REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. 167 OF 2017

PROF. TOM OJIENDA & ASSOCIATES..............................APPLICANT

-VERSUS-

MUMIAS SUGAR COMPANY LTD..................................RESPONDENT

R U L I N G

1. This Court delivered a Ruling on 30th October 2018 in respect to a Chamber Summons application dated 20th March 2018. That Chamber Summons was a reference against taxation of the Taxing Master S. A. Opande. The Chamber Summons was filed by **Mumias Sugar Company Ltd** (hereinafter the Client). The Bill of Costs, the subject of the taxation was an Advocate/Client Bill of Costs filed by **Prof. Tom Ojienda & Associates** (hereinafter the Advocate).

2. By the aforestated Ruling this Court found that the Taxing Master lacked jurisdiction to tax the Advocate/Client Bill of Costs. It is that Ruling that the present application by way of Notice of Motion, dated 4th February 2019, is directed at. By that Notice of Motion the Advocate seeks review and/or the setting aside of that Ruling of 30th October 2018.

3. It is necessary to consider the submissions of the parties which were the product of the impugned Ruling.

4. The Client in support of the reference submitted that the Taxing Master had no jurisdiction to tax the Bill of Costs because the Advocates fees for the consultancy work, that the Advocate was to undertake for the Client, were agreed by a contract between the Advocate and Client which contract was dated 15th July 2011. That contract provided for an inclusive fee of Kshs. 2,420,000. The Client annexed a copy of that contract to the affidavit in support of the application.

5. The Advocate in response to those submissions by the Client submitted that the Client instructed the Advocate to carry out audit/consultancy in 2014 and the said audit/consultancy was conducted between March and September 2014. The Advocate further submitted:

> ***"The Applicant/Respondent (the Advocate) sought to file the Bill of Costs herein as the amount as was agreed upon by the parties was never settled and the Applicant/Respondent was left no (sic) choice but to tax the Bill of Costs to scale."***

6. What the Advocate was essentially saying by that submission is that although his legal fee was agreed between him and the Client, but because the Client failed to pay the agreed amount he decided to tax his Bill of Costs.

7. What comes out clearly from those submissions by the Client and by the Advocate is that there existed an agreement whereby the Advocate's fee for the audit/consultancy was agreed. The Advocate further submitted that he filed his Bill of Costs because the Client failed to pay the agreed fee that was demanded of it.

8. It is important to state that the Client's submission referred to an agreement for audit/consultancy work, which was dated 15th July 2011. The Client annexed a copy of that agreement to its application by way of reference.

9. The Advocate in turn stated that he was instructed by the Client to carry out legal audit/consultancy in the year 2014. The Advocate did not annex the agreement of the year 2014 to his Replying Affidavit in response to the reference.

10. The above submissions are the ones that informed the impugned Ruling. By the impugned Ruling this Court made a finding as follows:

"It is this Court's finding that the Advocate/Client Bill of Costs was wrongly filed and taxed before the Taxing Master in view of the existence of a contract between Advocates and Client. The Taxing Master therefore lacked jurisdiction to tax that Bill of Cost."

11. By Notice of Motion dated 4th February 2019 the Advocate seeks review and/or setting aside of the impugned Ruling of 30th October 2018. The Advocate seeks those orders on the ground that there was an error on the face of the record based a various facts set out in the affidavit in support of the application.

12. The facts set out by the Advocate were; that the Client instructed the Advocate at a fee of Kshs. 2,420,000, who was then in a partnership, to carry out comprehensive legal audit. The legal audit was done and submitted to the Client. That the aforesaid partnership ceased to exist in 2012. The Advocate referred to instruction of the Client to him, confirmed by the Client's letter dated 13th February 2013. By that letter the Client instructed him to carry out an audit of the Client's operations and to prepare a detailed work plan and in that regard the Client offered to pay the Advocate Kshs. 4 million as legal fee. The Advocate deponed that since the Client failed to pay the agreed fee the Advocate decided to tax his costs, which taxation was the subject of the reference.

13. The Advocate deponed that the Court in its Ruling of 30th October 2018 failed to consider that the Client had two legal audit reports done. That is one in 2011, by the partnership, and the other in 2014 by the Advocate.

14. It is on those grounds that the Advocate seeks the order of review and/or setting aside the Ruling of 30th October 2018.

15. Review comes under Order 45(1) of the Civil Procedure rules. That rule provides:

"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."

16. The Court of Appeal in the case **ACCREDO AG & 3 OTHERS V STEFFANO UCCELLI & ANOTHER [2017] eKLR** stated an aggrieved person had to meet the conditions in Order 45 Rule 1 as follows:

"It is to be remembered that the person aggrieved is required to meet certain conditions under Sub Rule (1) (b), the aggrieved person instituting such review must satisfy the Court that:

a. There has been 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,

b. There is some mistake or error apparent on the face of the record, or

c. There exists sufficient reason to review the decree/order."

17. If I consider the first condition set out in the above case **ACCREDO Ag. & 3 others (Supra)** the Advocate needed to show that he had discovered new and important matter or evidence which with exercise of due diligence he could not have produced before Court. The Advocate bases his application on the ground that the Client issued two instructions for legal audit to be undertaken. He further argues that the Court erred to rely on the instructions contained in the contract, issued to the partnership in the year 2011 and yet the Advocate's Bill of Cost is in regard to instructions issued in 2013.

18. As set out above the Advocate although he alluded to another contract, and not the one 2011, when the reference was argued, he did not supply the other contract. It was not until the Advocate filed the present application for review that he produced the Client's letter of instruction of 13th February 2013. The Advocate failed to explain why that letter and the resultant legal audit were not supplied to the Court when the Court entertained the reference. It becomes clear that the Advocate failed to meet the first condition set out in the case **ACCREDO Ag & 3 others (Supra)**.

19. The Court's finding by the impugned Ruling was to the effect that the Taxing Master lacked jurisdiction to tax the Bill of Costs because the Advocate and the Client had agreed the amount of legal fees payable to the Advocate. The Court found that since the legal fees were agreed there was then no room for taxation.

20. It follows whether the Advocate's Bill of Costs is in respect to the Client's instructions of 2011 or of 2013, since in both cases the Advocate's fees were agreed the taxation for work done could not proceed because the Advocate's costs were ascertainable from the parties' agreement. The Advocate has failed to show there was an error or mistake on the face of the record in the impugned Ruling.

21. In my consideration of the application I fail to find that there are any sufficient reasons for review of the Ruling of 30th October 2018.

22. If the Advocates stand is that the Court erred in making the finding in Ruling of 30th October 2018 I will respond by saying that is not a basis for seeking review. It may only be a basis of appealing that Ruling. This is what the Court of Appeal had to say in the case **PANCRAS T. SWAI V KENYA BREWERIES LIMITED [2014] eKLR,** viz:

> ***"Our parting shot is that an erroneous conclusion of law or evidence is not a ground for a review but may be a good ground for appeal. Once the Appellants took the option of review rather than appeal they were proceeding in the wrong direction. They have now come to a dead end. As for this appeal, we are satisfied that the learned Commissioner was right when he found that there was absolutely no basis for the Appellant's application for review. We have therefore no option but to dismiss this appeal with costs to the Respondent."***

23. **The Advocate's Notice of Motion dated 4th February 2019 lacks merit and it is dismissed with costs.**

DATED, SIGNED and DELIVERED at NAIROBI this 25TH day of JULY, 2019.

MARY KASANGO

JUDGE

Ruling Read *and* ***Delivered*** *in* ***Open Court*** *in the presence of:*

Sophie.....................COURT ASSISTANT

...........................FOR THE APPLICANT

.......................FOR THE RESPONDENT