that, section 80 of the Civil Procedure Act and Order 45 Rule 1(b) of the Civil Procedure Rules, 2010, allow a party to apply for review of an order or judgment of the court. That, for an application for review to succeed, the Applicant has to show that; there was a mistake or error apparent on the face of the record, as held in the case of; *Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Limited (1989) KLR.*

17. The Applicant further submitted that, it has satisfied the requirements of; Order 45 of the Civil Procedure Rules, 2010, in that, the application has been made without undue delay, as evidenced in the further affidavit of; Austin Ouko and if there is any delay, it is fully attributable to court administrative processes that were beyond the ambit of the Applicant. The substratum of the application is not the discovery of new and important matter or evidence but it is errors apparent on the face of the record, that go to jurisdiction.

18. However, the firm of; Kajwang and Kajwang Co. Advocates, relied on the case of; *Mbogo & another vs Shah (1968) EA 93* which sets down the guidelines for review of a decision by a court. It was reiterated that, the Applicant has not shown any new or important matter or evidence to be produced in court and that the application offends the provisions of; section 80(a) of the Civil Procedure Act, in that, the position taken that the court lacked jurisdiction is more of a ground for appeal than a ground for review. Further reliance was placed on the case of; *Abasi Belinda v Fredrick Kangwamu & another (1963) EA 557*.

19. It was further submitted that, Section 3A of the Civil Procedure Act as read together with Article 165(3) (a) of the constitution of Kenya, 2010, gives, the court unlimited jurisdiction in both criminal and civil matters. The case of; *Samuel Kamau Macharia vs Kenya Commercial Bank & 2 others Civil Application No 2 of 2011* was relied on, where the court observed that, a court's jurisdiction flows from either the constitution or legislation or both.

20. The Respondent further relied on the case of; *Misc App. No 21 of 2003; D. Njogu & Co. Advocates vs Kenya National Capital Authority* where the court held that; Advocate/Client costs can never be less than the Party and Party Costs. That to allow the application sought would amount to condoning contempt of court, which would result in a lack of confidence in the courts.

21. I have considered the entire application in the light of the arguments advanced and I find that, the only issue that has arisen is whether; the impugned part of the ruling amounts to an error apparent on the face of the record. In a verbatim form, the subject paragraph states:

“As stated, the 1st Defendant has caused the delay herein. It is the beneficiary of the work done. The firm of Kinyanjui Njuguna & Co. Advocates have about Kshs 20,000,000. To mitigate any further prejudice, to the firm of; Kanjwang and Kajwang Co. Advocates, that has not been paid any money, I order that it be paid at least, a sum of Kshs 5,000,000 of the sums claimed, within twenty-one (21) days from the date of this order. In default of compliance of payments of the sums ordered, the order setting aside the taxed advocate/client fees shall stand vacated without recourse to court”.

22. The above order clearly indicates the reason why it was made. The history of this matter is well explained in the consolidated ruling and that is what informed the order. The Applicant prays for review thereof. The Respondents argue that, the order can only be a subject of appeal. The law on review of a court order is clear; section 80 of the Evidence Act (cap 80) Laws of Kenya, states that: -

“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 judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

23. Similarly, Order 45 Rule 1 of the Civil Procedure Rules, 2010 provides as 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.”

24. Thus the circumstances under which an application for review may be entertained are clear from these provisions. However, it is important to distinguish between review and an appeal. Review literally and even judicially means “re-examination or reconsideration”. It is “the act of looking, offer something again with a view to correction or improvement”. A review has a limited purpose and cannot be allowed to be “an appeal in disguise”. It has to be confined to the grounds set above. The basic philosophy inherent in it is, the universal acceptance of human fallibility.

25. To the contrary, in law, an appeal is the process in which cases are reviewed by a higher authority, where parties request a formal change to an official decision. Appeals function both as a process for error correction as well as a process of clarifying and interpreting law. It also suffices to note that, in the realm of law, the Courts and even the Statutes lean strongly in favour of; finality of decision legally and properly made. (see: *Raja Prithvi Chand Lal Choudhury v. Sukhray Raj, AIR 1941 FC 1*).

26. The Applicant in the instant case relies on the ground that, there is an error apparent on the face of the record. What then is an error apparent on the face of the record? It is an error that is manifest or self-evident and requires no examination or argument to establish it. It must be an error apparent that, strike the court at once and not on a prolonged sequential logical interpretation.

27. In the case of; *Satyanarayan Laxminarayan Hegde v. Malikarjun Bhavanappa Tirumule AIR 1960 SC 137* the Supreme Court held:

“An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self-evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior Court to issue such a writ.”

28. Similar sentiments were made in the case of; *Nyamogo & Nyamogo -vs- Kogo (2001) EA 174*, where the court further observed that;

“There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal.”

29. However, there might be cases in which an error of law might be considered by one Judge as apparent, patent, and self-evident; but might not be so considered by another Judge. Therefore, the legal contours of an error apparent on the face of the record cannot be exactly identified. In other words, an element of indefiniteness is inherent in its very nature and must be left to be determined judicially on the facts of each case.

30. In the instant matter, the court clearly gave reasons for the order. In a nutshell, it is not in dispute that, the firm of Kajwang and Kajwang Advocates, was instructed by the Applicant to act for it in this matter. This is confirmed by a consent dated 23rd August 2017, where the firm of; Wetangula, Adan & Co. Advocates took over instructions from Kajwang and Kajwang Advocates. More significantly, the Applicant vide the same consent agreed to “settle all dues and/or outstanding fees for legal work done up to the date of the consent”. Therefore, from the aforesaid, the retainer and liability to pay crystallized save for the amount payable.

31. In making the subject order, the court considered inter alia, the facts that, the Applicant had been indolent in executing the terms of the consent. It did not pursue its right to file a “Reference” within time, it took the discretion of the court to allow it to file the same out of time. The consent order was entered into in the year 2017 and since then it has not been actualized.

32. It is for that reason that, the order for payment of; Kshs 5,000, 000 was made to mitigate the hardship that, the recipient thereof may suffer in view of the fact that, it is uncertain as to how long the matter will remain undetermined in court. Further, the firm of; Kinyanjui Njuguna & Co, Advocates, which had been appointed to assist, the firm of Kajwang & Kajwang Advocates has already received a sum of; Kshs 20,000,000 and the firm of; Kajwang & Kajwang Advocates, has not been paid a single cent.

33. Therefore, the scenario that exists is that; the Applicant had received legal services, the firm of; Kinyanjui Njuguna & Co, Advocates, received fees (though in dispute) and one party in the entire transaction has no benefit at all.

34. It is also noteworthy that, contrary to what has been averred by the Applicant, the subject order did not restrict the taxing officer in exercising her or his discretion in taxing the subject bill. Therefore, the submissions by the Applicant that, the court fettered the taxing officer’s power is not supported by that order. There was no order that, the bill of costs be taxed at a minimum of Kshs 5,000,000. Even then, there is no evidence that, if that sum is paid, the recipient firm will not refund it.

35. In the considered opinion, to allow the Applicant to file the Reference out of time and deny the subject firm some benefit of its “sweat” amounts to an injustice. Indeed, the old adage states that “justice must not just be done, but must be seen to be done” Further, the scale of justice must balance.

36. In addition, the provisions of Article 159 of the constitution of Kenya implores upon the court to uphold substantive justice. A clear definition for substantive justice is that “it is a just behavior or treatment that is fair and reasonable. It has a solid foundation or basis and is concerned with the way in which an individual evaluates important and meaningful things to produce an outcome”.

37. The order issued was meant to uphold substantive justice. Finally, the Applicant sought for “setting aside” of the decision of the taxing officer and the resultant certificate”. The provisions of law that empowers the court to set aside an order or judgment, it the discretionary power to do so. Thus, the court can give conditions upon which an order can be set aside. That, does not amount to sitting on an appeal over its own decision.

38. Finally, the court will always be called upon by an applicant to make such orders that it may deem appropriate or just to meet the ends of justice. That prayer is always incidental to the main prayers in any application. It is intended to give the court discretion to exercise its inherent powers in the interest of justice and or the parties.

39. It is in the light of the aforesaid that, the impugned order was made. That order does not amount to an error apparent on the face of the record. If the applicant is of the view that it is erroneous, I concur with the submissions of the Respondents that it should file an appeal. I therefore dismiss this application. In the interest of justice, I shall not make any orders as to costs.

40. Those then are the orders of the court.

Dated delivered and signed this 19th day of October 2020.

GRACE L. NZIOKA

JUDGE

In the Presence of;

Mr. Paul Mwangi for the NSSF/Applicant

Mr Orego for Kajwang and Kajwang Advocates/ Respodent

Ms Kendi for Kinyanjui Njuguna Advocates /Respondent

Robert: Court assistant