



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL APPEAL NO. 192 OF 2008**

**TIMSALES LIMITED.....APPELLANT**

**-VERSUS-**

**PENINA ACHIENG OMONDI.....RESPONDENT**

*(Being an appeal from the Judgment/Decree and orders of Hon. S.M. Soita Principal Magistrate dated 2<sup>nd</sup> December 2008 in Molo PMCC No.264 of 2003)*

**RULING**

This appeal arose from the judgment of the trial court delivered on the 2<sup>nd</sup> December 2008 in **Nakuru CMCC No.192 of 2008** wherein the Appellant was dissatisfied with the findings on both liability and general damages as being excessive.

Upon the said judgment, a party and party Bill of costs was filed and taxed on the 28<sup>th</sup> February 2013 in the sum of Kshs.122, 670/=.

By the application before me dated 3<sup>rd</sup> September 2015, the Respondent Penina Achieng Omondi seeks an **Order of Review and/or setting aside or varying the taxed costs**. It is brought under **Order 45 Rule 1 of the Civil Procedure Rules**, and **Section 3A of the Act**, upon grounds that the parties hereto were negotiating an out of court settlement on the matter of costs when, with that knowledge the Respondent proceed to tax the Bill of costs dated the 4<sup>th</sup> June 2012.

In opposing the application the Respondent Timsales Limited filed grounds of opposition stating that the application is misconceived, frivolous, bad in law, and discloses no error or mistake on the face of the record or any discovery of new matter in terms of the provisions of **Order 45 of Civil Procedure Rule**.

In an application for a Review of any order or ruling based on **Order 45 Rule 1**, the applicant must show 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 on account of some mistake or error apparent on the face of the record, or any other sufficient reason.

I have combed through the affidavit and grounds in support of the application. I cannot see demonstration of any of the above.

The Respondent exercised its right to tax its bill of costs having been the successful party. It has not been demonstrated by any tangible evidence that there were any ongoing negotiations and even if there were, no reason was adduced as to why the applicant did not attend court for the taxation, notwithstanding the negotiations, if any.

In my view, the application as filed is incompetent. If the applicant was dissatisfied with the trial court judgment he ought to have filed an appeal or an application for Review under Order 45 of Civil Procedure Rules – **Judicial Review Application No. 8 of 2014 Republic –vs- Nyeri County Government Exparte Central Kenya Coffee Mill Limited (2017) e KLR**.

Under **Order 45 Civil Procedure Rules**, a court has power to Review its own orders and may set them aside or vary them. The applicant ought to show that he is an **aggrieved party** – within the meaning of **Order 45 rule 1**. Upon examination of the totality of the application, I find no grievances that warrant a review order on grounds envisaged under order 45 of Civil Procedure Rules. If the applicant was dissatisfied with the taxation, he ought to have filed an objection by way of a reference to the High court, under the Advocates Remuneration Order.

Further an application for review should ordinarily be made to the judicial officer who made the initial order. No reason is stated why the application was not made to the Deputy Registrar who is the taxing officer. In my view the applicant is trying to sneak an objection to the taxation, out of time through some short cut. I can not allow this to happen. There are clear legal provisions under the Advocates remuneration order that the applicant ought to have invoked for a remedy.

I agree with the Respondent that the orders sought are incapable of being granted. – **Accredo Ag & 3 Others –vs- Stefano Uccelli & Another (2017) e KLR.**

Accordingly I find that the application dated 3<sup>rd</sup> September 2015 does not meet the requirements set under order 45 rule 1 of the Civil Procedure Rules.

It is dismissed with costs.

**Dated, delivered and signed at Nakuru this 27<sup>th</sup> Day of June 2019.**

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**J.N. MULWA**

**JUDGE**